Judicial Council of California Civil Jury Instructions

CACI*

* Pronounced "Casey"

As approved at the
Judicial Council's Rules Committee October 2024 Meeting
and Judicial Council November 2024 Meeting

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Judicial Council of California

Series 100–2500

Judicial Council of California
Advisory Committee on Civil Jury Instructions

Hon. Adrienne M. Grover, Chair

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Preface to CACI Updates

This edition of CACI includes a number of additions and changes to the instructions, which were first published in 2003. In providing these updates, the Judicial Council Advisory Committee on Civil Jury Instructions is fulfilling its charge to maintain CACI. The committee is also striving to add instructions in new areas of the law and to augment existing areas.

The impetus for the revisions came from several sources including CACI users who detected changes in the law or who simply sought to do a better job of explaining the law in plain English. Responding to feedback from users is consistent with the Advisory Committee's goal to act as a vehicle for maintaining CACI as the work product of the legal community. We hope that our hundreds of contributors view our role in the same way and that they will continue to support us.

November 2024

Hon. Adrienne M. Grover
Court of Appeal, Sixth District
Chair, Advisory Committee on Civil Jury Instructions

The Advisory Committee on Civil Jury Instructions welcomes comments. Send comments by email to: civiljuryinstructions@jud.ca.gov

Or you may send print comments by regular mail to:

Advisory Committee on Civil Jury Instructions—Attn.
Eric Long
Legal Services Office
455 Golden Gate Avenue
San Francisco, CA 94102-3588

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December 2024

This 2025 Edition of CACI includes all of the new and revised California Civil Jury Instructions approved by the Judicial Council's Rules Committee at its October 2024 meeting and the Judicial Council at its November 2024 meeting.

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450A	Derived from 450 December 2010
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4603	Renumbered from 2730 June 2015
4604	Renumbered from 2731 June 2015

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The Judicial Council is the policymaking body of the California courts. Under the leadership of the Chief Justice and in accordance with the California Constitution, the council is responsible for ensuring the consistent, independent, impartial, and accessible administration of justice.

Preface

These instructions represent the work of a task force on jury instructions appointed by Chief Justice Ronald M. George in 1997. The task force's charge was to write instructions that are legally accurate and understandable to the average juror. The six-year effort responded to a perceived need for instructions written in plain English and the specific recommendation of the Blue Ribbon Commission on Jury System Improvement.

Jurors perform an invaluable service in our democracy, making important decisions that affect many aspects of our society. The Judicial Council instructions attempt to clarify the legal principles jurors must consider in reaching their decisions. The instructions were prepared by a statewide, broad-based task force consisting of court of appeal justices, trial judges, attorneys, academics, and lay people. They are approved by the Judicial Council as the state's official jury instructions under the California Rules of Court (see now Cal. Rules of Court, Rule 2.1050(a)). The Rules of Court provide that the use of these instructions is strongly encouraged (see now Cal. Rules of Court, Rule 2.1050(e)).

These instructions were prepared with a minimum of three steps: staff attorney drafts, subcommittee refinement, and full task force consideration. Initial drafts of the instructions were prepared by staff attorneys in the former Administrative Office of the Courts (now Legal Services Office) in San Francisco, primarily Lyn Hinegardner. Lawyers throughout the state provided subject-matter expertise and, in some cases, sets of instructions from which the task force began its drafting. These instructions were submitted to the legal community for comment and, in responding, hundreds of attorneys and judges provided valuable assistance. Several organizations, most particularly State Bar sections, provided invaluable input. A list of people and organizations who contributed to this effort follows; we apologize to those who have been omitted through oversight.

We are grateful to the publisher of this work. Representatives of LexisNexis Matthew Bender worked closely with us to prepare the jury instructions for publication. We appreciate their efficiency and courtesy.

We would also like to express our appreciation to our predecessor. The people of California and the legal community have been well served for over 60 years by BAJI, *California Jury Instructions, Civil, Book of Approved Jury Instructions*, written by a committee of the Superior Court of California, County of Los Angeles. That we have taken a very different approach to drafting of instructions does not detract from the historic importance of work done by the BAJI committee.

We believe that these instructions go a long way toward achieving the goal of a plain-English explanation of the law. These instructions, like the law, will be constantly changing. Change will come not only through appellate decisions and legislation but also through the observations and comments of the legal community. The Judicial Council Advisory Committee on Civil Jury Instructions, which has the responsibility of maintaining these instructions, welcomes your comments and suggestions for improvement.

September 2003

James D. Ward, Former Associate Justice
Court of Appeal, Fourth Appellate District, Division Two

Vice-Chair, Task Force on Jury Instructions
Chair, Civil Instruction Section

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Guide for Using Judicial Council of California Civil Jury Instructions

Ease of understanding by jurors, without sacrificing accuracy, is the primary goal of these Judicial Council instructions. A secondary goal is ease of use by lawyers. This guide provides an introduction to the instructions, explaining conventions and features that will assist in the use of both the print and electronic editions.

Jury Instructions as a Statement of the Law: While jury instructions are not a primary source of the law, they are a statement or compendium of the law, a secondary source. That the instructions are in plain English does not change their status as an accurate statement of the law.

Instructions Approved by Rule of Court: Rule 2.1050 of the California Rules of Court provides: "The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California . . . The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law . . . Use of the Judicial Council instructions is strongly encouraged."

Absence of Instruction: The fact that there is no CACI instruction on a claim, defense, rule, or other situation does not indicate that no instruction would ever be appropriate.

Using the Instructions

Revision Dates: The original date of approval and all revision dates of each instruction are presented. An instruction is considered as having been revised if there is a nontechnical change to the title, instruction text, or Directions for Use. Additions or changes to the Sources and Authority and Secondary Sources do not generate a new revision date. Beginning with the 2024 edition (instructions approved November 2023), revision dates marked with an asterisk indicate that changes were to the Directions for Use or title, with no change to the instruction text.

Directions for Use: The instructions contain Directions for Use. The directions alert the user to special circumstances involving the instruction and may include references to other instructions that should or should not be used. In some cases the directions include suggestions for modifications or for additional instructions that may be required. Before using any instruction, reference should be made to the Directions for Use.

Sources and Authority: Each instruction sets forth the primary sources that present the basic legal principles that support the instruction. Applicable statutes are listed along with quoted material from cases that pertain to the subject matter of the instruction. Authorities are included to support the text of the instruction, the burden of proof, and matters of law and of fact.

Cases included in the Sources and Authority should be treated as a digest of relevant citations. They are not meant to provide a complete analysis of the legal subject of the

instruction. Nor does the inclusion of an excerpt necessarily mean that the committee views it as binding authority. Rather, they provide a starting point for further legal research on the subject. The standard is that the committee believes that the excerpt would be of interest and relevant to CACI users.

Secondary Sources are also provided for treatises and practice guides from a variety of legal publishers.

Instructions for the Common Case: These instructions were drafted for the common type of case and can be used as drafted in most cases. When unique or complex circumstances prevail, users will have to adapt the instructions to the particular case.

Multiple Parties: Because jurors more easily understand instructions that refer to parties by name rather than by legal terms such as "plaintiff" and "defendant," the instructions provide for insertion of names. For simplicity of presentation, the instructions use single party plaintiffs and defendants as examples. If a case involves multiple parties or cross-complaints, the user will usually need to modify the parties in the instructions. Rather than naming a number of parties in each place calling for names, the user may consider putting the names of all applicable parties in the beginning and thereafter identifying them as "plaintiffs," "defendants," "cross-complaints," etc. Different instructions often apply to different parties. The user should only include the parties to whom each instruction applies.

Personal Pronouns: Many CACI instructions include an option to insert the personal pronouns "he/she/*nonbinary pronoun*," "his/her/*nonbinary pronoun*," or "him/her/*nonbinary pronoun*." It is the policy of the State of California that intersex, transgender, and nonbinary people are entitled to full legal recognition and equal treatment under the law. In accordance with this policy, attorneys and courts should take affirmative steps to ensure that they are using individuals' correct personal pronouns. Although the advisory committee acknowledges a trend for the use of "they," "their," and "them" as singular personal pronouns, the committee also recognizes these same pronouns have plural denotations with the potential to confuse jurors. For clarity in the jury instructions, the committee recommends using an individual's name rather than a personal nonbinary pronoun (such as "they") if the pronoun's use could result in confusion.

Reference to "Harm" in Place of "Damage" or "Injury": In many of the instructions, the word harm is used in place of damage, injury, or other similar words. The drafters of the instructions felt that this word was clearer to jurors.

Substantial Factor: The instructions frequently use the term "substantial factor" to state the element of causation, rather than referring to "cause" and then defining that term in a separate instruction as a "substantial factor." An instruction that defines "substantial factor" is located in the Negligence series. The use of the instruction is not intended to be limited to cases involving negligence.

Listing of Elements and Factors: For ease of understanding, elements of causes of action or affirmative defenses are listed by numbers (e.g., 1, 2, 3) and factors to be considered by jurors in their deliberations are listed by letters (e.g., a, b, c).

Uncontested Elements: Although some elements may be the subject of a stipulation that the element has been proven, the instruction should set forth all of the elements and indicate those that are deemed to have been proven by stipulation of the parties. Omitting uncontested elements may leave the jury with an incomplete understanding of the cause of action and the plaintiff's full burden of proof. It is better to include all the elements and then indicate the parties have agreed that one or more of them has been established and need not be decided by the jury. One possible approach is as follows:

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

1. That [plaintiff] and [defendant] entered into a contract (which is not disputed in this case);
2. That [plaintiff] did all, or substantially all, of the significant things that the contract required it to do;
3. That all conditions required for [defendant]'s performance had occurred (which is also not disputed in this case).

Irrelevant Factors: Factors are matters that the jury might consider in determining whether a party's burden of proof on the elements has been met. A list of possible factors may include some that have no relevance to the case and on which no evidence was presented. These irrelevant factors may safely be omitted from the instruction.

Burdens of Proof: The applicable burden of proof is included within each instruction explaining a cause of action or affirmative defense. The drafters felt that placing the burden of proof in that position provided a clearer explanation for the jurors.

Affirmative Defenses: For ease of understanding by users, all instructions explaining affirmative defenses use the term "affirmative defense" in the title.

Titles and Definitions

Titles of Instructions: Titles to instructions are directed to lawyers and sometimes use words and phrases not used in the instructions themselves. Since the title is not a part of the instruction, the titles may be removed before presentation to the jury.

Definitions of Legal Terms: The instructions avoid separate definitions of legal terms whenever possible. Instead, definitions have been incorporated into the language of the instructions. In some instances (e.g., specific statutory definitions) it was not possible to avoid providing a separate definition.

Evidence

Circumstantial Evidence: The words "indirect evidence" have been substituted for the expression "circumstantial evidence." In response to public comment on the subject, however, the drafters added a sentence indicating that indirect evidence is sometimes known as circumstantial evidence.

Preponderance of the Evidence: To simplify the instructions' language, the drafters avoided the phrase preponderance of the evidence and the verb preponderate. The instructions substitute in place of that phrase reference to evidence that is "more likely to be true than not true."

Using Verdict Forms

Verdict Forms are Models: A large selection of special verdict forms accompanies the instructions. Users of the forms must bear in mind that these are models only. Rarely can they be used without modifications to fit the circumstances of a particular case.

Purpose of Verdict Forms: The special verdict forms generally track the elements of the applicable cause of action. Their purpose is to obtain the jury's finding on the elements defined in the instructions. "The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law." (Code Civ. Proc., § 624; *see Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 [73 Cal.Rptr.2d 596].) Modifications made to the instructions in particular cases ordinarily will require corresponding modifications to the special verdict form.

Multiple Parties: The verdict forms have been written to address one plaintiff against one defendant. In nearly all cases involving multiple parties, the issues and the evidence will be such that the jury could reach different results for different parties. The liability of each defendant should always be evaluated individually, and the damages to be awarded to each plaintiff must usually be determined separately. Therefore, separate special verdicts should usually be prepared for each plaintiff with regard to each defendant. In some cases, the facts may be sufficiently simple to include multiple parties in the same verdict form, but if this is done, the transitional language from one question to another must be modified to account for all the different possibilities of yes and no answers for the various parties.

Multiple Causes of Action: The verdict forms are self-contained for a particular cause of action. When multiple causes of action are being submitted to the jury, it may be better to combine the verdict forms and eliminate duplication.

Modifications as Required by Circumstances: The verdict forms must be modified as required by the circumstances. It is necessary to determine whether any lesser or greater specificity is appropriate. The question in special verdict forms for plaintiff's damages provides an illustration. Consistent with the jury instructions, the question asks the jury to determine separately the amounts of past and future economic loss, and of past and future noneconomic loss. These four choices are included in brackets. In some cases it may be unnecessary to distinguish between past and future losses. In others there may be no claim for either economic or noneconomic damages. In some cases the court may wish to eliminate the terms "economic loss" and "noneconomic loss" from both the instructions and the verdict form. Without defining those terms, the court may prefer simply to ask the jury to determine the appropriate amounts for the various components of the losses without categorizing them for the jury as economic or noneconomic. The court can fix liability as joint or several under Civil Code sections 1431 and 1431.2, based on the verdicts. A more itemized breakdown of damages may be appropriate if the court is concerned about the sufficiency of the evidence supporting a particular component of damages. Appropriate special verdicts are preferred when periodic payment schedules may be required by Code of Civil Procedure section 667.7. (*Gorman v. Leftwich* (1990) 218 Cal.App.3d 141, 148–150 [266 Cal.Rptr. 671].)

November 2024

Hon. Adrienne M. Grover
Chair, Judicial Council Advisory Committee on Civil Jury Instructions

PRETRIAL

100. Preliminary Admonitions

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

Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and co-workers, spiritual leaders, advisors, or therapists. You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.

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

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

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

During the trial, do not read, listen to, or watch any news reports about this case. [I have no information that there will be news reports concerning this case.] This prohibition extends to the use of the Internet in any way, including reading any blog about the case or about anyone involved with it. If you receive any information about this case from any source outside of the courtroom, promptly report it to the court [attendant/bailiff]. It is important that all jurors see and hear the same evidence at the same time.

Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case or use any Internet maps or mapping programs or any other program or device to search for or to view any place discussed in the testimony. If you happen to pass by the scene, do not stop or investigate. If you do need to view the scene during the trial, you will be taken there as a group under proper supervision.

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

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

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

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

You must decide what the facts are in this case. Do not let bias, sympathy, prejudice, or public opinion influence your verdict.

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

New September 2003; Revised April 2004, October 2004, February 2005, June 2005, December 2007, December 2009, December 2011, December 2012, May 2020

Directions for Use

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

If the jury is allowed to separate, Code of Civil Procedure section 611 requires the judge to admonish the jury that "it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them."

Sources and Authority

- Constitutional Right to Jury Trial. Article I, section 16 of the California Constitution.
- Instructing the Jury. Code of Civil Procedure section 608.
- Jury as Trier of Fact. Evidence Code section 312.
- Admonishments to Jurors. Code of Civil Procedure section 611.
- Contempt of Court for Juror Misconduct. Code of Civil Procedure section 1209(a)(6).
- Under Code of Civil Procedure section 611, jurors may not "form or express an opinion" prior to deliberations. (See also *City of Pleasant Hill v. First Baptist Church of Pleasant Hill* (1969) 1 Cal.App.3d 384, 429 [82 Cal.Rptr. 1]. It is misconduct for a juror to prejudge the case. (*Deward v. Clough* (1966) 245 Cal.App.2d 439, 443–444 [54 Cal.Rptr. 68].)
- Jurors must not undertake independent investigations of the facts in a case. (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 36 [224 P.2d 808]; *Walter v. Ayvazian* (1933) 134 Cal.App. 360, 365 [25 P.2d 526].)
- Jurors are required to avoid discussions with parties, counsel, or witnesses. (*Wright v. Eastlick* (1899) 125 Cal. 517, 520–521 [58 P. 87]; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 144 [45 Cal.Rptr. 313, 403 P.2d 721].)
- It is misconduct for jurors to engage in experiments that produce new evidence. (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1746 [286 Cal.Rptr. 435].)
- Unauthorized visits to the scene of matters involved in the case are improper. (*Anderson v. Pacific Gas & Electric Co.* (1963) 218 Cal.App.2d 276, 280 [32 Cal.Rptr. 328].)
- It is improper for jurors to receive information from the news media about the case. (*Province v. Center for Women's Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1679 [25 Cal.Rptr.2d 667], disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 41 [32 Cal.Rptr.2d 200, 876 P.2d 999]; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 408 [196 Cal.Rptr. 117].)
- Jurors must avoid bias: " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.' " (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132], internal citations omitted.) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid.*)
- An instruction to disregard any appearance of bias on the part of the judge is proper and may cure any error in a judge's comments. (*Gist v. French* (1955)

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

Secondary Sources

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

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

California Judges Benchbook: Civil Proceedings—Trial §§ 12.6, 13.50, 13.51, 13.58 (Cal CJER 2019)

101. Overview of Trial

To assist you in your tasks as jurors, I will now explain how the trial will proceed. I will begin by identifying the parties to the case. [*Name of plaintiff***] filed this lawsuit. [He/She/***Nonbinary pronoun***/It] is called a [plaintiff/petitioner]. [He/She/***Nonbinary pronoun***/It] seeks [damages/***specify other relief***] from [***name of defendant***], who is called a [defendant/respondent].**

[[*Name of plaintiff***] claims [***insert description of the plaintiff's claim(s)***]. [***Name of defendant***] denies those claims. [[***Name of defendant***] also contends that [***insert description of the defendant's affirmative defense(s)***].]]**

[[*Name of cross-complainant***] has also filed what is called a cross complaint against [***name of cross-defendant***]. [***Name of cross-complainant***] is the [defendant/respondent], but also is called the cross-complainant. [***Name of cross-defendant***] is called a cross-defendant.]**

[In [his/her/*nonbinary pronoun***/its] cross-complaint, [***name of cross-complainant***] claims [***insert description of the cross-complainant's claim(s)***]. [***Name of cross-defendant***] denies those claims. [[***Name of cross-defendant***] also contends that [***insert description of the cross-defendant's affirmative defense(s) to the cross-complaint***].]]**

First, each side may make an opening statement, but neither side is required to do so. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. Also, because it is often difficult to give you the evidence in the order we would prefer, the opening statement allows you to keep an overview of the case in mind during the presentation of the evidence.

Next, the jury will hear the evidence. [*Name of plaintiff***] will present evidence first. When [***name of plaintiff***] is finished, [***name of defendant***] will have an opportunity to present evidence. [Then [***name of cross-complainant***] will present evidence. Finally, [***name of cross-defendant***] will present evidence.]**

Each witness will first be questioned by the side that asked the witness to testify. This is called direct examination. Then the other side is permitted to question the witness. This is called cross-examination.

Documents or objects referred to during the trial are called exhibits. Exhibits are given a [number/letter] so that they may be clearly identified. Exhibits are not evidence until I admit them into evidence. During your deliberations, you will be able to look at all exhibits admitted into evidence.

There are many rules that govern whether something will be admitted

into evidence. As one side presents evidence, the other side has the right to object and to ask me to decide if the evidence is permitted by the rules. Usually, I will decide immediately, but sometimes I may have to hear arguments outside of your presence.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments. What the parties say in closing argument is not evidence. The arguments are offered to help you understand the evidence and how the law applies to it.

New September 2003; Revised February 2007, June 2010, May 2019

Directions for Use

This instruction is intended to provide a "road map" for the jurors. This instruction should be read in conjunction with CACI No. 100, *Preliminary Admonitions*.

The bracketed second, third, and fourth paragraphs are optional. The court may wish to use these paragraphs to provide the jurors with an explanation of the claims and defenses that are at issue in the case. Include the third and fourth paragraphs if a cross-complaint is also being tried. Include the last sentence in the second and fourth paragraphs if affirmative defenses are asserted on the complaint or cross-complaint.

The sixth paragraph presents the order of proof. If there is a cross-complaint, include the last two sentences. Alternatively, the parties may stipulate to a different order of proof—for example, by agreeing that some evidence will apply to both the complaint and the cross-complaint. In this case, customize this paragraph to correspond to the stipulation.

Sources and Authority

- Pretrial Instructions on Trial Issues and Procedure. Rule 2.1035 of the California Rules of Court.
- Order of Trial Proceedings. Code of Civil Procedure section 607.
- "[W]e can understand that it might not have *seemed* like [cross-complainants] were producing much evidence on their cross-complaint at trial. Most of the relevant (and undisputed) facts bearing on the legal question of whether [cross-defendants] had a fiduciary duty and, if so, violated it, had been brought out in plaintiffs' case-in-chief. But just because the undisputed evidence favoring the cross-complaint also happened to come out on *plaintiffs'* case-in-chief does not mean it was not available to support the cross-complaint." (*Le v. Pham* (2010) 180 Cal.App.4th 1201, 1207 [103 Cal.Rptr.3d 606], original italics.)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 154

Wegner et al., Cal. Practice Guide: Civil Trials and Evidence, Ch. 1, *Preparing for*

Trial, ¶¶ 1:1, 1:2 (The Rutter Group)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.50 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 3.100 (Cal CJER 2019)

102. Taking Notes During the Trial

You have been given notebooks and may take notes during the trial. Do not take the notebooks out of the courtroom or jury room at any time during the trial. You may take your notes into the jury room during deliberations.

You should use your notes only to remind yourself of what happened during the trial. Do not let your note-taking interfere with your ability to listen carefully to all the testimony and to watch the witnesses as they testify. Nor should you allow your impression of a witness or other evidence to be influenced by whether or not other jurors are taking notes. Your independent recollection of the evidence should govern your verdict, and you should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

[The court reporter is making a record of everything that is said. If during deliberations you have a question about what the witness said, you should ask that the court reporter's records be read to you. You must accept the court reporter's record as accurate.]

At the end of the trial, your notes will be [collected and destroyed/collected and retained by the court but not as a part of the case record/ [*specify other disposition***]].**

New September 2003; Revised April 2007, December 2007

Directions for Use

This instruction may be given as an introductory instruction or as a concluding instruction after trial. (See CACI No. 5010, *Taking Notes During the Trial*).

The bracketed paragraph should not be read if a court reporter is not being used to record the trial proceedings.

In the last paragraph, specify the court's disposition of the notes after trial. No statute or rule of court requires any particular disposition.

Sources and Authority

- Juror Notes. Rule 2.1031 of the California Rules of Court.
- "Because of [the risks of note-taking], a number of courts have held that a cautionary instruction is required. For example, [one court] held that the instruction should include 'an explanation . . . that [jurors] should not permit their note-taking to distract them from the ongoing proceedings; that their notes are only an aid to their memory and should not take precedence over their independent recollection; that those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact

that another juror has taken notes; and that the notes are for the note taker's own personal use in refreshing his recollection of the evidence. The jury must be reminded that should any discrepancy exist between their recollection of the evidence and their notes, they should request that the record of the proceedings be read back and that it is the transcript that must prevail over their notes.' " (*People v. Whitt* (1984) 36 Cal.3d 724, 747 [205 Cal.Rptr. 810, 685 P.2d 1161], internal citations and footnote omitted.)

- "In *People v. Whitt*, we recognized the risks inherent in juror note-taking and observed that it is 'the better practice' for courts to give, sua sponte, a cautionary instruction on note-taking. Although the ideal instruction would advert specifically to all the dangers of note-taking, we found the less complete instruction given in *Whitt* to be adequate: 'Be careful as to the amount of notes that you take. I'd rather that you observe the witness, observe the demeanor of that witness, listen to how that person testifies rather than taking copious notes . . . . [I]f you do not recall exactly as to what a witness might have said or you disagree, for instance, during the deliberation [sic] as to what a witness may have said, we can reread that transcript back . . . .' " (*People v. Silbertson* (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152, 709 P.2d 1321], internal citations and footnote omitted.)

Secondary Sources

California Deskbook on Complex Civil Litigation Management, Ch. 4, *Trial of Complex Cases*, § 4.21[5] (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.32 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 3.97 (Cal CJER 2019)

103. Multiple Parties

[There are [*number*] plaintiffs in this trial. You should decide the case of each plaintiff separately as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of that plaintiff's own claim(s).]

[There are [*number*] defendants in this trial. You should decide the case against each defendant separately as if it were a separate lawsuit. Each defendant is entitled to separate consideration of that defendant's own defenses.]

[Different aspects of this case involve different parties (plaintiffs and defendants). Each instruction will identify the parties to whom it applies. Pay particular attention to the parties named in each instruction.]

[*or*]

[Unless I tell you otherwise, all instructions apply to each plaintiff and defendant.]

New September 2003; Revised April 2009, May 2020

Directions for Use

The CACI instructions require the use of party names rather than party-status words like "plaintiff" and "defendant." In multiparty cases, it is important to name only the parties in each instruction to whom the instruction applies. For example, an instruction on loss of consortium (see CACI No. 3920) will not apply to all plaintiffs. Instructions on vicarious liability (see CACI No. 3700 et seq.) will not apply to all defendants. Unless all or nearly all of the instructions will apply to all of the parties, give the first option for the last paragraph.

Sources and Authority

- "We realize, of course, that multiple defendants are involved and that each defendant is entitled to instructions on, and separate consideration of, every defense available and applicable to it. The purpose of this rule is to insure that the jury will distinguish and evaluate the separate facts relevant to each defendant." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 58 [148 Cal.Rptr. 596, 583 P.2d 121], internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 303

27 California Forms of Pleading and Practice, Ch. 318, *Judgments*, § 318.15 (Matthew Bender)

1 California Pretrial Civil Procedure Practice Guide: The Wagstaffe Group, Ch. 10, *Determining Initial Parties to the Action*, § 10-I

104. Nonperson Party

A [corporation/partnership/city/county/[*other entity*]], [*name of entity*], is a party in this lawsuit. [*Name of entity*] is entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.

When I use words like "person" or "he" or "she" in these instructions to refer to a party, those instructions also apply to [*name of entity*].

New September 2003

Directions for Use

This instruction should be given as an introductory instruction if one of the parties is an entity. Select the type of entity and insert the name of the entity where indicated in the instruction.

Sources and Authority

- Corporations Have Powers of Natural Person. Corporations Code section 207.
- "Person" Includes Corporation. Civil Code section 14.
- As a general rule, a corporation is considered to be a legal entity that has an existence separate from that of its shareholders. (*Erkenbrecher v. Grant* (1921) 187 Cal. 7, 9 [200 P. 641].)
- "In general, any person or entity has capacity to sue or defend a civil action in the California courts. This includes artificial 'persons' such as corporations, partnerships and associations." (*American Alternative Energy Partners II, 1985 v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 559 [49 Cal.Rptr.2d 686], internal citations omitted.)

Secondary Sources

9 Witkin, Summary of California Law (11th ed. 2017) Corporations, § 1, p. 775

1 California Pretrial Civil Procedure Practice Guide: The Wagstaffe Group, Ch. 10, *Determining Initial Parties to the Action*, §§ 10-V[E]–10-V[I]

105. Insurance

You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence.

New September 2003; Revised May 2019, November 2019

Directions for Use

If this instruction is given, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

By statute, evidence of a defendant's insurance coverage is inadmissible to prove liability. (Evid. Code, § 1155.) If evidence of insurance has been admitted for some other reason, (1) this instruction may need to be modified to clarify that insurance may not be considered for purposes of determining liability; and (2) a limiting instruction should be given advising the jury to consider the evidence only for the purpose for which it was admitted.

Sources and Authority

- Evidence of Insurance Inadmissible to Prove Liability. Evidence Code section 1155.
- " 'The evidence [of liability insurance] is regarded as both irrelevant and prejudicial to the defendant. Hence, not only is it subject to objection and exclusion, but any attempt to inject it by question, suggestion or argument is considered misconduct of counsel, and is often held reversible error. [Citations.]' " (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469 [130 Cal.Rptr. 786].)
- "Evidence of a *defendant's* insurance coverage ordinarily is not admissible to prove the defendant's negligence or other wrongdoing." (*Blake v. E. Thompson Petroleum Repair Co.* (1985) 170 Cal.App.3d 823, 830 [216 Cal.Rptr. 568], original italics.)
- "[E]vidence of a *plaintiff's* insurance coverage is not admissible for the purpose of mitigating the damages the plaintiff would otherwise recover from the tortfeasor. This is the 'collateral source rule.' " (*Blake, supra,* 170 Cal.App.3d at p. 830, original italics; see *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16–18 [84 Cal.Rptr. 173, 465 P.2d 61].)
- "Both of the foregoing principles are subject to the qualification that where the topic of insurance coverage is coupled with other relevant evidence, that topic may be admitted along with such other evidence. '[para.] It has always been the rule that the existence of insurance may properly be referred to in a case if the evidence is otherwise admissible.' The trial court must then determine, pursuant to Evidence Code section 352, whether the probative value of the other evidence

outweighs the prejudicial effect of the mention of insurance." (*Blake, supra*, 170 Cal.App.3d at p. 831, internal citation omitted.)

- "[T]he trial court did not abuse its discretion by excluding evidence of [plaintiff]'s insured [health care coverage] under Evidence Code section 352. [Plaintiff] had the right to treat outside his plan. Evidence of his insurance would have confused the issues or misled and prejudiced the jury." (*Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1278 [232 Cal.Rptr.3d 404].)
- "[M]ost of these references to Kaiser and Medicare, as well as the single reference to Social Security, merely provided context and background information on [plaintiff]'s past treatment at Kaiser and on some aspects of [defendant]'s experts' calculation of past and future reasonable medical expenses. They were helpful and even necessary to the jury's understanding of the issues. [Plaintiff] has not shown the court abused its discretion in admitting these references to assist the jury's understanding of the facts." (*Stokes v. Muschinske* (2019) 34 Cal.App.5th 45, 58 [245 Cal.Rptr.3d 764].)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 312

4 Witkin, California Evidence (6th ed. 2023) Circumstantial Evidence, § 156

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 34.32–34.36

California Practice Guide: Civil Trials and Evidence, Ch. 5-G, Jury Selection—Scope of Permissible Voir Dire—Proper vs. Improper Questions ¶ 5:371 (The Rutter Group)

3 California Trial Guide, Unit 50, *Extrinsic Policies Affecting or Excluding Evidence*, § 50.32 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.68[4][g] (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, *Questioning Witnesses and Objections*, 11.90

106. Evidence

You must decide what the facts are in this case only from the evidence you see or hear during the trial. Sworn testimony, documents, or anything else may be admitted into evidence. You may not consider as evidence anything that you see or hear when court is not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys will talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggests that it is true. However, the attorneys for both sides can agree that certain facts are true. This agreement is called a "stipulation." No other proof is needed and you must accept those facts as true in this trial.

Each side has the right to object to evidence offered by the other side. If I do not agree with the objection, I will say it is overruled. If I overrule an objection, the witness will answer and you may consider the evidence. If I agree with the objection, I will say it is sustained. If I sustain an objection, you must ignore the question. If the witness did not answer, you must not guess what that witness might have said or why I sustained the objection. If the witness has already answered, you must ignore the answer.

An attorney may make a motion to strike testimony that you have heard. If I grant the motion, you must totally disregard that testimony. You must treat it as though it did not exist.

New September 2003; Revised February 2005, December 2010, December 2012, May 2020

Directions for Use

This instruction should be given as an introductory instruction.

Sources and Authority

- "Evidence" Defined. Evidence Code section 140.
- Jury to Decide Questions of Fact. Evidence Code section 312.
- Miscarriage of Justice. Evidence Code section 353.
- A stipulation in proper form is binding on the parties if it is within the authority

of the attorney. Properly stipulated facts may not be contradicted. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142 [199 P.2d 952].)

- Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)
- Courts have stated that "[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished." (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49]; *Horn v. Atchison, Topeka & Santa Fe Ry. Co*. (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561].)

Secondary Sources

3 Witkin, California Evidence (6th ed. 2023) Presentation at Trial, § 1

7 Witkin, California Procedure (6th ed. 2023) Trial, § 304 et al.

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, §§ 322.56–322.57 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.61, 551.77 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial §§ 2.37, 2.38, 3.99, 5.21, 5.29, 5.39, 11.9, 11.35 (Cal CJER 2019)

107. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

(a) How well did the witness see, hear, or otherwise sense what the witness described in court?

(b) How well did the witness remember and describe what happened?

(c) How did the witness look, act, and speak while testifying?

(d) Did the witness have any reason to say something that was not true? For example, did the witness show any bias or prejudice or have a personal relationship with any of the parties involved in the case or have a personal stake in how this case is decided?

(e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else the witness said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness did not tell the truth about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness did not tell the truth about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

New September 2003; Revised April 2004, June 2005, April 2007, December 2012, June 2015, December 2016, May 2020

Directions for Use

This instruction may be given as an introductory instruction or as a concluding

instruction after trial. (See CACI No. 5003, *Witnesses*.)

Sources and Authority

- Role of Jury. Evidence Code section 312.
- Considerations for Evaluating the Credibility of Witnesses. Evidence Code section 780.
- Direct Evidence of Single Witness Sufficient. Evidence Code section 411.
- "It should certainly not be of importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 314

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.122 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 8.72 (Cal CJER 2019)

108. Duty to Abide by Translation Provided in Court

Some testimony will be given in [*insert language other than English*]. An interpreter will provide a translation for you at the time that the testimony is given. You must rely solely on the translation provided by the interpreter, even if you understand the language spoken by the witness. Do not retranslate any testimony for other jurors. If you believe the court interpreter translated testimony incorrectly, let me know immediately by writing a note and giving it to the [clerk/bailiff/court attendant].

New September 2003; Revised April 2004, June 2011

Sources and Authority

- "Juror [] committed misconduct by failing to rely on the court interpreter's translation, as she promised she would during voir dire. She committed further misconduct by sharing her personal translation with her fellow jurors thus introducing outside evidence into their deliberations." (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 304 [281 Cal.Rptr. 238].)
- "It is well-settled a juror may not conduct an independent investigation into the facts of the case or gather evidence from outside sources and bring it into the jury room. It is also misconduct for a juror to inject his or her own expertise into the jury's deliberation." (*People v. Cabrera, supra,* 230 Cal.App.3d at p. 303.)
- "If [the juror] believed the court interpreter was translating incorrectly, the proper action would have been to call the matter to the trial court's attention, not take it upon herself to provide her fellow jurors with the 'correct' translation." (*People v. Cabrera, supra,* 230 Cal.App.3d at p. 304.)

Secondary Sources

1A California Trial Guide, Unit 20, *Procedural Rules for Presentation of Evidence*, § 20.13[7] (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 8.119 (Cal CJER 2019)

109. Removal of Claims or Parties

[[*Name of plaintiff*]'s claim for [*insert claim*] is no longer an issue in this case.]

[[*Name of party*] is no longer a party to this case.]

Do not speculate as to why this [claim/person] is no longer involved in this case. You should not consider this during your deliberations.

New September 2003

Directions for Use

This instruction may be read during trial as appropriate.

Secondary Sources

California Judges Benchbook: Civil Proceedings—Trial § 9.27 (Cal CJER 2019)

110. Service Provider for Juror With Disability

During trial, [*name of juror***] will be assisted by a [***insert service provider***]. The [***insert service provider***] is not a member of the jury and is not to participate in the deliberations in any way other than as necessary to provide the service to [***name of juror***].**

New September 2003

Directions for Use

This instruction should be read along with other introductory instructions at the beginning of the trial if appropriate.

Sources and Authority

- Eligibility to Serve as Juror. Code of Civil Procedure section 203(a)(6).
- Service Provider for Juror With Disability. Code of Civil Procedure section 224.

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 106

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, § 322.32 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 8, *Interpreters*, 8.28 et al.

California Judges Benchbook: Civil Proceedings—Trial § 13.10 (Cal CJER 2019)

111. Instruction to Alternate Jurors

As [an] alternate juror[s], you are bound by the same rules that govern the conduct of the jurors who are sitting on the panel. You will observe the same trial and should pay attention to all of my instructions just as if you were sitting on the panel. Sometimes a juror needs to be excused during a trial for illness or some other reason. If that happens, an alternate will be selected to take that juror's place.

New October 2004

Directions for Use

If an alternate juror is substituted, see CACI No. 5014, *Substitution of Alternate Juror*.

Sources and Authority

- Alternate Jurors. Code of Civil Procedure section 234.
- "Alternate jurors are members of the jury panel which tries the case. They are selected at the same time as the regular jurors. They take the same oath and are subject to the same qualifications as the regular jurors. Alternate jurors hear the same evidence and are subject to the same admonitions as the regular jurors and, unless excused by the court, are available to participate as regular jurors." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

Secondary Sources

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, §§ 322.44, 322.52, 322.101 (Matthew Bender)

1 California Trial Guide, Unit 10, *Voir Dire Examination*, § 10.01 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, *Jury Selection*, 6.08[4]

California Judges Benchbook: Civil Proceedings—Trial § 3.89 (Cal CJER 2019)

112. Questions From Jurors

If, during the trial, you have a question that you believe should be asked of a witness, you may write out the question and send it to me through my courtroom staff. I will share your question with the attorneys and decide whether it may be asked.

Do not feel disappointed if your question is not asked. Your question may not be asked for a variety of reasons. For example, the question may call for an answer that is not allowed for legal reasons. Also, you should not try to guess the reason why a question is not asked or speculate about what the answer might have been. Because the decision whether to allow the question is mine alone, do not hold it against any of the attorneys or their clients if your question is not asked.

Remember that you are not an advocate for one side or the other. Each of you is an impartial judge of the facts. Your questions should be posed in as neutral a fashion as possible. Do not discuss any question asked by any juror with any other juror until after deliberations begin.

New February 2005; Revised April 2007, April 2009, June 2011

Directions for Use

This is an optional instruction for use if the jurors will be allowed to ask questions of the witnesses. For an instruction to be given at the end of the trial, see CACI No. 5019, *Questions From Jurors*. This instruction may be modified to account for an individual judge's practice.

Sources and Authority

- Written Questions From Jurors. Rule 2.1033 of the California Rules of Court.
- "In a proper case there may be a real benefit from allowing jurors to submit questions under proper control by the court. However, in order to permit the court to exercise its discretion and maintain control of the trial, the correct procedure is to have the juror write the questions for consideration by the court and counsel prior to their submission to the witness." (*People v. McAlister* (1985) 167 Cal.App.3d 633, 644 [213 Cal.Rptr. 271].)
- "[T]he judge has discretion to ask questions submitted by jurors or to pass those questions on and leave to the discretion of counsel whether to ask the questions." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1305 [18 Cal.Rptr.2d 796, 850 P.2d 1].)
- "The appellant urges that when jurymen ask improper questions the defendant is placed in the delicate dilemma of either allowing such question to go in without objection or of offending the jurors by making the objection and the appellant insists that the court of its own motion should check the putting of such

improper questions by the jurymen, and thus relieve the party injuriously affected thereby from the odium which might result from making that objection thereto. There is no force in this contention. Objections to questions, whether asked by a juror or by opposing counsel, are presented to the court, and its ruling thereon could not reasonably affect the rights or standing of the party making the objection before the jury in the one case more than in the other." (*Maris v. H. Crummey, Inc.* (1921) 55 Cal.App. 573, 578–579 [204 P. 259].)

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, § 97

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 7-E, *Juror Questioning Of Witnesses*, ¶ 7:45.11b (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, §§ 91.01–91.03 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial §§ 3.96, 8.53 (Cal CJER 2019)

113. Bias

Each one of us has biases about or certain perceptions or stereotypes of other people. Bias is a tendency to favor or disfavor a person or group of people. We may be aware of some of our biases, though we may not reveal them to others. We may not be fully aware of some of our other biases. We refer to biases that we are not fully aware of as "implicit" or "unconscious." They may be based on stereotypes we would reject if they were brought to our attention. Implicit or unconscious biases can affect how we perceive others and how we make decisions, without our being aware of the effect of these biases on those decisions.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, and whom we believe or disbelieve. We may favor or be more likely to believe people whom we see as similar to us or with whom we identify. Or we may disfavor or be less likely to believe people whom we see as different from us.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against parties or witnesses because of their race, national origin, ethnicity, disability, gender, gender identity, gender expression, religion, sexual orientation, age, [or] socioeconomic status[, or [*insert any other impermissible form of bias***]].**

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

New June 2010; Revised December 2012, May 2020, November 2023

Directions for Use

The court in consultation with the parties may add categories in paragraph 3 as relevant to the case.

Sources and Authority

- Duty to Prevent Bias and Ensure Fairness. Standard 10.20(b)(1), (2) of the California Standards of Judicial Administration.
- Judge Must Perform Duties Without Bias. Canon 3(b)(5) of the California Code of Judicial Ethics.

Secondary Sources

Witkin, California Procedure (5th ed. 2008) Trial, §§ 145–146

1 California Trial Guide, Unit 10, *Voir Dire Examination*, §§ 10.03[1], 10.21[2], 10.50, 10.80, 10.100, 10.110 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, *Jury Selection*, § 6.21

114. Bench Conferences and Conferences in Chambers

From time to time during the trial, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is present in the courtroom, or by calling a recess to discuss matters outside of your presence. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence. Do not be concerned about our discussions or try to guess what is being said.

I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of my view of the evidence.

New December 2010

Directions for Use

This instruction is based on Model Instruction 1.17 of the federal Ninth Circuit Court of Appeals. It may be used to explain to the jury why there may be discussions at the bench that the jury will not be able to hear, and why sometimes the judge will call a recess for discussions outside of the presence of the jury.

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 300

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.170 (Matthew Bender)

1 California Trial Guide, Unit 4, *Pretrial Evidentiary Motions*, § 4.10[1] (Matthew Bender)

Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 2, *Public Access to Trials and Records*, 2.05

115. "Class Action" Defined (Plaintiff Class)

A class action is a lawsuit that has been brought by one or more plaintiffs on behalf of a larger group of people who have similar legal claims. All of these people together are called a "class." [*Name of plaintiff***] brings this action as the class representative.**

In a class action, the claims of many individuals can be resolved at the same time instead of requiring each member to sue separately. Because of the large number of claims that are at issue in this case, not everyone in the class will testify. You may assume that the evidence at this [stage of the] trial applies to all class members [except as I specifically tell you otherwise]. All members of the class will be bound by the result of this trial.

In this case, the class(es) consist(s) of the following:

[*Describe each class, e.g.,*

Original Homebuyers: All current homeowners in the Happy Valley subdivision in Pleasantville, California, who purchased homes that were constructed and marketed by [name of defendant]. ("Class of Original Purchasers")

*Subsequent Homebuyers: All current homeowners in the Happy Valley subdivisions in Pleasantville, California, who purchased homes that were constructed and marketed by [name of defendant] from another homeowner. ("Class of Later Purchasers")***]**.

New June 2011

Directions for Use

The first paragraph may be modified for use with a defendant class. If in the course of the trial the court decertifies the class or one of the classes as to some or all issues, a concluding instruction explaining the effect of the decertification should be given.

In the second paragraph, if class evidence and individual evidence will be received in separate stages of the trial, include the first bracketed language. If both class evidence and individual evidence will be received together, include the second bracketed language and specify the class evidence in a separate instruction.

Sources and Authority

- Right to Bring Class Action. Code of Civil Procedure section 382.
- "Courts long have acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system. ' "By establishing a technique whereby the claims of many individuals can be resolved at the same time, the

class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress . . . .” ’ Generally, a class suit is appropriate ‘when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer.’ ‘But because group action also has the potential to create injustice, trial courts are required to ‘ “carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts.” ’ ” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 434–435 [97 Cal.Rptr.2d 179, 2 P.3d 27], internal citations omitted.)

- “The cases uniformly hold that a plaintiff seeking to maintain a class action must be a member of the class he claims to represent.” (*La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 875 [97 Cal.Rptr 849, 489 P.2d 1113].)

Secondary Sources

4 Witkin, California Procedure (6th ed. 2021) Pleading, § 266 et seq.

Cabraser, California Class Actions and Coordinated Proceedings (2d ed.), Ch. 3, *California’s Class Action Statute*, § 3.03 (Matthew Bender)

California Deskbook on Complex Civil Litigation Management, Ch. 5, *Specialized Areas*, § 5.80 et seq. (Matthew Bender)

12 California Forms of Pleading and Practice, Ch. 120, *Class Actions*, §§ 120.11, 120.14 (Matthew Bender)

4 California Points and Authorities, Ch. 41, *Class and Representative Actions*, § 41.30 et seq. (Matthew Bender)

2 California Pretrial Civil Procedure Practice Guide: The Wagstaffe Group, Ch. 37, *Class Actions*, § 37-I et seq.

116. Why Electronic Communications and Research Are Prohibited

I know that many of us are used to communicating and perhaps even learning by electronic communications and research. However, there are good reasons why you must not electronically communicate or do any research on anything having to do with this trial or the parties.

In court, jurors must make important decisions that have consequences for the parties. Those decisions must be based only on the evidence that you hear in this courtroom.

The evidence that is presented in court can be tested; it can be shown to be right or wrong by either side; it can be questioned; and it can be contradicted by other evidence. What you might read or hear on your own could easily be wrong, out of date, or inapplicable to this case.

The parties can receive a fair trial only if the facts and information on which you base your decisions are presented to you as a group, with each juror having the same opportunity to see, hear, and evaluate the evidence.

Also, a trial is a public process that depends on disclosure in the courtroom of facts and evidence. Using information gathered in secret by one or more jurors undermines the public process and violates the rights of the parties.

New June 2011

Directions for Use

Give this instruction after CACI No. 100, *Preliminary Admonitions*, in order to provide more information to the jury as to the reasons why independent electronic research using the internet and electronic communications are prohibited.

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 226 et seq.

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 7-F, *Juror Misconduct During Trial*, ¶¶ 7:110, 7:113.1 (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-F, *Juror Misconduct During Deliberations*, ¶¶ 15:206–15:210 (The Rutter Group)

4 Johnson, California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.10 et seq. (Matthew Bender)

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

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure,

Ch. 17, *Dealing With the Jury*, 17.21

California Judges Benchbook: Civil Proceedings—Trial §§ 3.95, 13.50, 13.51 (Cal CJER 2019)

117. Wealth of Parties

In reaching a verdict, you may not consider the wealth or poverty of any party. The parties' wealth or poverty is not relevant to any of the issues that you must decide.

New November 2017

Directions for Use

This instruction may be given unless liability and punitive damages are to be decided in a nonbifurcated trial. The defendant's wealth is relevant to punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 108 [284 Cal.Rptr. 318, 813 P.2d 1348].) Otherwise, the wealth or lack of it is not relevant. (*Hoffman v. Brandt* (1966) 65 Cal.2d 549, 552–553 [55 Cal.Rptr. 417, 421 P.2d 425].) If this instruction is given in a nonbifurcated trial, it should be modified to clarify that the prohibition on considering wealth applies only to liability and compensatory damages, and not to punitive damages. For discussion of the role of a defendant's financial condition with regard to punitive damages, see the punitive damages instructions in the Damages series, CACI Nos. 3940–3949.

Sources and Authority

- "Justice is to be accorded to rich and poor alike, and a deliberate attempt by counsel to appeal to social or economic prejudices of the jury, including the wealth or poverty of the litigants, is misconduct where the asserted wealth or poverty is not relevant to the issues of the case. The possibility, even if true, that a judgment for plaintiffs would mean that defendant would have to go to the Laguna Honda Home, had no relevance to the issues of the case, and the argument of defense counsel was clearly a transparent attempt to appeal to the sympathies of the jury on the basis of the claimed lack of wealth of the defendant. As such, it was clearly misconduct." (*Hoffman, supra,* 65 Cal.2d at pp. 552–553, internal citations omitted.)
- "[W]here liability and punitive damages are tried in a single proceeding, evidence of wealth is admissible. '[W]hile in the ordinary action for damages information regarding the adversary's financial status is *inadmissible,* this is not so in an action for punitive damages. In such a case evidence of defendant's financial condition is admissible at the trial for the purpose of determining the amount that it is proper to award [citations]. The relevancy of such evidence lies in the fact that punitive damages are not awarded for the purpose of rewarding the plaintiff but to punish the defendant. Obviously, the trier of fact cannot measure the 'punishment' without knowledge of defendant's ability to respond to a given award.' " (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1243 [1 Cal.Rptr.2d 301], original italics.)
- "In an action for damages, a showing of poverty of the plaintiff is highly

prejudicial; if such evidence is deliberately introduced, it may constitute reversible error." (*Hart v. Wielt* (1970) 4 Cal.App.3d 224, 234 [84 Cal.Rptr. 220].)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, §§ 312, 313, 216

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.24 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51[16] (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.141 et seq. (Matthew Bender)

118. Personal Pronouns

One of the [parties/witnesses/attorneys/*specify other participant in the case***] in this case uses the personal pronouns [***specify the person's pronouns***]. You may hear the judge and attorneys refer to [***name of person***] using the pronouns: [***specify the person's pronouns***].**

New May 2020

Directions for Use

It is the policy of the State of California that intersex, transgender, and nonbinary people are entitled to full legal recognition and equal treatment under the law. In accordance with this policy, attorneys and courts should take affirmative steps to ensure that they are using correct personal pronouns. To further this policy, these instructions have been expanded to include "nonbinary pronoun" wherever appropriate. Although the advisory committee acknowledges a trend for the singular use of "they," "their," and "them," the committee also recognizes these pronouns have plural denotations with the potential to confuse jurors. For clarity in the jury instructions, the committee recommends using an individual's name rather than a personal nonbinary pronoun (such as "they") if the pronoun could result in confusion.

The court should consult with the attorneys in the case before reading this instruction to the jury. The court should also consult with the individual whose pronouns are being discussed to ensure the court acts in a way that protects the individual's dignity and privacy.

Sources and Authority

- Gender Recognition Act. Stats. 2019, ch. 853 (SB 179).
- "Sex" Defined. Gov. Code, § 12926(r)(2).
- "Gender Expression" Defined. Cal. Code Regs., tit. 2, § 11030(a).
- "Gender Identity" Defined. Cal. Code Regs., tit. 2, § 11030(b).

119–199. Reserved for Future Use

EVIDENCE

200. Obligation to Prove—More Likely True Than Not True

The parties must persuade you, by the evidence presented in court, that what they are required to prove is more likely to be true than not true. This is referred to as "the burden of proof."

After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the party did not prove it. You should consider all the evidence, no matter which party produced the evidence.

In criminal trials, the prosecution must prove that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need prove only that it is more likely to be true than not true.

New September 2003; Revised February 2005, May 2020

Directions for Use

Evidence Code section 502 requires the court to instruct the jury regarding which party bears the burden of proof on each issue and the requisite degree of proof.

For an instruction on clear and convincing evidence, see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Sources and Authority

- Burden of Proof—Preponderance of Evidence. Evidence Code section 115.
- Party With Burden of Proof. Evidence Code section 500.
- Each party is entitled to the benefit of all the evidence, including the evidence produced by an adversary. (*Williams v. Barnett* (1955) 135 Cal.App.2d 607, 612 [287 P.2d 789]; 7 Witkin, California Procedure (4th ed. 1997) Trial, § 305, p. 352.)
- The general rule in California is that " '[i]ssues of fact in civil cases are determined by a preponderance of testimony.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 483 [286 Cal.Rptr. 40, 816 P.2d 892], citation omitted.)
- The preponderance-of-the-evidence standard "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.' " (*In re Angelia P.* (1981) 28 Cal.3d 908, 918 [171 Cal.Rptr. 637, 623 P.2d 198], citation omitted.)
- "Preponderance of the evidence" " 'means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed.' " (*Glage v. Hawes Firearms Co.* (1990) 226

Cal.App.3d 314, 325 [276 Cal.Rptr. 430] (quoting *People v. Miller* (1916) 171 Cal. 649, 652 [154 P. 468] and holding that it was prejudicial misconduct for jurors to refer to the dictionary for definition of the word "preponderance").)

Secondary Sources

1 Witkin, California Evidence (6th ed. 2023) Burden of Proof and Presumptions, § 39

Jefferson, California Evidence Benchbook (3d ed. 1997) Ch. 45, Burdens of Proof and of Producing Evidence; Presumptions

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.90, 551.92 (Matthew Bender)

201. Highly Probable—Clear and Convincing Proof

Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true. I will tell you specifically which facts must be proved by clear and convincing evidence.

New September 2003; Revised October 2004, June 2015

Directions for Use

Evidence Code section 502 requires the court to instruct the jury regarding which party bears the burden of proof on each issue and the requisite degree of proof.

This instruction should be read immediately after CACI No. 200, *Obligation to Prove—More Likely True Than Not True*, if the jury will have to decide an issue by means of the clear-and-convincing evidence standard.

Sources and Authority

- Burden of Proof. Evidence Code section 115.
- Party With Burden of Proof. Evidence Code section 500.
- "Proof by clear and convincing evidence is required 'where particularly important individual interests or rights are at stake,' such as the termination of parental rights, involuntary commitment, and deportation. However, 'imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487 [286 Cal.Rptr. 40, 816 P.2d 892] (quoting *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389–390).)
- " 'Clear and convincing' evidence requires a finding of high probability." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919 [171 Cal.Rptr. 637, 623 P.2d 198].)
- "Under the clear and convincing standard, the evidence must be ' " ' "so clear as to leave no substantial doubt" ' " ' and ' " ' "sufficiently strong to command the unhesitating assent of every reasonable mind." ' " ' " (*Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1158 [235 Cal.Rptr.3d 228].)
- "We decline to hold that CACI No. 201 should be augmented to require that 'the evidence must be "so clear as to leave no substantial doubt" and "sufficiently strong as to command the unhesitating assent of every reasonable mind." ' Neither *In re Angelia P., supra*, 28 Cal.3d 908, nor any more recent authority mandates that augmentation, and the proposed additional language is dangerously similar to that describing the burden of proof in criminal cases." (*Nevarrez v. San Marino Skilled Nursing & Wellness Center* (2013) 221 Cal.App.4th 102, 114 [163 Cal.Rptr.3d 874].)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Burden of Proof and Presumptions, §§ 39, 40

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 45.4, 45.21

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.90, 551.92 (Matthew Bender)

1 Cathcart et al., Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 9, *Burdens of Proof and Persuasion*, 9.16

202. Direct and Indirect Evidence

Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion.

Direct evidence can prove a fact by itself. For example, if a witness testifies she saw a jet plane flying across the sky, that testimony is direct evidence that a plane flew across the sky. Some evidence proves a fact indirectly. For example, a witness testifies that he saw only the white trail that jet planes often leave. This indirect evidence is sometimes referred to as "circumstantial evidence." In either instance, the witness's testimony is evidence that a jet plane flew across the sky.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves.

New September 2003; Revised December 2012

Directions for Use

An instruction concerning the effect of circumstantial evidence must be given on request when it is called for by the evidence. (*Shepherd v. Walley* (1972) 28 Cal.App.3d 1079, 1084 [105 Cal.Rptr. 387]; *Calandri v. Ione Unified School Dist.* (1963) 219 Cal.App.2d 542, 551 [33 Cal.Rptr. 333]; *Trapani v. Holzer* (1958) 158 Cal.App.2d 1, 6 [321 P.2d 803].)

Sources and Authority

- Direct Evidence. Evidence Code section 410.
- Inference. Evidence Code section 600(b).
- The Assembly Committee on Judiciary Comment to section 600 observes: "Under the Evidence Code, an inference is not itself evidence; it is the result of reasoning from evidence."
- "[T]he fact that evidence is 'circumstantial' does not mean that it cannot be 'substantial.' Relevant circumstantial evidence is admissible in California. Moreover, the jury is entitled to accept persuasive circumstantial evidence even where contradicted by direct testimony." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548 [138 Cal.Rptr. 705, 564 P.2d 857], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)
- "The terms 'indirect evidence' and 'circumstantial evidence' are interchangeable and synonymous." (*People v. Yokum* (1956) 145 Cal.App.2d 245, 250 [302 P.2d 406], *disapproved on other grounds*, *People v. Cook* (1983) 33 Cal.3d 400, 413

[189 Cal.Rptr. 159, 658 P.2d 86]; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152 [293 P.2d 495].)

Secondary Sources

1 Witkin, California Evidence (6th ed. 2023) Circumstantial Evidence, §§ 1, 2

3 Witkin, California Evidence (6th ed. 2023) Presentation at Trial, §§ 171–176

7 Witkin, California Procedure (6th ed. 2021) Trial, § 306

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.62 (Matthew Bender)

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 19.12–19.18

203. Party Having Power to Produce Better Evidence

You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence.

New September 2003

Directions for Use

An instruction on failure to produce evidence should not be given if there is no evidence that the party producing inferior evidence had the power to produce superior evidence. (*Thomas v. Gates* (1899) 126 Cal. 1, 6 [58 P. 315]; *Hansen v. Warco Steel Corp.* (1965) 237 Cal.App.2d 870, 876 [47 Cal.Rptr. 428]; *Holland v. Kerr* (1953) 116 Cal.App.2d 31, 37 [253 P.2d 88].)

The reference to "stronger evidence" applies to evidence that is admissible. This instruction should not be construed to apply to evidence that the court has ruled inadmissible. (*Hansen, supra,* 237 Cal.App.2d at p. 877.)

For willful suppression of evidence, see CACI No. 204, *Willful Suppression of Evidence*.

Sources and Authority

- Power to Produce Better Evidence. Evidence Code section 412.
- Section 412 does not incorporate the "best evidence rule," but instead deals with "stronger and more satisfactory" evidence. (*Largey v. Intrastate Radiotelephone, Inc.* (1982) 136 Cal.App.3d 660, 672 [186 Cal.Rptr. 520] (giving of instruction was proper because corporate records concerning date of meeting could have been stronger evidence than recollection of participants several years later).)
- This inference was a mandatory presumption under former Code of Civil Procedure section 1963(6). It is now considered a permissible inference. (See 3 Witkin, California Evidence (4th ed. 2000) § 114, p. 152.)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 317

11 Witkin, California Evidence (6th ed. 2023) Presentation at Trial, § 137

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.93[2] (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 11.10 (Cal CJER 2019)

204. Willful Suppression of Evidence

You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party.

New September 2003; Revised October 2004

Directions for Use

This instruction should be given only if there is evidence of suppression. (*In re Estate of Moore* (1919) 180 Cal. 570, 585 [182 P. 285]; *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1051 [213 Cal.Rptr. 69]; *County of Contra Costa v. Nulty* (1965) 237 Cal.App.2d 593, 598 [47 Cal.Rptr. 109].)

If there is evidence that a party improperly altered evidence (as opposed to concealing or destroying it), users should consider modifying this instruction to account for that circumstance.

In *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12 [74 Cal.Rptr.2d 248, 954 P.2d 511], a case concerning the tort of intentional spoliation of evidence, the Supreme Court observed that trial courts are free to adapt standard jury instructions on willful suppression to fit the circumstances of the case, "including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation."

Sources and Authority

- Willful Suppression of Evidence. Evidence Code section 413.
- Former Code of Civil Procedure section 1963(5) permitted the jury to infer "[t]hat the evidence willfully suppressed would be adverse if produced." Including this inference in a jury instruction on willful suppression is proper because "Evidence Code section 413 was not intended as a change in the law." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 994 [16 Cal.Rptr.2d 787], disapproved of on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179].)
- "The rule of [present Evidence Code section 413] . . . is predicated on common sense, and public policy. The purpose of a trial is to arrive at the true facts. A trial is not a game where one counsel safely may sit back and refuse to produce evidence where in the nature of things his client is the only source from which that evidence may be secured. *A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse*." (*Williamson v. Superior Court of Los Angeles County* (1978) 21 Cal.3d

829, 836 fn. 2 [148 Cal.Rptr. 39, 582 P.2d 126], original italics.)

- "We can see no error in the trial court's ruling [giving this instruction]. The jury was told only that it could 'consider whether one party intentionally concealed or destroyed evidence.' Defendants were free to present the jury with evidence that (as counsel represented to the court), the redactions were only of telephone numbers, and that the failure to interview certain witnesses was proper, and to argue that evidence to the jury." (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 273 [150 Cal.Rptr.3d 861].)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 317

3 Witkin, California Evidence (6th ed. 2023) Presentation at Trial, § 138

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.93 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial §§ 5.44, 11.10 (Cal CJER 2019)

205. Failure to Explain or Deny Evidence

If a party failed to explain or deny evidence against [him/her/*nonbinary pronoun*/it] when [he/she/*nonbinary pronoun*/it] could reasonably be expected to have done so based on what [he/she/*nonbinary pronoun*/it] knew, you may consider [his/her/*nonbinary pronoun*/its] failure to explain or deny in evaluating that evidence.

It is up to you to decide the meaning and importance of the failure to explain or deny evidence against the party.

New September 2003; Revised December 2012

Directions for Use

This instruction should be given only if there is a failure to deny or explain a fact that is material to the case.

Sources and Authority

- Failure to Explain or Deny. Evidence Code section 413.

Secondary Sources

3 Witkin, California Evidence (6th ed. 2023) Presentation at Trial, § 138

7 Witkin, California Procedure (6th ed. 2021) Trial, § 317

Cotchett, California Courtroom Evidence, § 11.04 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.93[3] (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 11.10 (Cal CJER 2019)

206. Evidence Admitted for Limited Purpose

During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other.

New September 2003; Revised May 2018, November 2018

Directions for Use

It is recommended that the judge call attention to the purpose to which the evidence applies.

If appropriate, an instruction limiting the purpose for which evidence is to be considered must be given upon request. (Evid. Code, § 355; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 Cal.2d 655, 665–666 [313 P.2d 557]; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 412 [264 Cal.Rptr. 779].)

A limited-purpose instruction is insufficient to cure hearsay problems with case-specific testimony given by an expert witness. (*People v. Sanchez* (2016) 63 Cal.4th 665, 684 [204 Cal.Rptr.3d 102, 374 P.3d 320].)

For an instruction on evidence applicable to one party or a limited number of parties, see CACI No. 207, *Evidence Applicable to One Party*.

Sources and Authority

- Evidence Admitted for Limited Purpose. Evidence Code section 355.
- Refusal to give a requested instruction limiting the purpose for which evidence is to be considered may constitute error. (*Adkins v. Brett* (1920) 184 Cal. 252, 261–262 [193 P. 251].)
- "The effect of the statute—here, the municipal code section—is to make certain hearsay evidence admissible *for a limited purpose,* i.e., supplementing or explaining other evidence. This triggers the long-standing rule codified in Evidence Code section 355, which states, 'When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly.' . . . In the absence of such a request, the evidence is ' "usable for any purpose." ' " (*Seibert v. City of San Jose* (2016) 247 Cal.App.4th 1027, 1060–1061 [202 Cal.Rptr.3d 890], original italics.)
- "Where the information is admitted for a purpose other than showing the truth of the matter asserted . . . , prejudice is likely to be minimal and a limiting instruction under section 355 may be requested to control the jury's use of the information." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1525 [3 Cal.Rptr.2d 833].)
- An adverse party may be excused from the requirement of requesting a limiting

instruction and may be permitted to assert error if the trial court unequivocally rejects the argument upon which a limiting instruction would be based. (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 298–299 [85 Cal.Rptr. 444, 466 P.2d 996].)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, §§ 32–36

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 20.11–20.13

1A California Trial Guide, Unit 21, *Procedures for Determining Admissibility of Evidence*, § 21.21 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.66[2], 551.77 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial §§ 3.106, 12.26 (Cal CJER 2019)

207. Evidence Applicable to One Party

[During the trial, I explained that certain evidence could be considered as to only one party. You may not consider that evidence as to any other party.]

[During the trial, I explained that certain evidence could be considered as to one or more parties but not to every party. You may not consider that evidence as to any other party.]

New September 2003

Directions for Use

If appropriate, an instruction limiting the parties to whom evidence applies must be given on request. (Evid. Code, § 355.) It is recommended that the judge call attention to the party or parties to which the evidence applies.

For an instruction on evidence admissible for a limited purpose, see CACI No. 206, *Evidence Admitted for Limited Purpose*.

Sources and Authority

- Evidence Applicable to One Party. Evidence Code section 355.

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, §§ 32–36

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 20.11–20.13

1A California Trial Guide, Unit 21, *Procedures for Determining Admissibility of Evidence*, § 21.21 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.66, 551.77 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial §§ 3.106, 12.26 (Cal CJER 2019)

208. Deposition as Substantive Evidence

During the trial, you received deposition testimony that was [read from the deposition transcript/[*describe other manner presented, e.g., shown by video***]]. A deposition is the testimony of a person taken before trial. At a deposition the person is sworn to tell the truth and is questioned by the attorneys. You must consider the deposition testimony that was presented to you in the same way as you consider testimony given in court.**

New September 2003; Revised December 2012

Sources and Authority

- How Testimony is Taken. Code of Civil Procedure section 2002.
- Use of Deposition at Trial. Code of Civil Procedure section 2025.620.
- Admissibility of Former Testimony. Evidence Code sections 1291(a), 1292(a).
- "Former Testimony" Defined. Evidence Code section 1290(c).
- "Admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact." (*Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380 [121 Cal.Rptr. 768].)
- "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds the witness unavailable as a witness within the meaning of section 240 of the Evidence Code." (*Chavez v. Zapata Ocean Resources, Inc.* (1984) 155 Cal.App.3d 115, 118 [201 Cal.Rptr. 887], citation omitted.)

Secondary Sources

3 Witkin, California Evidence (6th ed. 2023) Presentation at Trial, §§ 177–186

7 Witkin, California Procedure (6th ed. 2021) Trial, § 308

1A California Trial Guide, Unit 20, *Procedural Rules for Presentation of Evidence*, §§ 20.30–20.38, Unit 40, *Hearsay*, §§ 40.60–40.61 (Matthew Bender)

5 Levy et al., California Torts, Ch. 72, *Discovery*, § 72.41 (Matthew Bender)

16 California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions*, §§ 193.90–193.97 (Matthew Bender)

2 California Pretrial Civil Procedure Practice Guide: The Wagstaffe Group, Ch. 45, *Depositions and Subpoenas in California*, § 45-IX

209. Use of Interrogatories of a Party

Before trial, each party has the right to ask the other parties to answer written questions. These questions are called interrogatories. The answers are also in writing and are given under oath. You must consider the questions and answers that were read to you the same as if the questions and answers had been given in court.

New September 2003

Sources and Authority

- Use of Interrogatories at Trial. Code of Civil Procedure section 2030.410.
- "Admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact." (*Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380 [121 Cal.Rptr. 768].)

Secondary Sources

3 Witkin, California Evidence (6th ed. 2023) Presentation at Trial, § 187

7 Witkin, California Procedure (6th ed. 2021) Trial, § 308

1A California Trial Guide, Unit 20, *Procedural Rules for Presentation of Evidence*, § 20.50 (Matthew Bender)

16 California Forms of Pleading and Practice, Ch. 194, *Discovery: Interrogatories*, § 194.26 (Matthew Bender)

2 California Pretrial Civil Procedure Practice Guide: The Wagstaffe Group, Ch. 41, *Interrogatories*, § 41-V

210. Requests for Admissions

Before trial, each party has the right to ask another party to admit in writing that certain matters are true. If the other party admits those matters, you must accept them as true. No further evidence is required to prove them.

[However, these matters must be considered true only as they apply to the party who admitted they were true.]

New September 2003

Directions for Use

The bracketed phrase should be given if there are multiple parties.

Sources and Authority

- Requests for Admission. Code of Civil Procedure section 2033.010.
- "As Professor Hogan points out, '[t]he request for admission differs fundamentally from the other five discovery tools (depositions, interrogatories, inspection demands, medical examinations, and expert witness exchanges). These other devices have as their main thrust the uncovering of factual data that may be used in proving things at trial. The request for admission looks in the opposite direction. It is a device that seeks to eliminate the need for proof in certain areas of the case.' " (*Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1577 [25 Cal.Rptr.2d 354] (quoting 1 Hogan, Modern California Discovery (4th ed. 1988) § 9.1, p. 533).)
- All parties to the action may rely on admissions. (See *Swedberg v. Christiana Community Builders* (1985) 175 Cal.App.3d 138, 143 [220 Cal.Rptr. 544].)

Secondary Sources

2 Witkin, California Evidence (5th ed. 2012) Discovery, §§ 162, 172, 182

1A California Trial Guide, Unit 20, *Procedural Rules for Presentation of Evidence*, § 20.51 (Matthew Bender)

16 California Forms of Pleading and Practice, Ch. 196, *Discovery: Requests for Admissions*, § 196.19 (Matthew Bender)

2 California Pretrial Civil Procedure Practice Guide: The Wagstaffe Group, Ch. 44, *Requests for Admission*, § 44-I

211. Prior Conviction of a Felony

You have heard that a witness in this trial has been convicted of a felony. You were told about the conviction [only] to help you decide whether you should believe the witness. [You also may consider the evidence for the purpose of [*specify*].] You must not consider it for any other purpose.

New September 2003; Revised December 2012

Directions for Use

Include the word "only" unless the court has admitted the evidence for some other purpose, in which case, include the next-to-last sentence. For example, a prior alcohol-related conviction might be relevant to show conscious disregard if the claim involves conduct while under the influence.

Sources and Authority

- Admissibility of Evidence of Prior Felony Conviction. Evidence Code section 788.
- The standards governing admissibility of prior convictions in civil cases are different from those in criminal proceedings. In *Robbins v. Wong* (1994) 27 Cal.App.4th 261, 273 [32 Cal.Rptr.2d 337], the court observed: "Given the significant distinctions between the rights enjoyed by criminal defendants and civil litigants, and the diminished level of prejudice attendant to felony impeachment in civil proceedings, it is not unreasonable to require different standards of admissibility in civil and criminal cases." (*Id.* at p. 273.)
- In *Robbins*, the court concluded that article I, section 28(f) of the California Constitution, as well as any Supreme Court cases on this topic in the criminal arena, does not apply to civil cases. (*Robbins, supra,* 27 Cal.App.4th at p. 274.) However, the court did hold that the trial court "may utilize such decisions to formulate guidelines for the judicial weighing of probative value against prejudicial effect under section 352." (*Ibid.*)

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, §§ 304, 306, 307, 320

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.123 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, *Questioning Witnesses and Objections*, 11.64

California Judges Benchbook: Civil Proceedings—Trial § 8.74 (Cal CJER 2019)

212. Statements of a Party Opponent

A party may offer into evidence any oral or written statement made by an opposing party outside the courtroom.

When you evaluate evidence of such a statement, you must consider these questions:

1. **Do you believe that the party actually made the statement? If you do not believe that the party made the statement, you may not consider the statement at all.**
2. **If you believe that the statement was made, do you believe it was reported accurately?**

You should view testimony about an oral statement made by a party outside the courtroom with caution.

New September 2003

Directions for Use

Under Evidence Code section 403(c), the court must instruct the jury to disregard a statement offered as evidence if it finds that the preliminary facts do not exist. For adoptive admissions, see CACI No. 213, *Adoptive Admissions*.

Sources and Authority

- Determination of Preliminary Facts. Evidence Code section 403.
- Statements of Party. Evidence Code section 1220.
- The Law Revision Commission comment to this section observes that "[t]he rational underlying this exception is that the party cannot object to the lack of the right to cross-examine the declarant since the party himself made the statement."
- There is no requirement that the prior statement of a party must have been against his or her interests when made in order to be admissible. Any prior statement of a party may be offered against him or her in trial. (1 Witkin, California Evidence (4th ed. 2000) Hearsay § 93.)
- The cautionary instruction regarding admissions is derived from common law, formerly codified at Code of Civil Procedure section 2061. The repeal of this section did not affect decisional law concerning the giving of the cautionary instruction. (*People v. Beagle* (1972) 6 Cal.3d 441, 455, fn. 4 [99 Cal.Rptr. 313, 492 P.2d 1].)
- The purpose of the cautionary instruction has been stated as follows: "Ordinarily there is strong reasoning behind the principle that a party's extrajudicial admissions or declarations against interest should be viewed with caution. . . .

No class of evidence is more subject to error or abuse inasmuch as witnesses having the best of motives are generally unable to state the exact language of an admission and are liable, by the omission or the changing of words, to convey a false impression of the language used." (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 214 [57 Cal.Rptr. 319].)

- The need to give the cautionary instruction appears to apply to both civil and criminal cases. (See *People v. Livaditis* (1992) 2 Cal.4th 759, 789 [9 Cal.Rptr.2d 72, 831 P.2d 297] (conc. opn. of Mosk, J.).)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Hearsay, §§ 91–94, 126

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, § 127

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 3.7–3.22

2 California Trial Guide, Unit 40, *Hearsay*, § 40.30 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.76 (Matthew Bender)

213. Adoptive Admissions

You have heard evidence that [*name of declarant***] made the following statement: [***describe statement***]. You may consider that statement as evidence against [***name of party against whom statement was offered***] only if you find that all of the following conditions are true:**

1. **The statement was made to [***name of party against whom statement was offered***] or made in [his/her/***nonbinary pronoun***] presence;**
2. **[***Name of party against whom statement was offered***] heard and understood the statement;**
3. **[***Name of party against whom statement was offered***] would, under all the circumstances, naturally have denied the statement if [he/she/***nonbinary pronoun***] thought it was not true;**

   AND

4. **[***Name of party against whom statement was offered***] could have denied it but did not.**

If you decide that any of these conditions are not true, you must not consider for any purpose either the statement or [*name of party against whom statement was offered***]'s response.**

[You must not consider this evidence against any other party.]

New September 2003; Revised December 2012

Directions for Use

Under Evidence Code section 403(c), the court must instruct the jury to disregard the evidence of an adoptive admission if it finds that the preliminary facts do not exist.

For statements of a party opponent, see CACI No. 212, *Statements of a Party Opponent*. Evasive conduct falls under this instruction rather than under CACI No. 212.

Sources and Authority

- Determination of Preliminary Facts. Evidence Code section 403.
- Adoptive Admissions. Evidence Code section 1221.
- "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." (*In re Estate of Neilson*

(1962) 57 Cal.2d 733, 746 [22 Cal.Rptr. 1, 371 P.2d 745].)

- In order for the hearsay evidence to be admissible, "it must have been shown clearly that [the party] heard and understood the statement." (*Fisch v. Los Angeles Metropolitan Transit Authority* (1963) 219 Cal.App.2d 537, 540 [33 Cal.Rptr. 298].) There must also be evidence of some type of reaction to the statement. (*Ibid.*) It is clear that the doctrine "does not apply if the party is in such physical or mental condition that a reply could not reasonably be expected from him." (*Southers v. Savage* (1961) 191 Cal.App.2d 100, 104 [12 Cal.Rptr. 470].)
- "[T]here may be admissions other than statements made by the party himself; that is, statements of another may in some circumstances be treated as admissions of the party. The situations are (1) where the person who makes the statement is in privity with the party against whom it is offered, as in the case of agency, partnership, etc.; and (2) where the statement of the other is adopted by the party as his own, either expressly or by conduct. Familiar examples of this second situation are the admissions by silence, where declarations of third persons made in the presence of a party give rise to admissions, the conduct of the party in the face of the declaration constituting the adoption of the statement to form an admission." (*In re Estate of Gaines* (1940) 15 Cal.2d 255, 262 [100 P.2d 1055].)
- "The basis of the rule on admissions made in response to accusations is the fact that human experience has shown that generally it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing." (*Keller v. Key System Transit Lines* (1954) 129 Cal.App.2d 593, 596 [277 P.2d 869].)
- If the statement is not accusatory, then the failure to respond is not an admission. (*Neilson, supra*, 57 Cal.2d at p. 747; *Gilbert v. City of Los Angeles* (1967) 249 Cal.App.2d 1006, 1008 [58 Cal.Rptr. 56].)
- Admissibility of this evidence depends upon whether (1) the statement was made under circumstances that call for a reply, (2) whether the party understood the statement, and (3) whether it could be inferred from his conduct that he adopted the statement as an admission. (*Gilbert, supra*, 249 Cal.App.2d at p. 1009.)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Hearsay, §§ 103–106

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 3.23–3.30

Cotchett, California Courtroom Evidence, § 21.09 (Matthew Bender)

2 California Trial Guide, Unit 40, *Hearsay*, § 40.31 (Matthew Bender)

214. Reserved for Future Use

215. Exercise of a Communication Privilege

[*Name of party/witness***] has an absolute right not to disclose what [he/she/***nonbinary pronoun***] told [his/her/***nonbinary pronoun***] [doctor/attorney/[***other***]] in confidence because the law considers this information privileged. Do not consider, for any reason at all, the fact that [***name of party/witness***] did not disclose what [he/she/***nonbinary pronoun***] told [his/her/***nonbinary pronoun***] [doctor/attorney/[***other***]]. Do not discuss that fact during your deliberations or let it influence your decision in any way.**

New September 2003; Revised December 2012

Directions for Use

This instruction must be given upon request, if appropriate and the court has determined that the privilege has not been waived. (Evid. Code, § 913(b).)

Sources and Authority

- No Presumption on Exercise of Privilege. Evidence Code section 913(b).
- The comment to Evidence Code section 913 notes that this statute "may modify existing California law as it applies in civil cases." Specifically, the comment notes that section 913 in effect overrules two Supreme Court cases: *Nelson v. Southern Pacific Co*. (1937) 8 Cal.2d 648 [67 P.2d 682] and *Fross v. Wotton* (1935) 3 Cal.2d 384 [44 P.2d 350]. The *Nelson* court had held that evidence of a person's exercise of the privilege against self-incrimination in a prior proceeding may be shown for impeachment purposes if he or she testifies in a self-exculpatory manner in a subsequent proceeding. Language in *Fross* indicated that unfavorable inferences may be drawn in a civil case from a party's claim of the privilege against self-incrimination during the case itself.

Secondary Sources

2 Witkin, California Evidence (6th ed. 2023) Witnesses, § 92

7 Witkin, California Procedure (6th ed. 2021) Trial, § 314

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 35.26–35.27

Cotchett, California Courtroom Evidence, § 18.09 (Matthew Bender)

3 California Trial Guide, Unit 51, *Privileges*, §§ 51.01–51.32 (Matthew Bender)

2 California Pretrial Civil Procedure Practice Guide: The Wagstaffe Group, Ch. 40, *Scope of Discovery*, § 40-III

California Judges Benchbook: Civil Proceedings—Trial §§ 8.34, 8.41 (Cal CJER 2019)

216. Exercise of Right Not to Incriminate Oneself (Evid. Code, § 913)

[*Name of party/witness***] has an absolute constitutional right not to give testimony that might tend to incriminate [himself/herself/***nonbinary pronoun***]. Do not consider, for any reason at all, the fact that [***name of party/witness***] invoked the right not to testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.**

New September 2003; Revised December 2012

Directions for Use

The privilege against self-incrimination may be asserted in a civil proceeding. (*Kastigar v. United States* (1972) 406 U.S. 441, 444 [92 S.Ct. 1653, 32 L.Ed.2d 212]; *People v. Merfeld* (1997) 57 Cal.App.4th 1440, 1443 [67 Cal.Rptr.2d 759].) Under California law, neither the court nor counsel may comment on the fact that a witness has claimed a privilege, and the trier of fact may not draw any inference from the refusal to testify as to the credibility of the witness or as to any matter at issue in the proceeding. (Evid. Code, § 913(a); see *People v. Doolin* (2009) 45 Cal.4th 390, 441–442 [87 Cal.Rptr.3d 209, 198 P.3d 11].)

Therefore, the issue of a witness's invocation of the Fifth Amendment right not to self-incriminate is raised outside the presence of the jury, and the jury is not informed of the matter. This instruction is intended for use if the circumstances presented in a case result in the issue being raised in the presence of the jury and a party adversely affected requests a jury instruction. (See Evid. Code, § 913(b).)

Sources and Authority

- No Presumption From Exercise of Fifth Amendment Privilege. Evidence Code section 913.
- Privilege to Refuse to Disclose Incriminating Information. Evidence Code section 940.
- "[I]n any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him in criminal activity." (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653, 588 P.2d 793], internal citation omitted.)
- "A defendant may not bring a civil action to a halt simply by invoking the privilege against self-incrimination." (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1055 [151 Cal.Rptr.3d 65].)
- "[T]he privilege may not be asserted by merely declaring that an answer will incriminate; it must be 'evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious

disclosure could result.' " (*Troy v. Superior Court* (1986) 186 Cal.App.3d 1006, 1010–1011 [231 Cal.Rptr. 108], internal citations omitted.)

- "The Fifth Amendment of the United States Constitution includes a provision that '[no] person . . . shall be compelled in any criminal case to be a witness against himself, ...' Although the specific reference is to criminal cases, the Fifth Amendment protection 'has been broadly extended to a point where now it is available even to a person appearing only as a *witness* in *any* kind of proceeding where testimony can be compelled.' " (*Brown v. Superior Court* (1986) 180 Cal.App.3d 701, 708 [226 Cal.Rptr. 10], citation and footnote omitted.)
- "There is no question that the privilege against self-incrimination may be asserted by civil defendants who face possible criminal prosecution based on the same facts as the civil action. 'All matters which are privileged against disclosure upon the trial under the law of this state are privileged against disclosure through any discovery procedure.' " (*Brown, supra,* 180 Cal.App.3d at p. 708, internal citations omitted.)
- "California law, then, makes no distinction between civil and criminal litigation concerning adverse inferences from a witness's invocation of the privilege against self-incrimination; under Evidence Code section 913, juries are forbidden to make such inferences in both types of cases. No purpose is served, therefore, in either type of trial by forcing a witness to exercise the privilege on the stand in the jury's presence, for . . . the court would then be 'required, on request, to instruct the jury not to draw the very inference [the party calling the witness] sought to present to the jury." (*People v. Holloway* (2004) 33 Cal. 4th 96, 131 [14 Cal.Rptr.3d 212, 91 P.3d 164], internal citations omitted.)
- "The privilege against self-incrimination is guaranteed by both the federal and state Constitutions. As pointed out by the California Supreme Court, 'two separate and distinct testimonial privileges' exist under this guarantee. First, a defendant in a criminal case 'has an absolute right not to be called as a witness and not to testify.' Second, 'in any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him [or her] in criminal activity.' " (*People v. Merfeld, supra*, 57 Cal.App.4th at p. 1443, internal citations omitted.)
- "The jury may not draw any inference from a witness's invocation of a privilege. Upon request, the trial court must so instruct jurors. 'To avoid the potentially prejudicial impact of having a witness assert the privilege against self-incrimination before the jury, we have in the past recommended that, in determining the *propriety* of the witness's invocation of the privilege, the trial court hold a pretestimonial hearing outside the jury's presence.' Such a procedure makes sense under the appropriate circumstances. If there is a dispute about whether a witness may legitimately rely on the Fifth Amendment privilege against self-incrimination to avoid testifying, that legal question should be resolved by the court. Given the court's ruling and the nature of the potential testimony, the witness may not be privileged to testify at all, or counsel may

elect not to call the witness as a matter of tactics." (*People v. Doolin, supra*, 45 Cal.4th at pp. 441–442, original italics, internal citations omitted.)

- "Once a court determines a witness has a valid Fifth Amendment right not to testify, it is, of course, improper to require him to invoke the privilege in front of a jury; such a procedure encourages inappropriate speculation on the part of jurors about the reasons for the invocation. An adverse inference, damaging to the defense, may be drawn by jurors despite the possibility the assertion of privilege may be based upon reasons unrelated to guilt." (*Victaulic Co. v. American Home Assurance Co.* (2018) 20 Cal.App.5th 948, 981 [229 Cal.Rptr.3d 545].)

Secondary Sources

2 Witkin, California Evidence (5th ed. 2012) Witnesses, § 98

5 Levy et al., California Torts, Ch. 72, *Discovery*, §§ 72.20, 72.30 (Matthew Bender)

Cotchett, California Courtroom Evidence, § 18.09 (Matthew Bender)

3 California Trial Guide, Unit 51, *Privileges*, § 51.32 (Matthew Bender)

16 California Forms of Pleading and Practice, Ch. 191, *Discovery: Privileges and Other Discovery Limitations*, § 191.30 et seq. (Matthew Bender)

1 California Deposition and Discovery Practice, Ch. 21, *Privileged Matters in General*, § 21.20, Ch. 22, *Privilege Against Self-Incrimination* (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 8.34 (Cal CJER 2019)

217. Evidence of Settlement

You have heard evidence that there was a settlement between [*insert names of settling parties***]. You must not consider this settlement to determine responsibility for any harm. You may consider this evidence only to decide whether [***insert name of witness who settled***] is biased or prejudiced and whether [his/her/***nonbinary pronoun***] testimony is believable.**

New September 2003

Directions for Use

Evidence of prior settlement is not automatically admissible: "Even if it appears that a witness could have been influenced in his testimony by the payment of money or the obtaining of a dismissal, the party resisting the admission of such evidence may still appeal to the court's discretion to exclude it under section 352 of the code." (*Granville v. Parsons* (1968) 259 Cal.App.2d 298, 305 [66 Cal.Rptr. 149].)

Sources and Authority

- Evidence of Settlement. Evidence Code section 1152(a).
- "While evidence of a settlement agreement is inadmissible to prove liability, it is admissible to show bias or prejudice of an adverse party. Relevant evidence includes evidence relevant to the credibility of a witness." (*Moreno v. Sayre* (1984) 162 Cal.App.3d 116, 126 [208 Cal.Rptr. 444], internal citations omitted.)
- "[E]vidence of a plaintiff's settlement with one or more defendants is admissible at trial to prove witness bias and to prevent collusion." (*Diamond v. Reshko* (2015) 239 Cal.App.4th 828, 843 [191 Cal.Rptr.3d 438].)
- "[A] term in a settlement agreement requiring the settling defendant to stay in the case during trial is not per se improper, but the settling defendant's position should be revealed to the court and jury to avoid committing a fraud on the court, and to permit the trier of fact to properly weigh the settling defendant's testimony." (*Diamond, supra*, 239 Cal.App.4th at p. 844.)
- "[T]he good faith settlement determination did not limit the trial court's authority to admit evidence of that settlement at trial. To the contrary, . . . the decision whether to admit evidence of the settlement was for the trial court to make." (*Diamond*, *supra*, 239 Cal.App.4th at p. 846.)
- "The bias inherent in a settling defendant's realignment with the plaintiff's interest may or may not affect the conduct of the plaintiff or settling defendant at trial, but that is a question for the jury to decide." (*Diamond, supra*, 239 Cal.App.4th at p. 848.)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, §§ 145–153

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 34.15–34.24

3 California Trial Guide, Unit 50, *Extrinsic Policies Affecting or Excluding Evidence*, § 50.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.68 (Matthew Bender)

218. Statements Made to Physician (Previously Existing Condition)

[*Insert name of health-care provider***] has testified that [***insert name of patient***] made statements to [him/her/***nonbinary pronoun***] about [***name of patient***]'s medical history. These statements helped [***name of health-care provider***] diagnose the patient's condition. You can use these statements to help you examine the basis of [***name of health-care provider***]'s opinion. You cannot use them for any other purpose.**

[However, a statement by [*name of patient***] to [***name of health-care provider***] about [his/her/***nonbinary pronoun***] current medical condition may be considered as evidence of that medical condition.]**

New September 2003; Revised June 2006, May 2020

Directions for Use

This instruction does not apply to, and should not be used for, a statement of the patient's then-existing physical sensation, mental feeling, pain, or bodily health. Such statements are admissible as an exception to the hearsay rule under Evidence Code section 1250. This instruction also does not apply to statements of a patient regarding a prior mental or physical state if the patient is unavailable as a witness. (Evid. Code, § 1251.)

This instruction also does not apply to, and should not be used for, statements of a party that are offered into evidence by an opposing party. Such statements are admissible as an exception to the hearsay rule under Evidence Code section 1220. See CACI No. 212, *Statements of a Party Opponent.*

Sources and Authority

- Statements of Party. Evidence Code section 1220.
- Statements pointing to the cause of a physical condition may be admissible if they are made by a patient to a physician. The statement must be required for proper diagnosis and treatment and is admissible only to show the basis of the physician's medical opinion. (*People v. Wilson* (1944) 25 Cal.2d 341, 348 [153 P.2d 720]; *Johnson v. Aetna Life Insurance Co.* (1963) 221 Cal.App.2d 247, 252 [34 Cal.Rptr. 484]; *Willoughby v. Zylstra* (1935) 5 Cal.App.2d 297, 300–301 [42 P.2d 685].)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Hearsay, § 197

2 California Trial Guide, Unit 40, *Hearsay*, § 40.42 (Matthew Bender)

219. Expert Witness Testimony

During the trial you heard testimony from expert witnesses. The law allows an expert to state opinions about matters in the expert's field of expertise even if the expert has not witnessed any of the events involved in the trial.

You do not have to accept an expert's opinion. As with any other witness, it is up to you to decide whether you believe the expert's testimony and choose to use it as a basis for your decision. You may believe all, part, or none of an expert's testimony. In deciding whether to believe an expert's testimony, you should consider:

a. The expert's training and experience;

b. The facts the expert relied on; and

c. The reasons for the expert's opinion.

New September 2003; Revised May 2020

Directions for Use

This instruction should not be given for expert witness testimony on the standard of care in professional malpractice cases if the testimony is uncontradicted. Uncontradicted testimony of an expert witness on the standard of care in a professional malpractice case is conclusive. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632–633 [85 Cal.Rptr.2d 386]; *Conservatorship of McKeown* (1994) 25 Cal.App.4th 502, 509 [30 Cal.Rptr.2d 542]; *Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 156 [65 Cal.Rptr. 406].) In all other cases, the jury may reject expert testimony, provided that the jury does not act arbitrarily. (*McKeown, supra,* 25 Cal.App.4th at p. 509.)

Do not use this instruction in eminent domain and inverse condemnation cases. (See *Aetna Life and Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 877 [216 Cal.Rptr. 831]; CACI No. 3515, *Valuation Testimony*.)

For an instruction on hypothetical questions, see CACI No. 220, *Experts—Questions Containing Assumed Facts*. For an instruction on conflicting expert testimony, see CACI No. 221, *Conflicting Expert Testimony*.

Sources and Authority

- Qualification as Expert. Evidence Code section 720(a).
- " 'A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact.' 'However, even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert's opinion based on assumptions of fact

without evidentiary support [citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence. [Citations.] Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an "expert opinion is worth no more than the reasons upon which it rests." ' 'An expert who gives only a conclusory opinion does not assist the jury to determine what occurred, but instead supplants the jury by declaring what occurred.' " (*Property California SCJLW One Corp. v. Leamy* (2018) 25 Cal.App.5th 1155, 1163 [236 Cal.Rptr.3d 500], internal citation omitted.)

- "Under Evidence Code section 720, subdivision (a), a person is qualified to testify as an expert if he or she 'has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.' '[T]he determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth . . . . [Citation.] Where a witness has disclosed sufficient knowledge, the question of the degree of knowledge goes more to the weight of the evidence than its admissibility. [Citation.]' " (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 969 [191 Cal.Rptr.3d 766].)
- The "credibility of expert witnesses is a matter for the jury after proper instructions from the court." (*Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1265 [226 Cal.Rptr. 306].)
- "[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. Other provisions of law, including decisional law, may also provide reasons for excluding expert opinion testimony. [¶] But courts must also be cautious in excluding expert testimony. The trial court's gatekeeping role does not involve choosing between competing expert opinions." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771–772 [149 Cal.Rptr.3d 614, 288 P.3d 1237], footnote omitted.)
- " 'Generally, the opinion of an expert is admissible when it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." [Citations.] Also, "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." [Citation.] However, " 'Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates.' " ' Expert testimony will be excluded ' " 'when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." ' " ' " (*Burton*

v. Sanner (2012) 207 Cal.App.4th 12, 19 [142 Cal.Rptr.3d 782], internal citations omitted.)

- Under Evidence Code section 801(a), expert witness testimony "must relate to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 692 [217 Cal.Rptr. 522].)
- Expert witnesses are qualified by special knowledge to form opinions on facts that they have not personally witnessed. (*Manney v. Housing Authority of The City of Richmond* (1947) 79 Cal.App.2d 453, 460 [180 P.2d 69].)
- "Although a jury may not arbitrarily or unreasonably disregard the testimony of an expert, it is not bound by the expert's opinion. Instead, it must give to each opinion the weight which it finds the opinion deserves. So long as it does not do so arbitrarily, a jury may entirely reject the testimony of a plaintiff's expert, even where the defendant does not call any opposing expert and the expert testimony is not contradicted." (*Howard, supra,* 72 Cal.App.4th at p. 633, citations omitted.)
- "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth." (*People v. Sanchez* (2016) 63 Cal.4th 665, 686 [204 Cal.Rptr.3d 102, 374 P.3d 320].)
- "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests. A jury may repose greater confidence in an expert who relies upon well-established scientific principles. It may accord less weight to the views of an expert who relies on a single article from an obscure journal or on a lone experiment whose results cannot be replicated. There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*People v. Sanchez*, *supra*, 63 Cal.4th at pp. 685–686, original italics.)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, §§ 26–44

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 29.18–29.55

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.04 (Matthew Bender)

3A California Trial Guide, Unit 60, *Opinion Testimony*, § 60.05 (Matthew Bender)

California Products Liability Actions, Ch. 4, *The Role of the Expert*, § 4.03 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.70, 551.113 (Matthew Bender)

220. Experts—Questions Containing Assumed Facts

The law allows expert witnesses to be asked questions that are based on assumed facts. These are sometimes called "hypothetical questions."

In determining the weight to give to the expert's opinion that is based on the assumed facts, you should consider whether the assumed facts are true.

New September 2003

Directions for Use

Juries may be instructed that they should weigh an expert witness's response to a hypothetical question based on their assessment of the accuracy of the assumed facts in the hypothetical question. (*Treadwell v. Nickel* (1924) 194 Cal. 243, 263–264 [228 P. 25].)

For an instruction on expert witnesses generally, see CACI No. 219, *Expert Witness Testimony*. For an instruction on conflicting expert testimony, see CACI No. 221, *Conflicting Expert Testimony*.

Sources and Authority

- The value of an expert's opinion depends on the truth of the facts assumed. (*Richard v. Scott* (1978) 79 Cal.App.3d 57, 63 [144 Cal.Rptr. 672].)
- "Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' " (*People v. Vang* (2011) 52 Cal.4th 1038, 1045 [132 Cal.Rptr.3d 373, 262 P.3d 581].)
- Hypothetical questions must be based on facts that are supported by the evidence: "It was decided early in this state that a hypothetical question to an expert must be based upon facts shown by the evidence and that the appellate court will place great reliance in the trial court's exercise of its discretion in passing upon a sufficiency of the facts as narrated." (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 339 [145 Cal.Rptr. 47].)
- "A hypothetical question need not encompass all of the evidence. 'It is true that "it is not necessary that the question include a statement of all the evidence in the case. The statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question." On the other hand, the expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors . . . ." ' " (*People v. Vang, supra*, 52 Cal.4th at p. 1046, internal citation omitted.)
- Hypothetical questions should not omit essential material facts. (*Coe v. State*

Farm Mutual Automobile Insurance Co. (1977) 66 Cal.App.3d 981, 995 [136 Cal.Rptr. 331].)

- The jury should not be instructed that they are entitled to reject the entirety of an expert's opinion if a hypothetical assumption has not been proven. Rather, the jury should be instructed "to determine the effect of that failure of proof on the value and weight of the expert opinion based on that assumption." (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 156 [65 Cal.Rptr. 406].)
- "The jury still plays a critical role in two respects. First, it must decide whether to credit the expert's opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*People v. Vang, supra*, 52 Cal.4th at pp. 1049–1050.)
- "[Experts] . . . can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception." (*People v. Sanchez* (2016) 63 Cal.4th 665, 685 [204 Cal.Rptr.3d 102, 374 P.3d 320].)

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, §§ 208–215

Jefferson, California Evidence Benchbook (3d ed. 1997) § 29.43, pp. 609–610

3A California Trial Guide, Unit 60, *Opinion Testimony*, §§ 60.05, 60.50–60.51 (Matthew Bender)

California Products Liability Actions, Ch. 4, *The Role of the Expert*, § 4.03 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.70 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 8.92 (Cal CJER 2019)

221. Conflicting Expert Testimony

If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters that each witness relied on. You may also compare the experts' qualifications.

New September 2003

Directions for Use

Unless the issue is one that can be resolved only with expert testimony, the jury should not be instructed that they must accept the entire testimony of the expert whose testimony appears to be entitled to greater weight. (*Santa Clara County Flood Control and Water Conservation Dist. v. Freitas* (1960) 177 Cal.App.2d 264, 268–269 [2 Cal.Rptr. 129].)

For an instruction on expert witnesses generally, see CACI No. 219, *Expert Witness Testimony*. For an instruction on hypothetical questions, see CACI No. 220, *Experts—Questions Containing Assumed Facts*.

Sources and Authority

- "[C]redibility of expert witnesses is a matter for the jury after proper instructions from the court." (*Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1265 [226 Cal.Rptr. 306].)
- "[W]e rely upon the rule of *Sargon* [*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 [149 Cal.Rptr.3d 614, 288 P.3d 1237]] that although trial courts 'have a substantial "gatekeeping" responsibility' in evaluating proposed expert opinion, the gate tended is not a partisan checkpoint." (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 492 [199 Cal.Rptr.3d 583], internal citation omitted.)
- "Complex questions of medical causation are prone to uncertainty. . . . It is therefore imperative that the party without the burden of proof be allowed to suggest alternative causes, or the uncertainty of causation, to less than a reasonable medical probability. To withhold such information from the jury is to deprive it of relevant information in assessing whether the plaintiff has met its ultimate burden of persuasion. And, it would improperly transfer from the jury to the court the responsibility for resolving conflicts between competing expert opinions." (*Kline v. Zimmer, Inc.* (2022) 79 Cal.App.5th 123, 133–134 [294 Cal.Rptr.3d 500], internal citation and footnote omitted.)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 315

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.70 (Matthew Bender)

222. Evidence of Sliding-Scale Settlement

You have heard evidence that there was a settlement agreement between [*name of settling defendant***] and [***name of plaintiff***].**

Under this agreement, the amount of money that [*name of settling defendant***] will have to pay to [***name of plaintiff***] will depend on the amount of money that [***name of plaintiff***] receives from [***name of nonsettling defendant***] at trial. The more money that [***name of plaintiff***] might receive from [***name of nonsettling defendant***], the less that [***name of settling defendant***] will have to pay under the agreement.**

You may consider evidence of the settlement only to decide whether [*name of settling defendant/name of witness***] [, who testified on behalf of [***name of settling defendant***],] is biased or prejudiced and whether [his/her/** *nonbinary pronoun*] **testimony is believable.**

New April 2007; Revised June 2016

Directions for Use

Use this instruction for cases involving sliding scale or "Mary Carter" settlement agreements if a party who settled appears at trial as a witness. A "Mary Carter" agreement calls for the settling defendant to participate in the trial on the plaintiff's behalf, and provides for a settling defendant to be credited for amounts the plaintiff recovers from nonsettling defendants. It is secret and raises concerns of collusion and the potential for fraud. The interests of the parties are realigned in a manner not apparent to the trier of fact. (*Diamond v. Reshko* (2015) 239 Cal.App.4th 828, 843, fn. 7 [191 Cal.Rptr.3d 438].)

The court must give this instruction on the motion of any party unless it finds that disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Code Civ. Proc., § 877.5(a)(2).)

If the settling defendant is an entity, insert the name of the witness who testified on behalf of the entity and include the bracketed language in the third paragraph.

See CACI No. 217, *Evidence of Settlement*. See also CACI No. 3926, *Settlement Deduction*.

Sources and Authority

- Evidence of Settlement. Code of Civil Procedure section 877.5(a)(2).
- "[W]hen a defendant is a party to a sliding scale settlement, which is also called a 'Mary Carter' agreement, that agreement must be disclosed to the jury if the settling defendant testifies at trial, unless the court finds that the disclosure will create a substantial danger of undue prejudice." (*Diamond, supra*, 239 Cal.App.4th at p. 843.)

- Evidence of a settlement agreement is admissible to show bias or prejudice of an adverse party. Relevant evidence includes evidence relevant to the credibility of a witness. (*Moreno v. Sayre* (1984) 162 Cal.App.3d 116, 126 [208 Cal.Rptr. 444].)
- Evidence of a prior settlement is not automatically admissible. "Even if it appears that a witness could have been influenced in his testimony by the payment of money or the obtaining of a dismissal, the party resisting the admission of such evidence may still appeal to the court's discretion to exclude it under section 352 of the code." (*Granville v. Parsons* (1968) 259 Cal.App.2d 298, 305 [66 Cal.Rptr. 149].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 211

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.27 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution*, § 300.73[10] (Matthew Bender)

46 California Forms of Pleading and Practice, Ch. 520, *Settlement and Release*, § 520.16[3] (Matthew Bender)

3 California Pretrial Civil Procedure Practice Guide: The Wagstaffe Group, Ch. 57, *Settlement and Release*, § 57-V

223. Opinion Testimony of Lay Witness

A witness [who was not testifying as an expert] gave an opinion during the trial. You may, but are not required to, accept that opinion. You may give the opinion whatever weight you think is appropriate.

Consider the extent of the witness's opportunity to perceive the matters on which the opinion is based, the reasons the witness gave for the opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

New April 2008

Directions for Use

Give the bracketed phrase in the first sentence regarding the witness not testifying as an expert if an expert witness also testified in the case.

Sources and Authority

- Opinion Testimony of Lay Witness. Evidence Code section 800.
- Foundation for Opinion Testimony of Lay Witness. Evidence Code section 802.
- Character Evidence. Evidence Code section 1100.

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, §§ 3–25

Wegner et al., California Practice Guide: Civil Trial and Evidence, Ch. 8C-H, Opinion Evidence, ¶¶ 8:643–8:681 (The Rutter Group)

Jefferson's California Evidence Benchbook (Cont.Ed.Bar 3d ed.) §§ 29.1–29.17

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.70 (Matthew Bender)

1 Cotchett, California Courtroom Evidence, Ch. 17, *Nonexpert and Expert Opinion*, § 17.01 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 8.72 (Cal CJER 2019)

224. Testimony of Child

You have heard testimony from a witness who is [_____] years old. As with any other witness, you must decide whether the child gave truthful and accurate testimony.

In evaluating a child's testimony, you should consider all of the factors surrounding that testimony, including the child's age and ability to perceive, understand, remember, and communicate.

You should not discount or distrust testimony just because a witness is a child.

New April 2008

Sources and Authority

- Minors Qualified to Testify. Evidence Code section 700.
- Evaluation of Child's Testimony in Criminal Trial. Penal Code section 1127f.

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation, §§ 13, 100, 232

Wegner et al., California Practice Guide: Civil Trial and Evidence, Ch. 8C-A, Testimony, ¶¶ 8:228–8:233 (The Rutter Group)

Jefferson's California Evidence Benchbook (Cont.Ed.Bar 3d ed.) § 26.2

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.111, 551.113, 551.122 (Matthew Bender)

1 Cotchett, California Courtroom Evidence, Ch. 16, *Competency, Oath, Confrontation, Experts, Interpreters, Credibility, and Hypnosis*, § 16.01 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 8.105 (Cal CJER 2019)

225–299. Reserved for Future Use

CONTRACTS

300. Breach of Contract—Introduction

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/it] and [***name of defendant***] entered into a contract for [***insert brief summary of alleged contract***].**

[*Name of plaintiff***] claims that [***name of defendant***] breached this contract by [***briefly state the alleged breach***].**

[*Name of plaintiff***] also claims that [***name of defendant***]'s breach of this contract caused harm to [***name of plaintiff***] for which [***name of defendant***] should pay.**

[*Name of defendant***] denies [***insert denial of any of the above claims***]. [***Name of defendant***] also claims [***insert affirmative defense***].**

New September 2003; Revised December 2007

Directions for Use

This instruction is designed to introduce the jury to the issues involved in the case. It should be read before the instructions on the substantive law.

Sources and Authority

- The Supreme Court has observed that "[c]ontract and tort are different branches of law. Contract law exists to enforce legally binding agreements between parties; tort law is designed to vindicate social policy." (*Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.* (1994) 7 Cal.4th 503, 514 [28 Cal.Rptr.2d 475, 869 P.2d 454].)
- "The differences between contract and tort give rise to distinctions in assessing damages and in evaluating underlying motives for particular courses of conduct. Contract damages seek to approximate the agreed-upon performance . . . and are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectations of the parties are not recoverable." (*Applied Equipment Corp., supra,* 7 Cal.4th at p. 515, internal citations omitted.)
- Certain defenses are decided as questions of law, not as questions of fact. These defenses include frustration of purpose, impossibility, and impracticability. (*Oosten v. Hay Haulers Dairy Employees and Helpers Union* (1955) 45 Cal.2d 784, 788 [291 P.2d 17]; *Mitchell v. Ceazan Tires, Ltd.* (1944) 25 Cal.2d 45, 48 [153 P.2d 53]; *Autry v. Republic Productions, Inc.* (1947) 30 Cal.2d 144, 157 [180 P.2d 888]; *Glen Falls Indemnity Co. v. Perscallo* (1950) 96 Cal.App.2d 799, 802 [216 P.2d 567].)
- "Defendant contends that frustration is a question of fact resolved in its favor by

the trial court. The excuse of frustration, however, *like that of impossibility*, is a conclusion of law drawn by the court from the facts of a given case . . . ." (*Mitchell, supra,* 25 Cal.2d at p. 48, italics added.)

- Estoppel is a "nonjury fact question to be determined by the trial court in accordance with applicable law." (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe and Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61 [35 Cal.Rptr.2d 515].)
- "A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts." (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 789 [249 Cal.Rptr.3d 295, 444 P.3d 97].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 872–892

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.50 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.10 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.03–13.17

301. Third-Party Beneficiary

[*Name of plaintiff***] is not a party to the contract. However, [***name of plaintiff***] may be entitled to damages for breach of contract if [he/she/***nonbinary pronoun***/it] proves that a motivating purpose of [***names of the contracting parties***] was for [***name of plaintiff***] to benefit from their contract.**

You should consider all of the circumstances under which the contract was made. It is not necessary for [*name of plaintiff***] to have been named in the contract.**

New September 2003; Revised November 2019

Directions for Use

The right of a third-party beneficiary to enforce a contract might not be a question for the jury to decide. Third-party beneficiary status may be determined as a question of law if there is no conflicting extrinsic evidence. (See, e.g., *Kalmanovitz v. Bitting* (1996) 43 Cal.App.4th 311, 315 [50 Cal.Rptr.2d 332].)

Among the elements that the court must consider in deciding whether to allow a case to go forward is whether the third party would in fact benefit from the contract. (*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 829–830 [243 Cal.Rptr.3d 299, 434 P.3d 124].) If the court decides that this determination depends on resolution of a question of fact, add this element as a second element that the plaintiff must prove in addition to motivating purpose.

Sources and Authority

- Contract for Benefit of Third Person. Civil Code section 1559.
- "While it is not necessary that a third party be specifically named, the contracting parties must clearly manifest their intent to benefit the third party. 'The fact that [a third party] is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of *the parties* to secure to him personally the benefit of its provisions.' " (*Kalmanovitz, supra,* 43 Cal.App.4th at p. 314, original italics, internal citation omitted.)
- " 'It is sufficient if the claimant belongs to a class of persons for whose benefit it was made. [Citation.] A third party may qualify as a contract beneficiary where the contracting parties must have intended to benefit that individual, an intent which must appear in the terms of the agreement. [Citation.]' " (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 558 [90 Cal.Rptr.2d 469].)
- "Insofar as intent to benefit a third person is important in determining his right

to bring an action under a contract, it is sufficient that the promisor must have understood that the promisee had such intent. No specific manifestation by the promisor of an intent to benefit the third person is required." (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591 [15 Cal.Rptr. 821, 364 P.2d 685].)

- "[A] review of this court's third party beneficiary decisions reveals that our court has carefully examined the express provisions of the contract at issue, as well as all of the relevant circumstances under which the contract was agreed to, in order to determine not only (1) whether the third party would in fact benefit from the contract, but also (2) whether a motivating purpose of the contracting parties was to provide a benefit to the third party, and (3) whether permitting a third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties. All three elements must be satisfied to permit the third party action to go forward." (*Goonewardene, supra,* 6 Cal.5th at pp. 829–830.)
- "Because of the ambiguous and potentially confusing nature of the term 'intent', this opinion uses the term 'motivating purpose' in its iteration of this element to clarify that the contracting parties must have a motivating purpose to benefit the third party, and not simply knowledge that a benefit to the third party may follow from the contract." (*Goonewardene, supra,* 6 Cal.5th at p. 830, internal citation omitted.)
- "[The third] element calls for a judgment regarding the potential effect that permitting third party enforcement would have on the parties' contracting goals, rather than a determination whether the parties actually anticipated third party enforcement at the time the contract was entered into." (*Goonewardene, supra,* 6 Cal.5th at p. 831.)
- "Section 1559 of the Civil Code, which provides for enforcement by a third person of a contract made 'expressly' for his benefit, does not preclude this result. The effect of the section is to exclude enforcement by persons who are only incidentally or remotely benefited." (*Lucas, supra,* 56 Cal.2d at p. 590.)
- "Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered. [Citation.]" (*Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1725 [33 Cal.Rptr.2d 291].)
- "[A] third party's rights under the third party beneficiary doctrine may arise under an oral as well as a written contract . . . ." (*Goonewardene, supra,* 6 Cal.5th at p. 833.)
- "In place of former section 133, the Second Restatement inserted section 302: '(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either [para.] (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or [para.] (b) the circumstances

indicate that the promisee intends to give the beneficiary the benefit of the promised performance. [para.] (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.' " (*Outdoor Servs. v. Pabagold* (1986) 185 Cal.App.3d 676, 684 [230 Cal.Rptr. 73].)

- "[T]he burden is upon [plaintiff] to prove that the performance he seeks was actually promised. This is largely a question of interpretation of the written contract." (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 436 [204 Cal.Rptr. 435, 682 P.2d 1100].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 705–726

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.83, 140.103, 140.131 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.132 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.11 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 19, *Seeking or Opposing Recovery As Third Party Beneficiary of Contract*, 19.03–19.06

302. Contract Formation—Essential Factual Elements

[*Name of plaintiff*] claims that the parties entered into a contract. To prove that a contract was created, [*name of plaintiff*] must prove all of the following:

1. **That the contract terms were clear enough that the parties could understand what each was required to do;**
2. **That the parties agreed to give each other something of value [a promise to do something or not to do something may have value]; and**
3. **That the parties agreed to the terms of the contract.**

[When you examine whether the parties agreed to the terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement. You may not consider the parties' hidden intentions.]

If [*name of plaintiff*] did not prove all of the above, then a contract was not created.

New September 2003; Revised October 2004, June 2011, June 2014

Directions for Use

This instruction should only be given if the existence of a contract is contested. At other times, the parties may be contesting only a limited number of contract formation issues. Also, some of these issues may be decided by the judge as a matter of law. Read the bracketed paragraph only if element 3 is read.

The elements regarding legal capacity and legal purpose are omitted from this instruction because these issues are not likely to be before the jury. If legal capacity or legal purpose is factually disputed then this instruction should be amended to add that issue as an element. Regarding legal capacity, the element could be stated as follows: "That the parties were legally capable of entering into a contract." Regarding legal purpose, the element could be stated as follows: "That the contract had a legal purpose."

The final element of this instruction would be given before instructions on offer and acceptance. If neither offer nor acceptance is contested, then this element of the instruction will not need to be given to the jury.

Sources and Authority

- Essential Elements of Contract. Civil Code section 1550.
- Who May Contract. Civil Code section 1556.
- Consent. Civil Code section 1565.

- Mutual Consent. Civil Code section 1580.
- Good Consideration. Civil Code section 1605.
- Writing Is Presumption of Consideration. Civil Code section 1614.
- Burden of Proof on Consideration. Civil Code section 1615.
- "Whether parties have reached a contractual agreement and on what terms are questions for the fact finder when conflicting versions of the parties' negotiations require a determination of credibility." (*Hebberd-Kulow Enterprises, Inc. v. Kelomar, Inc.* (2013) 218 Cal.App.4th 272, 283 [159 Cal.Rptr.3d 869].)
- "Whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case." (*Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 349–350 [258 Cal.Rptr. 454].)
- "In order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.' [Citation.]" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811 [71 Cal.Rptr.2d 265].)
- "Whether a contract is sufficiently definite to be enforceable is a question of law for the court." (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770, fn. 2 [23 Cal.Rptr.2d 810].)
- "Consideration is present when the promisee confers a benefit or suffers a prejudice. Although 'either alone is sufficient to constitute consideration,' the benefit or prejudice' " 'must actually be bargained for as the exchange for the promise.' " ' 'Put another way, the benefit or prejudice must have induced the promisor's promise.' It is established that 'the compromise of disputes or claims asserted in good faith constitutes consideration for a new promise.' " (*Property California SCJLW One Corp. v. Leamy* (2018) 25 Cal.App.5th 1155, 1165 [236 Cal.Rptr.3d 500], internal citations omitted.)
- "[T]he presumption of consideration under [Civil Code] section 1614 affects the burden of producing evidence and not the burden of proof." (*Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 884 [268 Cal.Rptr. 505].)
- "Being an affirmative defense, lack of consideration must be alleged in answer to the complaint." (*National Farm Workers Service Center, Inc. v. M. Caratan, Inc.* (1983) 146 Cal.App.3d 796, 808 [194 Cal.Rptr. 617].)
- " 'It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.' " (*Flojo Internat., Inc. v. Lassleben* (1992) 4 Cal.App.4th 713, 719 [6 Cal.Rptr.2d 99], internal citation omitted.)
- "The failure to specify the amount or a formula for determining the amount of the bonus does not render the agreement too indefinite for enforcement. It is not essential that the contract specify the amount of the consideration or the means of ascertaining it." (*Moncada v. West Coast Quartz Corp.* (2013) 221

Cal.App.4th 768, 778 [164 Cal.Rptr.3d 601].)

- " 'An essential element of any contract is "consent." [Citations.] The "consent" must be "mutual." [Citations.] "Consent is not mutual, unless the parties all agree upon the same thing in the same sense." ' ' "The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe. [Citation.] Accordingly, the primary focus in determining the existence of mutual consent is upon the acts of the parties involved." ' " (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 789 [249 Cal.Rptr.3d 295, 444 P.3d 97], internal citations omitted.)
- "The manifestation of assent to a contractual provision may be 'wholly or partly by written or spoken words or by other acts or by failure to act.' " (*Merced County Sheriff's Employees' Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 670 [233 Cal.Rptr. 519] (quoting Rest. 2d Contracts, § 19).)
- "A letter of intent can constitute a binding contract, depending on the expectations of the parties. These expectations may be inferred from the conduct of the parties and surrounding circumstances." (*California Food Service Corp., Inc. v. Great American Insurance Co.* (1982) 130 Cal.App.3d 892, 897 [182 Cal.Rptr. 67], internal citations omitted.)
- "If words are spoken under circumstances where it is obvious that neither party would be entitled to believe that the other intended a contract to result, there is no contract." (*Fowler v. Security-First National Bank* (1956) 146 Cal.App.2d 37, 47 [303 P.2d 565].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 116 et seq.

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.10, 140.20–140.25 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.350 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, §§ 75.10, 75.11 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.03–13.17

303. Breach of Contract—Essential Factual Elements

To recover damages from [*name of defendant***] for breach of contract, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into a contract;**

[2. That [*name of plaintiff***] did all, or substantially all, of the significant things that the contract required [him/her/***nonbinary pronoun***/it] to do;]**

[or]

[2. That [*name of plaintiff***] was excused from having to [***specify things that plaintiff did not do, e.g., obtain a guarantor on the contract***];]**

[3. That [*specify occurrence of all conditions required by the contract for [name of defendant]'s performance, e.g., the property was rezoned for residential use***];]**

[or]

[3. That [*specify condition(s) that did not occur***] [was/were] [waived/excused];]**

[4. That [*name of defendant***] failed to do something that the contract required [him/her/***nonbinary pronoun***/it] to do;]**

[*or***]**

[4. That [*name of defendant***] did something that the contract prohibited [him/her/***nonbinary pronoun***/it] from doing;]**

5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s breach of contract was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised April 2004, June 2006, December 2010, June 2011, June 2013, June 2015, December 2016, May 2020

Directions for Use

Read this instruction in conjunction with CACI No. 300, *Breach of Contract—Introduction*.

Optional elements 2 and 3 both involve conditions precedent. A "condition precedent" is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises. (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th

1131, 1147 [180 Cal.Rptr.3d 683].) Element 2 involves the first kind of condition precedent; an act that must be performed by one party before the other is required to perform. Include the second option if the plaintiff alleges that the plaintiff was excused from having to perform some or all of the contractual conditions.

Not every breach of contract by the plaintiff will relieve the defendant of the obligation to perform. The breach must be *material;* element 2 captures materiality by requiring that the plaintiff have done the significant things that the contract required. Also, the two obligations must be *dependent*, meaning that the parties specifically bargained that the failure to perform the one relieves the obligation to perform the other. While materiality is generally a question of fact, whether covenants are dependent or independent is a matter of construing the agreement. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) If there is no extrinsic evidence in aid of construction, the question is one of law for the court. (*Verdier v. Verdier* (1955) 133 Cal.App.2d 325, 333 [284 P.2d 94].) Therefore, element 2 should not be given unless the court has determined that dependent obligations are involved. If parol evidence is required and a dispute of facts is presented, additional instructions on the disputed facts will be necessary. (See *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

Element 3 involves the second kind of condition precedent; an uncertain event that must happen before contractual duties are triggered. Include the second option if the plaintiff alleges that the defendant agreed to perform even though a condition did not occur. For reasons that the occurrence of a condition may have been excused, see the Restatement Second of Contracts, section 225, Comment b. See also CACI No. 321, *Existence of Condition Precedent Disputed*, CACI No. 322, *Occurrence of Agreed Condition Precedent*, and CACI No. 323, *Waiver of Condition Precedent*.

Element 6 states the test for causation in a breach of contract action: whether the breach was a substantial factor in causing the damages. (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 909 [28 Cal.Rptr.3d 894].) In the context of breach of contract, it has been said that the term "substantial factor" has no precise definition, but is something that is more than a slight, trivial, negligible, or theoretical factor in producing a particular result. (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 871–872 [63 Cal.Rptr.3d 514]; see CACI No. 430, *Causation—Substantial Factor*, applicable to negligence actions.)

Equitable remedies are also available for breach. "As a general proposition, '[t]he jury trial is a matter of right in a civil action at law, but not in equity. [Citations.]' " (*C & K Engineering Contractors v. Amber Steel Co., Inc.* (1978) 23 Cal.3d 1, 8 [151 Cal.Rptr. 323, 587 P.2d 1136]; *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 524 [154 Cal.Rptr. 164].) However, juries may render advisory verdicts on these issues. (*Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 670–671 [111 Cal.Rptr. 693, 517 P.2d 1157].)

Sources and Authority

- Contract Defined. Civil Code section 1549.

- "A contract is a voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing." (*Robinson v. Magee* (1858) 9 Cal. 81, 83.)
- "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186 [169 Cal.Rptr.3d 475].)
- "Implicit in the element of damage is that the defendant's breach *caused* the plaintiff's damage." (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352 [90 Cal.Rptr.3d 589], original italics.)
- "It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance. Similarly, where defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc., v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524], internal citation omitted.)
- "When a party's failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the contract. Normally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact. Whether a partial breach of a contract is material depends on 'the importance or seriousness thereof and the probability of the injured party getting substantial performance.' 'A material breach of one aspect of a contract generally constitutes a material breach of the whole contract.' " (*Brown, supra*, 192 Cal.App.4th at pp. 277–278, internal citations omitted.)
- "The obligations of the parties to a contract are either dependent or independent. The parties' obligations are dependent when the performance by one party is a condition precedent to the other party's performance. In that event, one party is excused from its obligation to perform if the other party fails to perform. If the parties' obligations are independent, the breach by one party does not excuse the other party's performance. Instead, the nonbreaching party still must perform and its remedy is to seek damages from the other party based on its breach of the contract." (*Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172, 1182–1183 [236 Cal.Rptr.3d 542], internal citations omitted.)
- "Whether specific contractual obligations are independent or dependent is a matter of contract interpretation based on the contract's plain language and the parties' intent. Dependent covenants or '[c]onditions precedent are not favored in the law [citations], and courts shall not construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that effect.' " (*Colaco*, *supra*, 25 Cal.App.5th at p. 1183, internal citations omitted.)
- "The wrongful, i.e., the unjustified or unexcused, failure to perform a contract is

a *breach*. Where the nonperformance is legally justified, or excused, there may be a failure of consideration, but not a breach." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 847, original italics, internal citations omitted.) "Ordinarily, a breach is the result of an intentional act, but *negligent performance* may also constitute a breach, giving rise to alternative contract and tort actions." (*Ibid.*, original italics.)

- " ' "Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." [Citation.]' " (*Stephens & Stephens XII, LLC, supra*, 231 Cal. App. 4th at p. 1144.)
- " 'Causation of damages in contract cases, as in tort cases, requires that the damages be proximately caused by the defendant's breach, and that their causal occurrence be at least reasonably certain.' A proximate cause of loss or damage is something that is a substantial factor in bringing about that loss or damage." (*U.S. Ecology, Inc., supra*, 129 Cal.App.4th at p. 909, internal citations omitted.)
- "An essential element of [breach of contract] claims is that a defendant's alleged misconduct was the cause in fact of the plaintiff's damage. [¶] The causation analysis involves two elements. ' "One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event." [Citation.]' The second element is proximate cause. ' "[P]roximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.' " ' " (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1102–1103 [192 Cal.Rptr.3d 354], footnote and internal citation omitted.)
- "Determining whether a defendant's misconduct was the cause in fact of a plaintiff's injury involves essentially the same inquiry in both contract and tort cases." (*Tribeca Companies, LLC, supra*, 239 Cal.App.4th at p. 1103.)
- "b. *Excuse*. The non-occurrence of a condition of a duty is said to be 'excused' when the condition need no longer occur in order for performance of the duty to become due. The non-occurrence of a condition may be excused on a variety of grounds. It may be excused by a subsequent promise, even without consideration, to perform the duty in spite of the non-occurrence of the condition. See the treatment of 'waiver' in § 84, and the treatment of discharge in §§ 273–85. It may be excused by acceptance of performance in spite of the non-occurrence of the condition, or by rejection following its non-occurrence accompanied by an inadequate statement of reasons. See §§ 246–48. It may be excused by a repudiation of the conditional duty or by a manifestation of an inability to perform it. See § 255; §§ 250–51. It may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing (§ 205). See § 239. And it may be excused by impracticability. See § 271. These and other grounds for excuse are dealt with in other chapters of this Restatement. This Chapter deals only with one general ground, excuse to avoid forfeiture. See § 229." (Rest.2d of Contracts, § 225, comment b.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 872

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.50 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.10 et seq. (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.03–22.50

304. Oral or Written Contract Terms

[Contracts may be written or oral.]

[Contracts may be partly written and partly oral.]

Oral contracts are just as valid as written contracts.

New September 2003; Revised December 2013

Directions for Use

Give the bracketed alternative that is most applicable to the facts of the case.

If the written agreement is fully integrated, the second option may not be appropriate. Parol evidence is inadmissible if the judge finds that the written agreement is fully integrated. (Code Civ. Proc., § 1856(d).) The parol evidence rule generally prohibits the introduction of extrinsic evidence—oral or written—to vary or contradict the terms of an integrated written instrument. (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 175 [15 Cal.Rptr.2d 209]; see Civ. Code, § 1625; Code Civ. Proc., § 1856(a).)

There are, however, exceptions to the parol evidence rule. (See, e.g., *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1174–1175 [151 Cal.Rptr.3d 93, 291 P.3d 316] [fraud exception]; see also Code Civ. Proc., § 1856.) If an exception has been found as a matter of law, the second option may be given. If there are questions of fact regarding the applicability of an exception, additional instructions on the exception will be necessary.

Sources and Authority

- Oral Contracts. Civil Code section 1622.
- Statute of Frauds. Civil Code section 1624.
- "This question posed by defendant [may a contract be partly written and partly oral] must be answered in the affirmative in this sense: that a contract or agreement in legal contemplation is neither written nor oral, but oral or written evidence may be received to establish the terms of the contract or agreement between the parties. . . . A so-called partly written and partly oral contract is in legal effect a contract, the terms of which may be proven by both written and oral evidence." (*Lande v. Southern California Freight Lines* (1948) 85 Cal.App.2d 416, 420–421 [193 P.2d 144].)
- "When the parties to a written contract have agreed to it as an 'integration'—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms . . . [However,] '[w]hen only part of the agreement is integrated, the same rule applies to that part, but parol evidence may be used to prove elements of the agreement not reduced to writing.' " (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225 [65 Cal.Rptr. 545, 436 P.2d 561].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts § 117

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8E-G, *Parol Evidence Rule*, ¶ 8:3145 (The Rutter Group)

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.83 (Matthew Bender)

27 California Legal Forms Transaction Guide, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.12 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.03–13.17

305. Implied-in-Fact Contract

In deciding whether a contract was created, you should consider the conduct and relationship of the parties as well as all the circumstances of the case.

Contracts can be created by the conduct of the parties, without spoken or written words. Contracts created by conduct are just as valid as contracts formed with words.

Conduct will create a contract if the conduct of both parties is intentional and each knows, or has reason to know, that the other party will interpret the conduct as an agreement to enter into a contract.

New September 2003

Sources and Authority

- Contract May Be Express or Implied. Civil Code sections 1619.
- Express Contract. Civil Code section 1620.
- Implied Contract. Civil Code section 1621.
- "Unlike the 'quasi-contractual' quantum meruit theory which operates without an actual agreement of the parties, an implied-in-fact contract entails an actual contract, but one manifested in conduct rather than expressed in words." (*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 455 [78 Cal.Rptr.2d 101].)
- "An implied-in-fact contract is based on the conduct of the parties. Like an express contract, an implied-in-fact contract requires an ascertained agreement of the parties." (*Unilab Corp. v. Angeles-IPA* (2016) 244 Cal.App.4th 622, 636 [198 Cal.Rptr.3d 211], internal citation omitted.)
- Express and implied-in-fact contracts have the same legal effect, but differ in how they are proved at trial: " 'Contracts may be express or implied. These terms, however, do not denote different kinds of contracts, but have reference to the evidence by which the agreement between the parties is shown. If the agreement is shown by the direct words of the parties, spoken or written, the contract is said to be an express one. But if such agreement can only be shown by the acts and conduct of the parties, interpreted in the light of the subject-matter and of the surrounding circumstances, then the contract is an implied one.' " (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 678, fn. 16 [134 Cal.Rptr. 815, 557 P.2d 106], internal citation omitted.)
- "As to the basic elements [of a contract cause of action], there is no difference between an express and implied contract. . . . While an implied in fact contract may be inferred from the conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is an intent to promise." (*Division of Labor*

Law Enforcement v. Transpacific Transportation Co. (1977) 69 Cal.App.3d 268, 275 [137 Cal.Rptr. 855]; see also *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 888 [24 Cal.Rptr.2d 892].)

- The formation of an implied contract can become an issue for the jury to decide: "Whether or not an implied contract has been created is determined by the acts and conduct of the parties and all the surrounding circumstances involved and is a question of fact." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 611 [176 Cal.Rptr. 824], internal citation omitted.)
- "Whether an implied contract exists ' " 'is usually a question of fact for the trial court. Where evidence is conflicting, or where reasonable conflicting inferences may be drawn from evidence which is not in conflict, a question of fact is presented for decision of the trial court. . . .' [Citation.]" ' " (*Unilab Corp, supra,* 244 Cal.App.4th at p. 636.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 102

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.10, 140.110 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.07

306. Unformalized Agreement

[*Name of defendant*] contends that the parties did not enter into a contract because they had not signed a final written agreement. To prove that a contract was created, [*name of plaintiff*] must prove both of the following:

1. **That the parties understood and agreed to the terms of the agreement; and**
2. **That the parties agreed to be bound before a written agreement was completed and signed.**

New September 2003; Revised December 2012, May 2020

Directions for Use

Give this instruction if the parties agreed to contract terms with the intention of reducing their agreement to a written and signed contract, but an alleged breach occurred before the written contract was completed and signed. For other situations involving the lack of a final written contract, see CACI No. 304, *Oral or Written Contract Terms*, and CACI No. 305, *Implied-in-Fact Contract*.

Do not give this instruction unless the defendant has testified or offered other evidence in support of the contention.

Sources and Authority

- "Where the writing at issue shows 'no more than an intent to further reduce the informal writing to a more formal one' the failure to follow it with a more formal writing does not negate the existence of the prior contract. However, where the writing shows it was not intended to be binding until a formal written contract is executed, there is no contract." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307 [87 Cal.Rptr.2d 822], internal citations omitted.)
- "[I]f the respective parties orally agreed upon all of the terms and conditions of a proposed written agreement with the mutual intention that the oral agreement should thereupon become binding, the mere fact that a formal written agreement to the same effect has not yet been signed does not alter the binding validity of the oral agreement. [Citation.]" (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358 [72 Cal.Rptr.2d 598].)
- "Thus, where it is part of the understanding between the parties that the terms of their contract are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract." (*Beck v. American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555, 1562 [260 Cal.Rptr. 237].)
- "Whether it was the parties' mutual intention that their oral agreement to the

terms contained in a proposed written agreement should be binding immediately is to be determined from the surrounding facts and circumstances of a particular case and is a question of fact for the trial court." (*Banner Entertainment, Inc., supra,* 62 Cal.App.4th at p. 358.)

- "[W]hen parties agree on the material terms of a contract with the intention to later reduce it to a formal writing, failure to complete the formal writing does not negate the existence of the initial contract. If the parties do not agree on the content of the formal writing (for example because one party wants to include something not agreed on in the first place, as [defendant] says happened here), the proposed writing is not a counteroffer; rather, the initial agreement remains binding and a rejected writing is a nullity." (*CSAA Ins. Exchange v. Hodroj* (2021) 72 Cal.App.5th 272, 276 [287 Cal.Rptr.3d 264].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 133, 134

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.07[3]

307. Contract Formation—Offer

Both an offer and an acceptance are required to create a contract. [*Name of defendant***] contends that a contract was not created because there was never any offer. To overcome this contention, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] communicated to [***name of defendant***] that [he/she/***nonbinary pronoun***/it] was willing to enter into a contract with [***name of defendant***];**
2. **That the communication contained specific terms; and**
3. **That, based on the communication, [***name of defendant***] could have reasonably concluded that a contract with these terms would result if [he/she/***nonbinary pronoun***/it] accepted the offer.**

If [*name of plaintiff***] did not prove all of the above, then a contract was not created.**

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of the contention there was never any offer.

This instruction assumes that the defendant is claiming the plaintiff never made an offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror). If the existence of an offer is not contested, then this instruction is unnecessary.

Sources and Authority

- Courts have adopted the definition of "offer" found at Restatement Second of Contracts, section 24: "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." (*City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 930 [1 Cal.Rptr.2d 896, 819 P.2d 854].)
- Under basic contract law " '[a]n offer must be sufficiently definite, or must call for such definite terms in the acceptance that the performance promised is reasonably certain.' " (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770 [23 Cal.Rptr.2d 810].)
- "The trier of fact must determine 'whether a reasonable person would necessarily assume . . . a willingness to enter into contract.' [Citation.]" (*In re*

First Capital Life Insurance Co. (1995) 34 Cal.App.4th 1283, 1287 [40 Cal.Rptr.2d 816].)

- Offers should be contrasted with preliminary negotiations: "Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement." (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 59 [248 Cal.Rptr. 217].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 116, 117, 125–137

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.210 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.18–13.24

308. Contract Formation—Revocation of Offer

Both an offer and an acceptance are required to create a contract. [*Name of defendant***] contends that the offer was withdrawn before it was accepted. To overcome this contention, [***name of plaintiff***] must prove one of the following:**

1. **That [***name of defendant***] did not withdraw the offer; or**
2. **That [***name of plaintiff***] accepted the offer before [***name of defendant***] withdrew it; or**
3. **That [***name of defendant***]'s withdrawal of the offer was never communicated to [***name of plaintiff***].**

If [*name of plaintiff***] did not prove any of the above, then a contract was not created.**

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of the contention.

This instruction assumes that the defendant is claiming to have revoked the defendant's offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeree).

Sources and Authority

- Revocation Before Acceptance. Civil Code section 1586.
- Methods for Revocation. Civil Code section 1587.
- "It is a well-established principle of contract law that an offer may be revoked by the offeror any time prior to acceptance." (*T. M. Cobb Co., Inc. v. Superior Court* (1984) 36 Cal.3d 273, 278 [204 Cal.Rptr. 143, 682 P.2d 338].)
- " 'Under familiar contract law, a revocation of an offer must be directed to the offeree.' [Citation.]" (*Moffett v. Barclay* (1995) 32 Cal.App.4th 980, 983 [38 Cal.Rptr.2d 546].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 159–165

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.22, 140.61 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.351 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard*

Contractual Provisions, § 75.211 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.23–13.24

309. Contract Formation—Acceptance

Both an offer and an acceptance are required to create a contract. [*Name of defendant***] contends that a contract was not created because the offer was never accepted. To overcome this contention, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of defendant***] agreed to be bound by the terms of the offer. [If [***name of defendant***] agreed to be bound only on certain conditions, or if [he/she/***nonbinary pronoun***/it] introduced a new term into the bargain, then there was no acceptance]; and**
2. **That [***name of defendant***] communicated [his/her/***nonbinary pronoun***/its] agreement to [***name of plaintiff***].**

If [*name of plaintiff***] did not prove both of the above, then a contract was not created.**

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of the contention.

This instruction assumes that the defendant is claiming to have not accepted plaintiff's offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

Sources and Authority

- Acceptance. Civil Code section 1585.
- "[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer." (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855–856 [70 Cal.Rptr.2d 595].)
- "[I]t is not necessarily true that any communication other than an unequivocal acceptance is a rejection. Thus, an acceptance is not invalidated by the fact that it is 'grumbling,' or that the offeree makes some simultaneous 'request.' Nevertheless, it must appear that the 'grumble' does not go so far as to make it doubtful that the expression is really one of assent. Similarly, the 'request' must not add additional or different terms from those offered. Otherwise, the 'acceptance' becomes a counteroffer." (*Guzman v. Visalia Community Bank* (1999) 71 Cal.App.4th 1370, 1376 [84 Cal.Rptr.2d 581].)
- "The interpretation of the purported acceptance or rejection of an offer is a

question of fact. Further, based on the general rule that manifested mutual assent rather than actual mental assent is the essential element in the formation of contracts, the test of the true meaning of an acceptance or rejection is not what the party making it thought it meant or intended it to mean. Rather, the test is what a reasonable person in the position of the parties would have thought it meant." (*Guzman, supra,* 71 Cal.App.4th at pp. 1376–1377.)

- "Acceptance of an offer, which may be manifested by conduct as well as by words, must be expressed or communicated by the offeree to the offeror." (*Russell v. Union Oil Co.* (1970) 7 Cal.App.3d 110, 114 [86 Cal.Rptr. 424].)
- "The Restatement Second of Contracts, section 60 provides, 'If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded.' Comment a to Restatement 2d, section 60 provides, 'a. *Interpretation of offer*. If the offeror prescribes the only way in which his offer may be accepted, an acceptance in any other way is a counter-offer. But frequently in regard to the details of methods of acceptance, the offeror's language, if fairly interpreted, amounts merely to a statement of a satisfactory method of acceptance, without positive requirement that this method shall be followed.' [¶] Similarly, Restatement 2d, section 30 provides in relevant part, 'Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.' Comment b to Restatement 2d section 30 states: '*Invited form.* Insistence on a particular form of acceptance is unusual. Offers often make no express reference to the form of acceptance; sometimes ambiguous language is used. Language referring to a particular mode of acceptance is often intended and understood as suggestion rather than limitation; the suggested mode is then authorized, but other modes are not precluded. In other cases language which in terms refers to the mode of acceptance is intended and understood as referring to some more important aspect of the transaction, such as the time limit for acceptance.' " (*Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 311–312 [181 Cal.Rptr.3d 399], original italics, footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 180–192

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.352 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.214 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.25–13.31

310. Contract Formation—Acceptance by Silence

Ordinarily, if a person does not say or do anything in response to another party's offer, then the person has not accepted the offer. However, if [*name of plaintiff*] proves that both [he/she/*nonbinary pronoun*/it] and [*name of defendant*] understood silence or inaction to mean that [*name of defendant*] had accepted [*name of plaintiff*]'s offer, then there was an acceptance.

New September 2003; Revised May 2020

Directions for Use

This instruction assumes that the defendant is claiming to have not accepted plaintiff's offer. Change the identities of the parties in the last two sets of brackets if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeror).

This instruction should be read in conjunction with and immediately after CACI No. 309, *Contract Formation—Acceptance*, if acceptance by silence is an issue.

Sources and Authority

- Consent by Acceptance of Benefits. Civil Code section 1589.
- Because acceptance must be communicated, "[s]ilence in the face of an offer is not an acceptance, unless there is a relationship between the parties or a previous course of dealing pursuant to which silence would be understood as acceptance." (*Southern California Acoustics Co., Inc. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 722 [79 Cal.Rptr. 319, 456 P.2d 975].)
- Acceptance may also be inferred from inaction where one has a duty to act, and from retention of the offered benefit. (*Golden Eagle Insurance Co. v. Foremost Insurance Co.* (1993) 20 Cal.App.4th 1372, 1386 [25 Cal.Rptr.2d 242].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 193–197

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.11 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.31

311. Contract Formation—Rejection of Offer

[*Name of defendant*] contends that the offer to enter into a contract terminated because [*name of plaintiff*] rejected it. To overcome this contention, [*name of plaintiff*] must prove both of the following:

1. **That [*name of plaintiff*] did not reject [*name of defendant*]'s offer; and**
2. **That [*name of plaintiff*] did not make any additions or changes to the terms of [*name of defendant*]'s offer.**

If [*name of plaintiff*] did not prove both of the above, then a contract was not created.

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of the contention that the plaintiff rejected the offer.

Note that rejections of a contract offer, or proposed alterations to an offer, are effective only if they are communicated to the other party. (See *Beverly Way Associates v. Barham* (1990) 226 Cal.App.3d 49, 55 [276 Cal.Rptr. 240].) If it is necessary for the jury to make a finding regarding the issue of communication then this instruction may need to be modified.

This instruction assumes that the defendant is claiming plaintiff rejected defendant's offer. Change the identities of the parties in the indented paragraphs if, under the facts of the case, the roles of the parties are switched (e.g., if defendant was the alleged offeree).

Conceptually, this instruction dovetails with CACI No. 309, *Contract Formation—Acceptance*. This instruction is designed for the situation where a party has rejected an offer by not accepting it on its terms.

Sources and Authority

- Acceptance. Civil Code section 1585.
- Cases provide that "a qualified acceptance amounts to a new proposal or counter-offer putting an end to the original offer. . . . A counter-offer containing a condition different from that in the original offer is a new proposal and, if not accepted by the original offeror, amounts to nothing." (*Apablasa v. Merritt and Co.* (1959) 176 Cal.App.2d 719, 726 [1 Cal.Rptr. 500], internal citations omitted.) More succinctly: "The rejection of an offer kills the offer." (*Stanley v. Robert S. Odell and Co.* (1950) 97 Cal.App.2d 521, 534 [218 P.2d 162].)
- "[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract; and a qualified

acceptance amounts to a new proposal or counteroffer putting an end to the original offer." (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855–856 [70 Cal.Rptr.2d 595].)

- The original offer terminates as soon as the rejection is communicated to the offeror: "It is hornbook law that an unequivocal rejection by an offeree, communicated to the offeror, terminates the offer; even if the offeror does no further act, the offeree cannot later purport to accept the offer and thereby create enforceable contractual rights against the offeror." (*Beverly Way Associates, supra,* 226 Cal.App.3d at p. 55.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 163

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.352 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, §§ 75.212–75.214 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.23–13.24

312. Substantial Performance

[*Name of defendant*] contends that [*name of plaintiff*] did not perform all of the things that [*name of plaintiff*] was required to do under the contract, and therefore [*name of defendant*] did not have to perform [his/her/*nonbinary pronoun*/its] obligations under the contract. To overcome this contention, [*name of plaintiff*] must prove both of the following:

1. **That [*name of plaintiff*] made a good faith effort to comply with the contract; and**
2. **That [*name of defendant*] received essentially what the contract called for because [*name of plaintiff*]'s failures, if any, were so trivial or unimportant that they could have been easily fixed or paid for.**

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of the contention that the plaintiff did not perform all of the things required under the contract.

Sources and Authority

- " 'Substantial performance means that there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, and that the contractor has in good faith performed all of its substantive terms. If so, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed.' " (*Connell v. Higgins* (1915) 170 Cal. 541, 556 [150 P. 769], citation omitted.)
- The Supreme Court has cited the following passage from Witkin with approval: "At common law, recovery under a contract for work done was dependent upon a complete performance, although hardship might be avoided by permitting recovery in quantum meruit. The prevailing doctrine today, which finds its application chiefly in building contracts, is that substantial performance is sufficient, and justifies an action on the contract, although the other party is entitled to a reduction in the amount called for by the contract, to compensate for the defects. What constitutes substantial performance is a question of fact, but it is essential that there be no wilful departure from the terms of the contract, and that the defects be such as may be easily remedied or compensated, so that the promisee may get practically what the contract calls for." (*Posner v. Grunwald-Marx, Inc*. (1961) 56 Cal.2d 169, 186–187 [14 Cal.Rptr. 297, 363 P.2d 313]; see also *Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal.App.3d 88, 101 [161 Cal.Rptr. 423].)

- " 'Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact.' " (*Connell, supra,* 170 Cal. at pp. 556–557, internal citation omitted.)
- "The doctrine of substantial performance has been recognized in California since at least 1921, when the California Supreme Court decided the landmark case of *Thomas Haverty Co. v. Jones* [citation], in which the court stated: 'The general rule on the subject of [contractual] performance is that "Where a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing he agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, or by operation of law, or by the act of God or the public enemy." [Citation.] [¶] . . . [I]t is settled, especially in the case of building contracts, where the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, that if there has been a substantial performance thereof by the contractor in good faith, where the failure to make full performance can be compensated in damages, to be deducted from the price or allowed as a counterclaim, and the omissions and deviations were not willful or fraudulent, and do not substantially affect the usefulness of the building for the purposes for which it was intended, the contractor may, in an action upon the contract, recover the amount unpaid of his contract price less the amount allowed as damages for the failure in strict performance. [Citations.]' " (*Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1291–1292 [71 Cal.Rptr.3d 317].)
- "We hold that a provision in the parties' contract making time of the essence does not automatically make [the defendant's] untimely performance a breach of contract because there are triable issues regarding the scope of that provision and whether its enforcement would result in a forfeiture to [the defendant] and a windfall to [the plaintiff]." (*Magic Carpet Ride LLC v. Rugger Investment Group, LLC* (2019) 41 Cal.App.5th 357, 360 [254 Cal.Rptr.3d 213].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 843–884

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.23 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.30, 50.31 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.08[2], 22.16[2], 22.37, 22.69

313. Modification

[*Name of party claiming modification***] claims that the original contract was modified or changed. [***Name of party claiming modification***] must prove that the parties agreed to the modification. [***Name of other party***] denies that the contract was modified.**

The parties to a contract may agree to modify its terms. You must decide whether a reasonable person would conclude from the words and conduct of the parties that they agreed to modify the contract. You cannot consider the parties' hidden intentions.

[A contract in writing may be modified by a contract in writing.]

[A contract in writing may be modified by an oral agreement to the extent the oral agreement is carried out by the parties.]

[A contract in writing may be modified by an oral agreement if the parties agree to give each other something of value.]

[An oral contract may be modified by consent of the parties, in writing, without an agreement to give each other something of value.]

New September 2003; Revised December 2009

Sources and Authority

- Modification. Civil Code section 1698.
- The Law Revision Commission comment to this section observes: "The rules provided by subdivisions (b) and (c) merely describe cases where proof of an oral modification is permitted; these rules do not, however, affect in any way the burden of the party claiming that there was an oral modification to produce sufficient evidence to persuade the trier of fact that the parties actually did make an oral modification of the contract."
- Modification of Oral Contract. Civil Code section 1697.
- "It is axiomatic that the parties to an agreement may modify it." (*Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 519 [198 Cal.Rptr. 725].)
- "Another issue of fact appearing in the evidence is whether the written contract was modified by executed oral agreements. This can be a question of fact. An agreement to modify a written contract will be implied if the conduct of the parties is inconsistent with the written contract so as to warrant the conclusion that the parties intended to modify it." (*Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 158 [92 Cal.Rptr. 120], internal citation omitted.)
- "Modification is a change in the obligation by a modifying agreement which requires mutual assent." (*Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457 [118 Cal.Rptr. 695].)

- "A contract can, of course, be subsequently modified with the assent of the parties thereto, provided the same elements essential to the validity of the original contract are present." (*Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 223 [64 Cal.Rptr. 915], internal citations omitted.)
- "Generally speaking, a commitment to perform a preexisting contractual obligation has no value. In contractual parlance, for example, doing or promising to do something one is already legally bound to do cannot constitute the consideration needed to support a binding contract." (*Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1185 [88 Cal.Rptr.2d 718].)
- Consideration is unnecessary if the modification is to correct errors and omissions. (*Texas Co. v. Todd* (1937) 19 Cal.App.2d 174, 185–186 [64 P.2d 1180].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 995–1002

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8E-G, *Parol Evidence Rule*, ¶¶ 8:3050–8:3202 (The Rutter Group)

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.112, 140.149–140.152 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.520–50.523 (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations,* §§ 77.21, 77.121, 77.320–77.323 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.58

314. Interpretation—Disputed Words

[*Name of plaintiff***] and [***name of defendant***] dispute the meaning of the following words in their contract: [***insert disputed language***].**

[*Name of plaintiff***] claims that the words mean [***insert plaintiff's interpretation***]. [***Name of defendant***] claims that the words mean [***insert defendant's interpretation***]. [***Name of plaintiff***] must prove that [his/her/** ***nonbinary pronoun*****/its] interpretation is correct.**

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

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

New September 2003; Revised December 2014

Directions for Use

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

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

Sources and Authority

- Contract Interpretation: Intent. Civil Code section 1636.
- Contracts Explained by Circumstances. Civil Code section 1647.
- "Juries are not prohibited from interpreting contracts. Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. But when, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." (*City of Hope National Medical Center*, *supra*, 43 Cal.4th

at p. 395, footnote and internal citations omitted.)

- "This rule—that the jury may interpret an agreement when construction turns on the credibility of extrinsic evidence—is well established in our case law. California's jury instructions reflect this (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 314) . . . , as do authoritative secondary sources." (*City of Hope National Medical Center*, *supra*, 43 Cal.4th at pp. 395–396, internal citations omitted.)
- "The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. Furthermore, '[w]hen two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.' " (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710 [50 Cal.Rptr.2d 323].)
- "In interpreting a contract, the objective intent, as evidenced by the words of the contract is controlling. We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." (*Lloyd's Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197–1198 [32 Cal.Rptr.2d 144], internal citations omitted.)
- "Ordinarily, even in an integrated contract, extrinsic evidence can be admitted to explain the meaning of the contractual language at issue, although it cannot be used to contradict it or offer an inconsistent meaning. The language, in such a case, must be ' "reasonably susceptible" ' to the proposed meaning." (*Hot Rods, LLC v. Northrop Grumman Systems Corp.* (2015) 242 Cal.App.4th 1166, 1175–1176 [196 Cal.Rptr.3d 53].)
- " 'When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. [Citation.] This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence [citations] or that extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation. [Citations.] If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury. [Citations.]' " (*Brown v. Goldstein* (2019) 34 Cal.App.5th 418, 433 [246 Cal.Rptr.3d 161].)
- "[I]t is indisputably the law that 'when ambiguous terms in a memorandum are disputed, extrinsic evidence is admissible to resolve the uncertainty.' The agreement must still provide the essential terms, and it is 'clear that extrinsic evidence cannot *supply* those required terms.' 'It can, however, be used to *explain* essential terms that were understood by the parties but would otherwise

be unintelligible to others.' " (*Jacobs v. Locatelli* (2017) 8 Cal.App.5th 317, 325 [213 Cal.Rptr.3d 514], original italics, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 764–766

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

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

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

315. Interpretation—Meaning of Ordinary Words

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

New September 2003; Revised December 2014

Directions for Use

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

Sources and Authority

- Words to Be Understood in Usual Sense. Civil Code section 1644.
- "Generally speaking, words in a contract are to be construed according to their plain, ordinary, popular or legal meaning, as the case may be. However, particular expressions may, by trade usage, acquire a different meaning in reference to the subject matter of a contract. If both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage and parol evidence is admissible to establish the trade usage even though the words in their ordinary or legal meaning are entirely unambiguous. [Citation.]" (*Hayter Trucking Inc. v. Shell Western E & P, Inc.* (1993) 18 Cal.App.4th 1, 15 [22 Cal.Rptr.2d 229].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 768

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

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

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

316. Interpretation—Meaning of Technical Words

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

New September 2003; Revised December 2014

Directions for Use

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

Sources and Authority

- Technical Words. Civil Code section 1645.
- "The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls judicial interpretation." (*Cooper Companies, Inc. v. Transcontinental Insurance Co.* (1995) 31 Cal.App.4th 1094, 1101 [37 Cal.Rptr.2d 508].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 768

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

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

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

317. Interpretation—Construction of Contract as a Whole

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

New September 2003; Revised December 2014

Directions for Use

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

Sources and Authority

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

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 769–770

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

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

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting*

a Particular Construction of Contract, 21.19

318. Interpretation—Construction by Conduct

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

New September 2003; Revised December 2014

Directions for Use

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

Sources and Authority

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

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 772

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

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

319. Interpretation—Reasonable Time

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

New September 2003; Revised December 2014

Directions for Use

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

Sources and Authority

- Time of Performance of Contract. Civil Code section 1657.
- "[A]s the contract was silent as to the time of delivery a reasonable time for performance must be implied." (*Palmquist v. Palmquist* (1963) 212 Cal.App.2d 322, 331 [27 Cal.Rptr. 744].)
- "The question of what constituted a reasonable time was of course one of fact." (*Lyon v. Goss* (1942) 19 Cal.2d 659, 673 [123 P.2d 11].)
- "[W]hat constitutes a reasonable time is a question of fact, depending upon the situation of the parties, the nature of the transaction, and the facts of the particular case." (*Sawday v. Vista Irrigation Dist.* (1966) 64 Cal.2d 833, 836 [52 Cal.Rptr. 1, 415 P.2d 816].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 785–787

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

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

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

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

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

320. Interpretation—Construction Against Drafter

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

New September 2003; Revised December 2014

Directions for Use

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

Sources and Authority

- Language Interpreted Against Party Causing Uncertainty. Civil Code section 1654.
- "[T]his [Civil Code section 1654] canon applies only as a tie breaker, when other canons fail to dispel uncertainty." *Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 596 [19 Cal.Rptr.2d 295], disapproved on other grounds in *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376–377 [36 Cal.Rptr.2d 581, 885 P.2d 994].)
- "The trial court's instruction . . . embodies a general rule of contract interpretation that was applicable to the negotiated agreement between [the parties]. It may well be that in a particular situation the discussions and exchanges between the parties in the negotiation process may make it difficult or even impossible for the jury to determine which party caused a particular contractual ambiguity to exist, but this added complexity does not make the underlying rule irrelevant or inappropriate for a jury instruction. We conclude, accordingly, that the trial court here did not err in instructing the jury on Civil Code section 1654's general rule of contract interpretation." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 398 [75 Cal.Rptr.3d 333, 181 P.3d 142].)
- "[I]f the uncertainty is not removed by application of the other rules of interpretation, a contract must be interpreted most strongly against the party who prepared it. This last rule is applied with particular force in the case of adhesion contracts." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 801 [79 Cal.Rptr.2d 273], internal citations omitted.)
- "[T]he doctrine of contra proferentem (construing ambiguous agreements against the drafter) applies with even greater force when the person who prepared the writing is a lawyer." *Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1370

[62 Cal.Rptr.2d 27].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 780

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

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

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

321. Existence of Condition Precedent Disputed

[*Name of defendant***] claims that the contract with [***name of plaintiff***] provides that [he/she/***nonbinary pronoun***/it] was not required to [***insert duty***] unless [***insert condition precedent***].**

[*Name of defendant***] must prove that the parties agreed to this condition. If [***name of defendant***] proves this, then [***name of plaintiff***] must prove that [***insert condition precedent***].**

If [*name of plaintiff***] does not prove that [***insert condition precedent***], then [***name of defendant***] was not required to [***insert duty***].**

New September 2003

Directions for Use

This instruction should only be given if both the existence and the occurrence of a condition precedent are contested. If only the occurrence of a condition precedent is contested, use CACI No. 322, *Occurrence of Agreed Condition Precedent*.

Sources and Authority

- Conditional Obligation. Civil Code section 1434.
- Condition Precedent. Civil Code section 1436.
- "Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313 [24 Cal.Rptr.2d 597, 862 P.2d 158].)
- "A conditional obligation is one in which 'the rights or duties of any party thereto depend upon the occurrence of an uncertain event.' '[P]arties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event.' A condition in a contract may be a condition precedent, concurrent, or subsequent. '[A] condition precedent is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises.' " (*JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc.* (2015) 243 Cal.App.4th 571, 593 [198 Cal.Rptr.3d 47].)
- "The existence of a condition precedent normally depends upon the intent of the parties as determined from the words they have employed in the contract." (*Karpinski v. Smitty's Bar, Inc.* (2016) 246 Cal.App.4th 456, 464 [201 Cal.Rptr.3d 148].)
- "Dependent covenants or '[c]onditions precedent are not favored in the law [citations], and courts shall not construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that

effect.' " (*Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172, 1183 [236 Cal.Rptr.3d 542], internal citations omitted.)

- "[W]here defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)
- "When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test." (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 [117 Cal.Rptr. 601], internal citations omitted.)
- "[T]he parol evidence rule does not apply to conditions precedent." (*Karpinski, supra,* 246 Cal.App.4th at p. 464, fn 6.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 803–814

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.44, 140.101 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.20–50.22 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.19, 22.66

322. Occurrence of Agreed Condition Precedent

The parties agreed in their contract that [*name of defendant***] would not have to [***insert duty***] unless [***insert condition precedent***]. [***Name of defendant***] contends that this condition did not occur and that [he/she/***nonbinary pronoun***/it] did not have to [***insert duty***]. To overcome this contention, [***name of plaintiff***] must prove that [***insert condition precedent***].**

If [*name of plaintiff***] does not prove that [***insert condition precedent***], then [***name of defendant***] was not required to [***insert duty***].**

New September 2003; Revised May 2020

Directions for Use

Do not give this instruction unless the defendant has testified or offered other evidence in support of the contention a condition precedent did not occur.

If both the existence and the occurrence of a condition precedent are contested, use CACI No. 321, *Existence of Condition Precedent Disputed*.

Sources and Authority

- Conditional Obligation. Civil Code section 1434.
- Condition Precedent. Civil Code section 1436.
- "A conditional obligation is one in which 'the rights or duties of any party thereto depend upon the occurrence of an uncertain event.' '[P]arties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event.' A condition in a contract may be a condition precedent, concurrent, or subsequent." (*JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc.* (2015) 243 Cal.App.4th 571, 593 [198 Cal.Rptr.3d 47].)
- "[A] 'condition precedent' is 'either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises.' " (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1147 [180 Cal.Rptr.3d 683].)
- "Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313 [24 Cal.Rptr.2d 597, 862 P.2d 158].)
- "The existence of a condition precedent normally depends upon the intent of the parties as determined from the words they have employed in the contract." (*Karpinski v. Smitty's Bar, Inc.* (2016) 246 Cal.App.4th 456, 464 [201 Cal.Rptr.3d 148].)
- " '[G]enerally, a party's failure to perform a condition precedent will preclude an

action for breach of contract.' " (*Stephens & Stephens XII, LLC, supra*, 231 Cal.App.4th at p. 1147.)

- "[W]here defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)
- "When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test." (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 [117 Cal.Rptr. 601], internal citations omitted.)
- "[T]he parol evidence rule does not apply to conditions precedent." (*Karpinski, supra,* 246 Cal.App.4th at p. 464, fn 6.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 799–814

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.44, 140.101 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.20–50.22 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.19, 22.66

323. Waiver of Condition Precedent

[*Name of plaintiff***] and [***name of defendant***] agreed in their contract that [***name of defendant***] would not have to [***insert duty***] unless [***insert condition precedent***]. That condition did not occur. Therefore, [***name of defendant***] contends that [he/she/***nonbinary pronoun***/it] did not have to [***insert duty***].**

To overcome this contention, [*name of plaintiff***] must prove by clear and convincing evidence that [***name of defendant***], by words or conduct, gave up [his/her/***nonbinary pronoun***/its] right to require [***insert condition precedent***] before having to [***insert duty***].**

New September 2003; Revised December 2013

Directions for Use

For an instruction on waiver as an affirmative defense, see CACI No. 336, *Affirmative Defense—Waiver.*

Sources and Authority

- "Ordinarily, a plaintiff cannot recover on a contract without alleging and proving performance or prevention or waiver of performance of conditions precedent and willingness and ability to perform conditions concurrent." (*Roseleaf Corp. v. Radis* (1953) 122 Cal.App.2d 196, 206 [264 P.2d 964].)
- " '[C]ase law is clear that " '[w]aiver is the intentional relinquishment of a known right after knowledge of the facts.' [Citations.] The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver' [citation]." [Citations.] The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right." (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1148 [180 Cal.Rptr.3d 683].)
- "All case law on the subject of waiver is unequivocal: ' "Waiver always rests upon intent.' " (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515] [plaintiff's claim that defendant waived occurrence of conditions must be proved by clear and convincing evidence].)
- "A condition is waived when a promisor by his words or conduct justifies the promisee in believing that a conditional promise will be performed despite the failure to perform the condition, and the promisee relies upon the promisor's manifestations to his substantial detriment." (*Sosin v. Richardson* (1962) 210 Cal.App.2d 258, 264 [26 Cal.Rptr. 610].)
- "Waiver is ordinarily a question for the trier of fact; '[h]owever, where there are no disputed facts and only one reasonable inference may be drawn, the issue can

be determined as a matter of law.' " (*DuBeck v. California Physicians' Service* (2015) 234 Cal.App.4th 1254, 1265 [184 Cal.Rptr.3d 743].)

- Section 84 of the Restatement Second of Contracts provides:

  (1) Except as stated in Subsection (2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless

  (a) occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur; or

  (b) uncertainty of the occurrence of the condition was an element of the risk assumed by the promisor.

  (2) If such a promise is made before the time for the occurrence of the condition has expired and the condition is within the control of the promisee or a beneficiary, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if

  (a) the notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and

  (b) reinstatement of the requirement of the condition is not unjust because of a material change of position by the promisee or beneficiary; and

  (c) the promise is not binding apart from the rule stated in Subsection (1).

Secondary Sources

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.48

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.44 (Matthew Bender)

27 California Legal Forms Transaction Guide, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.231 (Matthew Bender)

324. Anticipatory Breach

A party can breach, or break, a contract before performance is required by clearly and positively indicating, by words or conduct, that the party will not or cannot meet the requirements of the contract.

If [*name of plaintiff***] proves that [he/she/***nonbinary pronoun***/it] would have been able to fulfill the terms of the contract and that [***name of defendant***] clearly and positively indicated, by words or conduct, that [he/she/***nonbinary pronoun***/it] would not or could not meet the contract requirements, then [***name of defendant***] breached the contract.**

New September 2003; Revised May 2020

Sources and Authority

- Anticipatory Breach. Civil Code section 1440.
- "Repudiation of a contract, also known as "anticipatory breach," occurs when a party announces an intention not to perform prior to the time due for performance." (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1150 [180 Cal.Rptr.3d 683].)
- Courts have defined anticipatory breach as follows: "An anticipatory breach of contract occurs on the part of one of the parties to the instrument when he positively repudiates the contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof, or by voluntarily transferring to a third person the property rights which are essential to a substantial performance of the previous agreement, or by a voluntary act which renders substantial performance of the contract impossible or apparently impossible." (*C. A. Crane v. East Side Canal & Irrigation Co.* (1935) 6 Cal.App.2d 361, 367 [44 P.2d 455].)
- Anticipatory breach can be express or implied: "An express repudiation is a clear, positive, unequivocal refusal to perform; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible." (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137 [123 Cal.Rptr. 641, 539 P.2d 425].)
- "In the event the promisor repudiates the contract before the time for his or her performance has arrived, the plaintiff has an election of remedies—he or she may 'treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he [or she] can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his [or her] remedies for actual breach if a breach does in fact occur at such time.' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 489 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)
- Anticipatory breach can be used as an excuse for plaintiff's failure to

substantially perform. (*Gold Mining & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 29 [142 P.2d 22].)

- "Although it is true that an anticipatory breach or repudiation of a contract by one party permits the other party to sue for damages without performing or offering to perform its own obligations, this does not mean damages can be recovered without evidence that, but for the defendant's breach, the plaintiff would have had the ability to perform." (*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 625 [2 Cal.Rptr.2d 288], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 886–893

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.54, 140.105 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.23 (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations,* §§ 77.15, 77.361 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.23

325. Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements

In every contract or agreement there is an implied promise of good faith and fair dealing. This implied promise means that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract. Good faith means honesty of purpose without any intention to mislead or to take unfair advantage of another. Generally speaking, it means being faithful to one's duty or obligation. However, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract.

[*Name of plaintiff***] claims that [***name of defendant***] violated the duty to act fairly and in good faith. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into a contract;**

[2. That [*name of plaintiff***] did all, or substantially all of the significant things that the contract required [him/her/***nonbinary pronoun***/it] to do [or that [he/she/***nonbinary pronoun***/it] was excused from having to do those things;]**

[3. That all conditions required for [*name of defendant***]'s performance [had occurred/ [or] were excused];]**

4. **That [***name of defendant***] [***specify conduct that plaintiff claims prevented plaintiff from receiving the benefits under the contract***];**

5. **That by doing so, [***name of defendant***] did not act fairly and in good faith; and**

6. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s conduct.**

New April 2004; Revised June 2011, December 2012, June 2014, November 2019, May 2020

Directions for Use

This instruction should be given if the plaintiff has brought a separate count for breach of the covenant of good faith and fair dealing. It may be given in addition to CACI No. 303, *Breach of Contract—Essential Factual Elements*, if breach of contract on other grounds is also alleged.

Include element 2 if the plaintiff's substantial performance of contract requirements is at issue. Include element 3 if the contract contains conditions precedent that must

occur before the defendant is required to perform. For discussion of element 3, see the Directions for Use to CACI No. 303.

In element 4, insert an explanation of the defendant's conduct that violated the duty to act in good faith.

If a claim for breach of the implied covenant does nothing more than allege a mere contract breach and, relying on the same alleged acts, simply seeks the same damages or other relief already claimed in a contract cause of action, it may be disregarded as superfluous because no additional claim is actually stated. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [272 Cal.Rptr. 387].) The harm alleged in element 6 may produce contract damages that are different from those claimed for breach of the express contract provisions. (See *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885 [123 Cal.Rptr.3d 736] [noting that gravamen of the two claims rests on different facts and different harm].)

It has been noted that one may bring a claim for breach of the implied covenant without also bringing a claim for breach of other contract terms. (See *Careau & Co., supra*, 222 Cal.App.3d at p. 1395.) Thus it would seem that a jury should be able to find a breach of the implied covenant even if it finds for the defendant on all other breach of contract claims.

Sources and Authority

- "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198], internal citation omitted.)
- " ' "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." ' [] The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371–372 [6 Cal.Rptr.2d 467, 826 P.2d 710], internal citations omitted.)
- "When one party to a contract retains the unilateral right to amend the agreement governing the parties' relationship, its exercise of that right is constrained by the covenant of good faith and fair dealing which precludes amendments that operate retroactively to impair accrued rights." (*Cobb v. Ironwood Country Club* (2015) 233 Cal.App.4th 960, 963 [183 Cal.Rptr.3d 282].)
- "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. The covenant thus cannot ' " 'be endowed with an existence independent of its contractual underpinnings.' " ' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their

agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349–350 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics, internal citations omitted.)

- "The implied covenant of good faith and fair dealing cannot be read to require defendants to take a particular action that is discretionary under the contract when the contract also expressly grants them the discretion to take a different action. To apply the covenant to *require* a party to take one of two alternative actions expressly allowed by the contract and forgo the other would contravene the rule that the implied covenant of good faith and fair dealing may not be 'read to prohibit a party from doing that which is expressly permitted by an agreement.' " (*Bevis v. Terrace View Partners, LP* (2019) 33 Cal.App.5th 230, 256 [244 Cal.Rptr.3d 797], original italics.)
- "The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. 'The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.' . . . 'In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.' " (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031–1032 [14 Cal.Rptr.2d 335], internal citations omitted.)
- "There is no obligation to deal fairly or in good faith absent an existing contract. If there exists a contractual relationship between the parties . . . the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract." (*Racine & Laramie, Ltd., supra,* 11 Cal.App.4th at p. 1032, internal citations omitted.)
- "Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract." (*Digerati Holdings, LLC, supra*, 194 Cal.App.4th at p. 885.)
- " '[B]reach of a specific provision of the contract is not . . . necessary' to a claim for breach of the implied covenant of good faith and fair dealing." (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244 [160 Cal.Rptr.3d 718].)
- " 'It is universally recognized the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract.' Violation of an express provision is not, however, required. 'Nor is it necessary that the party's conduct be dishonest. Dishonesty presupposes subjective immorality; the covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive.' 'A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable. [Citations.] In the case of a discretionary power, it has been suggested the covenant requires the party holding such power to

exercise it "for any purpose within the reasonable contemplation of the parties at the time of formation—to capture opportunities that were preserved upon entering the contract, interpreted objectively." ' [¶] 'The issue of whether the implied covenant of good faith and fair dealing has been breached is ordinarily "a question of fact unless only one inference [can] be drawn from the evidence." ' " (*Moore v. Wells Fargo Bank, N.A.* (2019) 39 Cal.App.5th 280, 291–292 [251 Cal.Rptr.3d 779], internal citations omitted.)

- "If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated. Thus, absent those limited cases where a breach of a consensual contract term is not claimed or alleged, the only justification for asserting a separate cause of action for breach of the implied covenant is to obtain a tort recovery." (*Careau & Co., supra*, 222 Cal.App.3d at p. 1395.)
- "[W]e believe that the gravamen of the two counts differs. The gravamen of the breach of contract count is [cross defendants'] alleged failure to comply with their express contractual obligations specified in paragraph 37 of the cross-complaint, while the gravamen of the count for breach of the implied covenant of good faith and fair dealing is their alleged efforts to undermine or prevent the potential sale and distribution of the film, both by informing distributors that the film was unauthorized and could be subject to future litigation and by seeking an injunction. (*Digerati Holdings, LLC, supra*, 194 Cal. App. 4th at p. 885.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 822, 824–826

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.12, 140.50 et seq. (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 23, *Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing*, 23.05

326. Assignment Contested

[*Name of plaintiff*] was not a party to the original contract. However, [*name of plaintiff*] may bring a claim for breach of the contract if [he/she/*nonbinary pronoun*/it] proves that [*name of assignor*] transferred [his/her/*nonbinary pronoun*/its] rights under the contract to [*name of plaintiff*]. This transfer is referred to as an "assignment."

[*Name of plaintiff*] must prove that [*name of assignor*] intended to transfer [his/her/*nonbinary pronoun*/its] contract rights to [*name of plaintiff*]. In deciding [*name of assignor*]'s intent, you should consider the entire transaction and the conduct of the parties to the assignment.

[A transfer of contract rights does not necessarily have to be made in writing. It may be oral or implied by the conduct of the parties to the assignment.]

New February 2005

Directions for Use

The bracketed third paragraph should be used only in cases involving a transfer that may be made without a writing.

Sources and Authority

- Oral Assignments. Civil Code section 1052.
- "While no particular form of assignment is required, it is essential to the assignment of a right that the assignor manifest an intention to transfer the right." (*Sunburst Bank v. Executive Life Insurance Co.* (1994) 24 Cal.App.4th 1156, 1164 [29 Cal.Rptr.2d 734], internal citations omitted.)
- "The burden of proving an assignment falls upon the party asserting rights thereunder. In an action by an assignee to enforce an assigned right, the evidence must not only be sufficient to establish the fact of assignment when that fact is in issue, but the measure of sufficiency requires that the evidence of assignment be clear and positive to protect an obligor from any further claim by the primary obligee." (*Cockerell v. Title Insurance & Trust Co.* (1954) 42 Cal.2d 284, 292 [267 P.2d 16], internal citations omitted.)
- "The accrued right to collect the proceeds of the fire insurance policy is a chose in action, and an effective assignment thereof may be expressed orally as well as in writing; may be the product of inference; and where the parties to a transaction involving such a policy by their conduct indicate an intention to transfer such proceeds, the courts will imply an assignment thereof. In making such a determination, substance and not form controls." (*Greco v. Oregon Mutual Fire Insurance Co.* (1961) 191 Cal.App.2d 674, 683 [12 Cal.Rptr. 802], internal citations omitted.)

- "An assignor may not maintain an action upon a claim after making an absolute assignment of it to another; his right to demand performance is extinguished, the assignee acquiring such right. To 'assign' ordinarily means to transfer title or ownership of property, but an assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person. It is the substance and not the form of a transaction which determines whether an assignment was intended. If from the entire transaction and the conduct of the parties it clearly appears that the intent of the parties was to pass title to the chose in action, then an assignment will be held to have taken place." (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225 [87 Cal.Rptr. 213], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 727–739

6 California Forms of Pleading and Practice, Ch. 60, *Assignments*, § 60.20 (Matthew Bender)

27 California Legal Forms, Ch. 76, *Assignments of Rights and Obligations*, § 76.201 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.51–22.56, 22.58, 22.59

327. Assignment Not Contested

[*Name of plaintiff*] was not a party to the original contract. However, [he/she/*nonbinary pronoun*/it] may bring a claim for breach of contract because [*name of assignor*] transferred the rights under the contract to [*name of plaintiff*]. This transfer is referred to as an "assignment."

New February 2005

Directions for Use

This instruction is intended to explain to the jury why a party not named in the original contract is nevertheless a party to the case.

Sources and Authority

- Oral Assignment. Civil Code section 1052.
- "To 'assign' ordinarily means to transfer title or ownership of property, but an assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person. It is the substance and not the form of a transaction which determines whether an assignment was intended. If from the entire transaction and the conduct of the parties it clearly appears that the intent of the parties was to pass title to the chose in action, then an assignment will be held to have taken place." (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225 [87 Cal.Rptr. 213], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 727–739

6 California Forms of Pleading and Practice, Ch. 60, *Assignments*, § 60.20 (Matthew Bender)

27 California Legal Forms, Ch. 76, *Assignments of Rights and Obligations*, § 76.201 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.51–22.56, 22.58, 22.59

328. Breach of Implied Duty to Perform With Reasonable Care—Essential Factual Elements

The parties' contract requires that [*name of defendant***] [***specify performance alleged to have been done negligently, e.g., install cable television service***]. It is implied in the contract that this performance will be done competently and with reasonable care. [***Name of plaintiff***] claims that [***name of defendant***] breached this implied condition. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into a contract;**

[2. That [*name of plaintiff***] did all, or substantially all of the significant things that the contract required [him/her/***nonbinary pronoun***/it] to do;]**

[or]

[2. That [*name of plaintiff***] was excused from having to [***specify things that plaintiff did not do, e.g., obtain a guarantor on the contract***];]**

[3. That [*specify occurrence of all conditions required by the contract for [name of defendant]'s performance, e.g., the property was rezoned for residential use***];]**

[or]

[3. That [*specify condition(s) that did not occur***] [was/were] [waived/excused];]**

4. **That [***name of defendant***] failed to use reasonable care in [***specify performance***]; and**

5. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s conduct.**

New June 2015

Directions for Use

Give this instruction if the plaintiff alleges harm from the defendant's failure to perform a contractual obligation with reasonable care. Every contract includes an implied duty to perform required acts competently. (*Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1324 [178 Cal.Rptr.3d 100].) If negligent performance is alleged, the jury should be instructed that the contract contains this implied duty. The jury must then decide whether the duty has been breached. It must also find all of the other elements required for breach of contract. (See CACI No. 303, *Breach of Contract—Essential Factual Elements*.)

This instruction may be adapted for use as an affirmative defense if the defendant asserts that the plaintiff is not entitled to recover on the contract because of the plaintiff's failure to perform its duties competently. (See *Roscoe Moss Co. v. Jenkins* (1942) 55 Cal.App.2d 369, 376–378 [130 P.2d 477].)

For discussion of issues with the options for elements 2 and 3, see the Directions for Use to CACI No. 303, *Breach of Contract—Essential Factual Elements*.

Sources and Authority

- "[E]xpress contractual terms give rise to implied duties, violations of which may themselves constitute breaches of contract. ' "Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract." The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement [citation].' " (*Holguin*, *supra*, 229 Cal.App.4th at p. 1324.)
- "A contract to perform services gives rise to a duty of care which requires that such services be performed in a competent and reasonable manner." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 774 [69 Cal.Rptr.2d 466].)
- "[T]he statement in the written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed 'shall be fit and proper for its said intended use,' as stated by the trial court." (*Kuitems v. Covell* (1951) 104 Cal.App.2d 482, 485 [231 P.2d 552].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 822, 824

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.12 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Crompton et al., Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.79

329. Reserved for Future Use

330. Affirmative Defense—Unilateral Mistake of Fact

[*Name of defendant***] claims that there was no contract because [he/she/***nonbinary pronoun***/it] was mistaken about [***insert description of mistake***]. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] was mistaken about [***insert description of mistake***];**
2. **That [***name of plaintiff***] knew [***name of defendant***] was mistaken and used that mistake to take advantage of [him/her/***nonbinary pronoun***/it];**
3. **That [***name of defendant***]'s mistake was not caused by [his/her/***nonbinary pronoun***/its] excessive carelessness; and**
4. **That [***name of defendant***] would not have agreed to enter into the contract if [he/she/***nonbinary pronoun***/it] had known about the mistake.**

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

New September 2003; Revised April 2004

Directions for Use

If the mistake is one of law, this may not be a jury issue.

This instruction does not contain the requirement that the mistake be material to the contract because the materiality of a representation is a question of law. (*Merced County Mutual Fire Insurance Co. v. State of California* (1991) 233 Cal.App.3d 765, 772 [284 Cal.Rptr. 680].) Accordingly, the judge would decide whether an alleged mistake was material, and that mistake would be inserted into this instruction.

Sources and Authority

- When Consent Not Freely Given. Civil Code sections 1567, 1568.
- Mistake. Civil Code section 1576.
- Mistake of Fact. Civil Code section 1577.
- "It is settled that to warrant a unilateral rescission of a contract because of mutual mistake, the mistake must relate to basic or material fact, not a collateral matter." (*Wood v. Kalbaugh* (1974) 39 Cal.App.3d 926, 932 [114 Cal.Rptr. 673].)
- "A mistake need not be mutual. Unilateral mistake is ground for relief where the mistake is due to the fault of the other party or the other party knows or has reason to know of the mistake. . . . To rely on a unilateral mistake of fact, [the party] must demonstrate his mistake was not caused by his 'neglect of a legal

duty.' Ordinary negligence does not constitute the neglect of a legal duty as that term is used in section 1577." (*Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1007–1008 [211 Cal.Rptr. 45], internal citations omitted.)

- To prevail on a unilateral mistake claim, the defendant must prove that the plaintiff knew that the defendant was mistaken and that plaintiff used that mistake to take advantage of the defendant: "Defendants contend that a material mistake of fact—namely, the defendants' belief that they would not be obligated to install a new roof upon the residence—prevented contract formation. A unilateral mistake of fact may be the basis of relief. However, such a unilateral mistake may not invalidate a contract without a showing that the other party to the contract was aware of the mistaken belief and unfairly utilized that mistaken belief in a manner enabling him to take advantage of the other party." (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 944 [127 Cal.Rptr. 846], internal citations omitted.)
- "Failure to make reasonable inquiry to ascertain or effort to understand the meaning and content of the contract upon which one relies constitutes neglect of a legal duty such as will preclude recovery for unilateral mistake of fact." (*Wal-Noon Corporation v. Hill* (1975) 45 Cal.App.3d 605, 615 [119 Cal.Rptr. 646].) However, "[o]rdinary negligence does not constitute the neglect of a legal duty as that term is used in section 1577." (*Architects & Contractors Estimating Service, Inc. v. Smith, supra,* 164 Cal.App.3d at p. 1008.)
- Neglect of legal duty has been equated with "gross negligence," which is defined as "the want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594 [297 P.2d 644].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 257–276

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.50–215.57, 215.141 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.90 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations,* § 77.350 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.24

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 16, *Attacking or Defending Existence of Contract—Mistake*, 16.08[2], 16.13–16.16, 16.18

331. Affirmative Defense—Bilateral Mistake

[*Name of defendant***] claims that there was no contract because both parties were mistaken about [***insert description of mistake***]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That both parties were mistaken about [***insert description of mistake***]; and**
2. **That [***name of defendant***] would not have agreed to enter into this contract if [he/she/***nonbinary pronoun***/it] had known about the mistake.**

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

New September 2003

Directions for Use

This instruction does not contain the requirement that the mistake be material to the contract because the materiality of a representation is a question of law. (*Merced County Mutual Fire Insurance Co. v. State of California* (1991) 233 Cal.App.3d 765, 772 [284 Cal.Rptr. 680].) Accordingly, the judge would decide whether an alleged mistake was material, and that mistake would be inserted into this instruction.

If the mistake is one of law, this may not be a jury issue.

Sources and Authority

- When Consent Not Free. Civil Code section 1567.
- Consent Obtained by Fraud. Civil Code section 1568.
- Mistake. Civil Code section 1576.
- Mistake of Fact. Civil Code section 1577.
- Mistake of Law. Civil Code section 1578.
- Rescission of Contract. Civil Code section 1689.
- "A mistake of fact may be urged as a defense to an action upon a contract only if the mistake is material to the contract." (*Edwards v. Lang* (1961) 198 Cal.App.2d 5, 12 [18 Cal.Rptr. 60].)
- "A 'mistake' within the meaning of subdivision (b)(1) of section 1689 of the Civil Code can be either one of fact or of law. 'Generally a mistake of fact occurs when a person understands the facts to be other than they are . . . .' When both parties understand the facts other than they are, the mistake necessarily is mutual and thus becomes a basis for rescission." (*Crocker-Anglo*

Nat'l Bank v. Kuchman (1964) 224 Cal.App.2d 490, 496 [36 Cal.Rptr. 806], internal citations omitted.)

- "[T]o warrant a unilateral rescission of a contract because of mutual mistake, the mistake must relate to basic or material fact, not a collateral matter." (*Wood v. Kalbaugh* (1974) 39 Cal.App.3d 926, 932 [114 Cal.Rptr 673].)
- "Where, as here, the extrinsic evidence is not in conflict, the determination of whether a mutual mistake occurred is a question of law." (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 527 [117 Cal. Rptr. 2d 220, 41 P.3d 46].)
- "Ordinary negligence does not bar a claim for mutual mistake because ' "[t]here is an element of carelessness in nearly every case of mistake . . . ." ' 'Only gross negligence or 'preposterous or irrational' conduct will [bar] mutual mistake.' " (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1243 [160 Cal.Rptr.3d 718], internal citation omitted.)
- "Where parties are aware at the time the contract is entered into that a doubt exists in regard to a certain matter and contract on that assumption, the risk of the existence of the doubtful matter is assumed as an element of the bargain." (*Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 885 [124 Cal.Rptr 577].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 257–276

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.50–215.57, 215.140 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.90 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations,* § 77.350 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.24

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 16, *Attacking or Defending Existence of Contract—Mistake*, 16.08[1], 16.09, 16.11, 16.18

332. Affirmative Defense—Duress

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

1. **That [***name of plaintiff***] used a wrongful act or wrongful threat to pressure [***name of defendant***] into consenting to the contract;**
2. **That [***name of defendant***] was so afraid or intimidated by the wrongful act or wrongful threat that [he/she/***nonbinary pronoun***] did not have the free will to refuse to consent to the contract; and**
3. **That [***name of defendant***] would not have consented to the contract without the wrongful act or wrongful threat.**

An act or a threat is wrongful if [*insert relevant rule—e.g., "a criminal act is threatened"***].**

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

New September 2003; Revised December 2005

Directions for Use

Use CACI No. 333, *Affirmative Defense—Economic Duress,* in cases involving economic duress.

Sources and Authority

- When Consent Not Freely Given. Civil Code sections 1567, 1568.
- Duress. Civil Code section 1569.
- Menace. Civil Code section 1570.
- "Menace" is considered to be duress: "Under the modern rule, ' "[d]uress, which includes whatever destroys one's free agency and constrains [her] to do what is against [her] will, may be exercised by threats, importunity or any species of mental coercion. It is shown where a party 'intentionally used threats or pressure to induce action or nonaction to the other party's detriment.' " ' The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing." (*In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 84 [260 Cal.Rptr. 403], internal citations omitted.)
- "Duress envisions some unlawful action by a party by which one's consent is obtained through fear or threats." (*Keithley v. Civil Service Bd. of The City of Oakland* (1970) 11 Cal.App.3d 443, 450 [89 Cal.Rptr. 809], internal citations omitted.)
- Duress is found only where fear is intentionally used as a means of procuring

consent: "[A]n action for duress and menace cannot be sustained when the voluntary action of the apprehensive party is induced by his speculation upon or anticipation of a future event suggested to him by the defendant but not threatened to induce his conduct. The issue in each instance is whether the defendant intentionally exerted an unlawful pressure on the injured party to deprive him of contractual volition and induce him to act to his own detriment." (*Goldstein v. Enoch* (1967) 248 Cal.App.2d 891, 894–895 [57 Cal.Rptr. 19].)

- It is wrongful to use the threat of criminal prosecution to obtain a consent: "California law is clear that an agreement obtained by threat of criminal prosecution constitutes menace and is unenforceable as against public policy." (*Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119, 127 [18 Cal.Rptr.2d 626].) However, a threat of legitimate civil action is not considered wrongful: "[T]he action or threat in duress or menace must be unlawful, and a threat to take legal action is not unlawful unless the party making the threat knows the falsity of his claim." (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128 [54 Cal.Rptr. 533].)
- Standard duress is evaluated under a subjective standard: "The question in each case [is], Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purpose of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained? Hence, under this theory duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim." (*In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 744 [129 Cal.Rptr. 566].)
- The wrongful acts of a third party may constitute duress sufficient to allow rescission of a contract with a party, who, although not participating in those wrongful acts, had knowledge of the innocent party's position. (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 205–206 [1 Cal.Rptr. 12, 347 P.2d 12].)
- "[Defendant has] the burden of proving by a preponderance of the evidence the affirmative of the issues of duress and plaintiff's default." (*Fio Rito v. Fio Rito* (1961) 194 Cal.App.2d 311, 322 [14 Cal.Rptr. 845]; cf. *Stevenson v. Stevenson* (1940) 36 Cal.App.2d 494, 500 [97 P.2d 982].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 310–316

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake,* §§ 215.20–215.21, 215.23–215.28, 215.120–215.121 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.20 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations,* § 77.351 (Matthew Bender)

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

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

333. Affirmative Defense—Economic Duress

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

1. **That [***name of plaintiff***] used a wrongful act or wrongful threat to pressure [***name of defendant***] into consenting to the contract;**
2. **That a reasonable person in [***name of defendant***]'s position would have believed that there was no reasonable alternative except to consent to the contract; and**
3. **That [***name of defendant***] would not have consented to the contract without the wrongful act or wrongful threat.**

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

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

New September 2003; Revised December 2005, June 2011, December 2011, May 2020

Directions for Use

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

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

In the next-to-last paragraph, state the rule that makes the alleged conduct wrongful. (See Restatement 2d of Contracts, § 176, When a Threat is Improper.) The conduct must be something more than the breach or threatened breach of the contract itself. An act for which a party has an adequate legal remedy is not duress. (*River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1425 [45 Cal.Rptr.2d 790].)

Sources and Authority

- When Consent Not Freely Given. Civil Code sections 1567, 1568.

- "The doctrine of 'economic duress' can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract. The party subjected to the coercive act, and having no reasonable alternative, can then plead 'economic duress' to avoid the contract." (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644 [76 Cal.Rptr.2d 615], internal citation omitted.)
- The nonexistence of a "reasonable alternative" is a question of fact. (*CrossTalk Productions, Inc., supra,* 65 Cal.App.4th at p. 644.)
- " 'At the outset it is helpful to acknowledge the various policy considerations which are involved in cases involving economic duress. Typically, those claiming such coercion are attempting to avoid the consequences of a modification of an original contract or of a settlement and release agreement. On the one hand, courts are reluctant to set aside agreements because of the notion of freedom of contract and because of the desirability of having private dispute resolutions be final. On the other hand, there is an increasing recognition of the law's role in correcting inequitable or unequal exchanges between parties of disproportionate bargaining power and a greater willingness to not enforce agreements which were entered into under coercive circumstances.' " (*Rich & Whillock, Inc., supra*, 157 Cal.App.3d at p. 1158.)
- " 'As it has evolved to the present day, the economic duress doctrine is not limited by early statutory and judicial expressions requiring an unlawful act in the nature of a tort or a crime. . . . Instead, the doctrine now may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure. . . . The assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment may constitute a wrongful act for purposes of the economic duress doctrine. . . . Further, a reasonably prudent person subject to such an act may have no reasonable alternative but to succumb when the only other alternative is bankruptcy or financial ruin. . . .' " (*Chan, supra*, 188 Cal.App.4th at pp. 1173–1174.)
- " 'It is not duress . . . to take a different view of contract rights, even though mistaken, from that of the other contracting party, and it is not duress to refuse, in good faith, to proceed with a contract, even though such refusal might later be found to be wrong. [¶] . . . "A mere threat to withhold a legal right for the enforcement of which a person has an adequate [legal] remedy is not duress." ' " (*River Bank America, supra*, 38 Cal.App.4th at p. 1425.)
- "[W]rongful acts will support a claim of economic duress when 'a reasonably prudent person subject to such an act may have no reasonable alternative but to succumb when the only other alternative is bankruptcy or financial ruin.' " (*Uniwill, supra*, 124 Cal.App.4th at p. 545.)
- "Economic duress has been recognized as a basis for rescinding a settlement. However, the courts, in desiring to protect the freedom of contracts and to

accord finality to a privately negotiated dispute resolution, are reluctant to set aside settlements and will apply 'economic duress' only in limited circumstances and as a 'last resort.' " (*San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1058 [37 Cal.Rptr.2d 501].)

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

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 315–317

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

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

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

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

334. Affirmative Defense—Undue Influence

[*Name of defendant*] claims that no contract was created because [he/she/*nonbinary pronoun*] was unfairly pressured by [*name of plaintiff*] into consenting to the contract.

To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of plaintiff*] used**

   [a relationship of trust and confidence] [or]

   [[*name of defendant*]'s weakness of mind] [or]

   [[*name of defendant*]'s needs or distress]

   to induce or pressure [*name of defendant*] into consenting to the contract; and

2. **That [*name of defendant*] would not otherwise have consented to the contract.**

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

New September 2003

Sources and Authority

- When Consent Not Freely Given. Civil Code sections 1567, 1568.
- Undue Influence. Civil Code section 1575.
- The question of undue influence is decided as a question of fact: "[D]irect evidence of undue influence is rarely obtainable and, thus the court is normally relegated to determination by inference from the totality of facts and circumstances. Indeed, there are no fixed definitions or inflexible formulas. Rather, we are concerned with whether from the entire context it appears that one's will was overborne and he was induced to do or forbear to do an act which he would not do, or would do, if left to act freely." (*Keithley v. Civil Service Bd. of the City of Oakland* (1970) 11 Cal.App.3d 443, 451 [89 Cal.Rptr. 809], internal citations omitted.)
- "In essence, undue influence consists of the use of excessive pressure by a dominant person over a servient person resulting in the apparent will of the servient person being in fact the will of the dominant person. The undue susceptibility to such overpersuasive influence may be the product of physical or emotional exhaustion or anguish which results in one's inability to act with unencumbered volition." (*Keithley, supra,* 11 Cal.App.3d at p. 451.)
- Whether or not the parties have a confidential relationship is a question of fact:

> "It is, of course, well settled that while the mere fact that a relationship is friendly and intimate does not necessarily amount to a confidential relationship, such relationship may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. It is likewise frequently emphasized that the existence of a confidential relationship presents a question of fact which, of necessity, may be determined only on a case by case basis." (*O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 153 [119 Cal.Rptr. 245], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 317–322

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.40–215.42, 215.130–215.132 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.70 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations,* § 77.352 (Matthew Bender)

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

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, *Attacking or Defending Existence of Contract—Fraud, Duress, Menace, and Undue Influence*, 17.03–17.06, 17.25–17.28

335. Affirmative Defense—Fraud

[*Name of defendant***] claims that no contract was created because [his/her/***nonbinary pronoun***/its] consent was obtained by fraud. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] represented that [***insert alleged fraudulent statement***];**
2. **That [***name of plaintiff***] knew that the representation was not true;**
3. **That [***name of plaintiff***] made the representation to persuade [***name of defendant***] to agree to the contract;**
4. **That [***name of defendant***] reasonably relied on this representation; and**
5. **That [***name of defendant***] would not have entered into the contract if [he/she/***nonbinary pronoun***/it] had known that the representation was not true.**

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

New September 2003

Directions for Use

This instruction covers intentional misrepresentation under the first alternative presented in Civil Code section 1572. The other types of fraud that are set forth in section 1572 are negligent misrepresentation, concealment of a material fact, and false promise.

If the case involves an alleged negligent misrepresentation, substitute the following for element 2: "That [*name of plaintiff*] had no reasonable grounds for believing the representation was true."

If the case involves concealment, the following may be substituted for element 1: "That [*name of plaintiff*] intentionally concealed an important fact from [*name of defendant*], creating a false representation." See CACI No. 1901, *Concealment,* for alternative ways of proving this element.

If the case involves a false promise, substitute the following for element 1: "That [*name of plaintiff*] made a promise that [he/she/*nonbinary pronoun*/it] did not intend to perform" and insert the word "promise" in place of the word "representation" throughout the remainder of the instruction.

Sources and Authority

- When Consent Not Freely Given. Civil Code sections 1567, 1568.
- Actual Fraud. Civil Code section 1572.

- Fraud can be found in making a misstatement of fact, as well as in the concealment of a fact: "Actual fraud involves conscious misrepresentation, or concealment, or non-disclosure of a material fact which induces the innocent party to enter the contract." (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128 [54 Cal.Rptr. 533].)
- Fraud may be asserted as an affirmative defense: "One who has been induced to enter into a contract by false and fraudulent representations may rescind the contract; or he may affirm it, keeping what he has received under it, and maintain an action to recover damages he has sustained by reason of the fraud; or he may set up such damages as a complete or partial defense if sued on the contract by the other party." (*Grady v. Easley* (1941) 45 Cal.App.2d 632, 642 [114 P.2d 635].)
- "It is well established that a defrauded defendant may set up the fraud as a defense and, in fact, may even recoup his damages by counterclaim in an action brought by the guilty party to the contract. The right to avoid for fraud, however, is lost if the injured party, after acquiring knowledge of the fraud, manifests an intention to affirm the contract." (*Bowmer v. H. C. Louis, Inc.* (1966) 243 Cal.App.2d 501, 503 [52 Cal.Rptr. 436], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 286–309

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.70–215.72, 215.144 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.40 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations,* § 77.353 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.24

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, *Attacking or Defending Existence of Contract—Fraud, Duress, Menace, and Undue Influence*, 17.03–17.09, 17.12–17.18

336. Affirmative Defense—Waiver

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] did not have to [***insert description of performance***] because [***name of plaintiff***] gave up [his/her/***nonbinary pronoun***/its] right to have [***name of defendant***] perform [this/these] obligation[s]. This is called a "waiver."**

To succeed, [*name of defendant***] must prove both of the following by clear and convincing evidence:**

1. **That [***name of plaintiff***] knew [***name of defendant***] was required to [***insert description of performance***]; and**
2. **That [***name of plaintiff***] freely and knowingly gave up [his/her/** ***nonbinary pronoun*****/its] right to have [***name of defendant***] perform [this/these] obligation[s].**

A waiver may be oral or written or may arise from conduct that shows that [*name of plaintiff***] gave up that right.**

If [*name of defendant***] proves that [***name of plaintiff***] gave up [his/her/***nonbinary pronoun***/its] right to [***name of defendant***]'s performance of [***insert description of performance***], then [***name of defendant***] was not required to perform [this/these] obligation[s].**

New September 2003

Directions for Use

This issue is decided under the "clear and convincing" standard of proof. See CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Sources and Authority

- "Waiver is the intentional relinquishment of a known right after knowledge of the facts." (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 572 [150 P.2d 422].)
- " ' "The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. [Citation.]" [Citation.] Thus, "California courts will find waiver when a party intentionally relinquishes a right or when that party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished." [Citation.]' [Citation.]" (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 78 [215 Cal.Rptr.3d 835].)
- "Acceptance of benefits under a lease is conduct that supports a finding of waiver." (*Gould v. Corinthian Colleges, Inc.* (2011) 192 Cal.App.4th 1176, 1179 [120 Cal.Rptr.3d 943], internal citations omitted.)
- "Waiver is ordinarily a question for the trier of fact; '[h]owever, where there are

no disputed facts and only one reasonable inference may be drawn, the issue can be determined as a matter of law.' " (*DuBeck v. California Physicians' Service* (2015) 234 Cal.App.4th 1254, 1265 [184 Cal.Rptr.3d 743].)

- When the injured party with knowledge of the breach continues to accept performance from the guilty party, such conduct may constitute a waiver of the breach. (*Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal. 435, 440–441 [6 P.2d 71].)
- There can be no waiver where the one against whom it is asserted has acted without full knowledge of the facts. It cannot be presumed, in the absence of such knowledge, that there was an intention to waive an existing right. (*Craig v. White* (1921) 187 Cal. 489, 498 [202 P. 648].)
- "[N]otwithstanding a provision in a written contract that expressly precludes oral modification, the parties may, by their words or conduct, waive the enforcement of a contract provision if the evidence shows that was their intent." (*Wind Dancer Production Group, supra,* 10 Cal.App.5th at p. 80.)
- "The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver'." (*City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107–108 [48 Cal.Rptr. 865, 410 P.2d 369].)
- "The trial court correctly instructed the jury that the waiver of a known right must be shown by clear and convincing proof." *(DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe and Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61 [35 Cal.Rptr.2d 515].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 881, 882

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.57, 140.113, 140.136 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.40, 50.41, 50.110 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.08, 22.65, 22.68

337. Affirmative Defense—Novation

[*Name of defendant*] claims that the original contract with [*name of plaintiff*] cannot be enforced because the parties substituted a new and different contract for the original.

To succeed, [*name of defendant*] must prove that all parties agreed, by words or conduct, to cancel the original contract and to substitute a new contract in its place.

If you decide that [*name of defendant*] has proved this, then the original contract is not enforceable.

New September 2003; Revised October 2004

Directions for Use

If the contract in question is not the original contract, specify which contract it is instead of "original."

Although there is language in *Alexander v. Angel* (1951) 37 Cal.2d 856, 860–861 [236 P.2d 561] that could be read to suggest that a novation must be proved by the higher standard of clear and convincing proof, an examination of the history of that language and the cases upon which the language in *Alexander* depends (*Columbia Casualty Co. v. Lewis* (1936) 14 Cal.App.2d 64, 72 [57 P.2d 1010] and *Houghton v. Lawton* (1923) 63 Cal.App. 218, 223 [218 P. 475]) demonstrates that the original use of the term "clear and convincing," carried forward thereafter without analysis, was intended only to convey the concept that a novation must clearly be shown and may not be presumed. The history of the language does not support a requirement that a party alleging a novation must prove there is a high probability (i.e., clear and convincing proof) that the parties agreed to a novation. See also, sections 279 and 280 of the Restatement Second of Contracts. A party alleging a novation must prove that the facts supporting the novation are more likely to be true than not true.

Sources and Authority

- Novation. Civil Code sections 1530. 1531.
- "A novation is a substitution, by agreement, of a new obligation for an existing one, with intent to extinguish the latter. A novation is subject to the general rules governing contracts and requires an intent to discharge the old contract, a mutual assent, and a consideration." (*Klepper v. Hoover* (1971) 21 Cal.App.3d 460, 463 [98 Cal.Rptr. 482].)
- Conduct may form the basis for a novation although there is no express writing or agreement. (*Silva v. Providence Hospital of Oakland* (1939) 14 Cal.2d 762, 773 [97 P.2d 798].)
- Novation is a question of fact, and the burden of proving it is upon the party

asserting it. (*Alexander v. Angel* (1951) 37 Cal.2d 856, 860 [236 P.2d 561].)

- "When there is conflicting evidence the question whether the parties to an agreement entered into a modification or a novation is a question of fact." (*Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 980 [269 Cal.Rptr. 807].)
- "The 'question whether a novation has taken place is always one of intention,' with the controlling factor being the intent of the obligee to effect a release of the original obligor on his obligation under the original agreement." (*Alexander, supra,* 37 Cal.2d at p. 860, internal citations omitted.)
- "[I]n order for there to be a valid novation, it is necessary that the parties intend that the rights and obligations of the new contract be substituted for the terms and conditions of the old contract." (*Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457 [118 Cal.Rptr. 695].)
- "While the evidence in support of a novation must be 'clear and convincing,' the 'whole question is one of fact and depends upon all the facts and circumstances of the particular case,' with the weight and sufficiency of the proof being matters for the determination of the trier of the facts under the general rules applicable to civil actions." (*Alexander, supra,* 37 Cal.2d at pp. 860–861, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 992–994

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.141 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.450–50.464 (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations,* §§ 77.20, 77.280–77.282 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.58[3]

338. Affirmative Defense—Statute of Limitations

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s claimed harm occurred before [***insert date two or four years before date of filing***].**

New December 2007

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable four-year period for breach of a written contract (see Code Civ. Proc., § 337(1)) or two-year period for breach of an oral contract. (See Code Civ. Proc., § 339(1).) Do not use this instruction for breach of a California Uniform Commercial Code sales contract. (See Com. Code, § 2725.)

If the contract either shortens or extends the limitation period, use the applicable period from the contract instead of two years or four years.

If the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation defense, CACI No. 455, *Statute of Limitations—Delayed Discovery,* may be adapted for use.

Sources and Authority

- Four-Year Statute of Limitations: Contract. Code of Civil Procedure section 337(a).
- Two-Year Statute of Limitations: Contract. Code of Civil Procedure section 339(1).
- "In general, California courts have permitted contracting parties to modify the length of the otherwise applicable California statute of limitations, whether the contract has extended or shortened the limitations period." (*Hambrecht & Quist Venture Partners v. Am. Medical Internat.* (1995) 38 Cal.App.4th 1532, 1547 [46 Cal.Rptr.2d 33].)
- "A contract cause of action does not accrue until the contract has been breached." (*Spear v. Cal. State Automobile Assn.* (1992) 2 Cal.4th 1035, 1042 [9 Cal.Rptr.2d 381, 831 P.2d 821].)
- "The claim accrues when the plaintiff discovers, or could have discovered through reasonable diligence, the injury and its cause." (*Angeles Chem. Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 119 [51 Cal.Rptr.2d 594].)
- "[T]he discovery rule may be applied to breaches [of contract] which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." (*Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 4–5 [131

Cal.Rptr.2d 680].)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, § 473 et seq.

5 Witkin, California Procedure (6th ed. 2021) Pleading, § 1158

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 345

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.42[2] (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action*, 4.03 et seq.

339–349. Reserved for Future Use

350. Introduction to Contract Damages

If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***/its] claim against [***name of defendant***] for breach of contract, you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm caused by the breach. This compensation is called "damages." The purpose of such damages is to put [***name of plaintiff***] in as good a position as [he/she/***nonbinary pronoun***/it] would have been if [***name of defendant***] had performed as promised.**

To recover damages for any harm, [*name of plaintiff***] must prove that when the contract was made, both parties knew or could reasonably have foreseen that the harm was likely to occur in the ordinary course of events as result of the breach of the contract.**

[*Name of plaintiff***] also must prove the amount of [his/her/***nonbinary pronoun***/its] damages according to the following instructions. [He/She/***Nonbinary pronoun***/It] does not have to prove the exact amount of damages. You must not speculate or guess in awarding damages.**

[*Name of plaintiff***] claims damages for [***identify general damages claimed***].**

New September 2003; Revised October 2004, December 2010

Directions for Use

This instruction should always be read before any of the following specific damages instructions. (See CACI Nos. 351–360.)

Sources and Authority

- Contract Damages. Civil Code section 3300.
- Damages Must Be Clearly Ascertainable. Civil Code section 3301.
- Damages No Greater Than Benefit of Full Performance. Civil Code section 3358.
- Damages Must Be Reasonable. Civil Code section 3359.
- "An element of a breach of contract cause of action is damages proximately caused by the defendant's breach. The statutory measure of damages for breach of contract is 'the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.' 'Contract damages seek to approximate the agreed-upon performance. "[I]n the law of contracts the theory is that the party injured by breach should receive as nearly as possible the equivalent of the benefits of performance." ' " (*Copenbarger v. Morris Cerullo World Evangelism, Inc.* (2018) 29 Cal.App.5th 1, 9 [239 Cal.Rptr.3d 838], internal citations omitted.)

- "This aim can never be exactly attained yet that is the problem the trial court is required to resolve." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)
- "[D]amages may not exceed the benefit which it would have received had the promisor performed." (*Brandon & Tibbs, supra,* 226 Cal.App.3d at p. 468, internal citations omitted.)
- " 'The rules of law governing the recovery of damages for breach of contract are very flexible. Their application in the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case.' " (*Brandon & Tibbs, supra,* 226 Cal.App.3d at p. 455, internal citation omitted.)
- "Contractual damages are of two types—general damages (sometimes called direct damages) and special damages (sometimes called consequential damages)." (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 968 [22 Cal.Rptr.3d 340, 102 P.3d 257].)
- "General damages are often characterized as those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. Because general damages are a natural and necessary consequence of a contract breach, they are often said to be within the contemplation of the parties, meaning that because their occurrence is sufficiently predictable the parties at the time of contracting are 'deemed' to have contemplated them." (*Lewis Jorge Construction Management, Inc., supra*, 34 Cal.4th at p. 968, internal citations omitted.)
- " 'Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.' 'In contrast, tort damages are awarded to [fully] compensate the victim for [all] injury suffered.' " (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550 [87 Cal.Rptr.2d 886, 981 P.2d 978], internal citations omitted.)
- "[I]f special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract.' " (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697 [42 Cal.Rptr.2d 136], internal citations omitted.)
- "The detriment that is 'likely to result therefrom' is that which is foreseeable to the breaching party at the time the contract is entered into." (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted.)

- "Where the fact of damages is certain, as here, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable approximation." (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398 [112 Cal.Rptr.2d 99], footnotes and internal citations omitted.)
- "Under contract principles, the nonbreaching party is entitled to recover only those damages, including lost future profits, which are 'proximately caused' by the specific breach. Or, to put it another way, the breaching party is only liable to place the nonbreaching party in the same position as if the specific breach had not occurred. Or, to phrase it still a third way, the breaching party is only responsible to give the nonbreaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain." (*Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1709 [51 Cal.Rptr.2d 365], internal citations omitted.)
- "[D]amages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California." (*Erlich, supra,* 21 Cal.4th 543 at p. 558, internal citations omitted.)
- "Cases permitting recovery for emotional distress typically involve mental anguish stemming from more personal undertakings the traumatic results of which were unavoidable. Thus, when the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach of the contract may give rise to damages for mental suffering or emotional distress." (*Erlich, supra,* 21 Cal.4th at p. 559, internal citations omitted.)
- "The right to recover damages for emotional distress for breach of mortuary and crematorium contracts has been well established in California for many years." (*Saari v. Jongordon Corp*. (1992) 5 Cal.App.4th 797, 803 [7 Cal.Rptr.2d 82], internal citation omitted.)
- "[T]he principle that attorney fees *qua* damages are recoverable as damages, and not as costs of suit, applies equally to breach of contract." (*Copenbarger, supra,* 29 Cal.App.5th at p. 10, original italics.)
- "Numerous other cases decided both before and after *Brandt* have likewise recognized that '[a]lthough fee issues are usually addressed to the trial court in the form of a posttrial motion, fees as damages are pleaded and proved by the party claiming them and are decided by the jury unless the parties stipulate to a posttrial procedure.' " (*Monster, LLC v. Superior Court* (2017) 12 Cal.App.5th 1214, 1229 [219 Cal.Rptr.3d 814].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 894–903

California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.1–4.9

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*,

§§ 140.55–140.56, 140.100–140.106 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.70 et seq. (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.10–50.11 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, § 65.20 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.03 et seq.

351. Special Damages

[*Name of plaintiff*] [also] claims damages for [*identify special damages*].

To recover for this harm, [*name of plaintiff*] must prove that when the parties made the contract, [*name of defendant*] knew or reasonably should have known of the special circumstances leading to the harm.

New September 2003

Directions for Use

Before giving this instruction, the judge should determine whether a particular item of damage qualifies as "special."

Sources and Authority

- Measure of Contract Damages. Civil Code section 3300.
- " 'Unlike general damages, special damages are those losses that do not arise directly and inevitably from any similar breach of any similar agreement. Instead, they are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties. Special damages are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of contracting (an objective test). [Citations.] Special damages "will not be presumed from the mere breach" but represent loss that 'occurred by reason of injuries following from' the breach.' " (*Schellinger Brothers v. Cotter* (2016) 2 Cal.App.5th 984, 1010 [207 Cal.Rptr.3d 82].)
- "Special damages must fall within the rule of *Hadley v. Baxendale*, . . . that is, they must reasonably be supposed to have been contemplated or foreseeable by the parties when making the contract as the probable result of a breach." (*Sabraw v. Kaplan* (1962) 211 Cal.App.2d 224, 227 [27 Cal.Rptr. 81], internal citations omitted.)
- "Parties may voluntarily assume the risk of liability for unusual losses, but to do so they must be told, at the time the contract is made, of any special harm likely to result from a breach [citations]. Alternatively, the nature of the contract or the circumstances in which it is made may compel the inference that the defendant should have contemplated the fact that such a loss would be 'the probable result' of the defendant's breach. [Citation.] Not recoverable as special damages are those 'beyond the expectations of the parties.' [Citation.] Special damages for breach of contract are limited to losses that were either actually foreseen [citation] or were 'reasonably foreseeable' when the contract was formed." (*Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1269–1270 [168 Cal.Rptr.3d 499].)

- "When reference is made to the terms of the contract alone, there is ordinarily little difficulty in determining what damages arise from its breach in the usual course of things, and the parties will be presumed to have contemplated such damages only. But where it is claimed the circumstances show that a special purpose was intended to be accomplished by one of the parties (a failure to accomplish which by means of the contract would cause him greater damage than would ordinarily follow from a breach by the other party), and such purpose was known to the other party, the facts showing the special purpose and the knowledge of the other party must be averred. This rule has frequently been applied to the breach of a contract for the sale of goods to be delivered at a certain time. In such cases the general rule of damages is fixed by reference to the market value of the goods at the time they were to have been delivered, because in the usual course of events the purchaser could have supplied himself with like commodities at the market price. And if special circumstances existed entitling the purchaser to greater damages for the defeat of a special purpose known to the contracting parties (as, for example, if the purchaser had already contracted to furnish the goods at a profit, and they could not be obtained in the market), such circumstances must be stated in the declaration with the facts which, under the circumstances, enhanced the injury." (*Mitchell v. Clarke* (1886) 71 Cal. 163, 164–165 [11 P. 882], internal citation omitted.)
- "[I]f special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract. The requirement of knowledge or notice as a prerequisite to the recovery of special damages is based on the theory that a party does not and cannot assume limitless responsibility for all consequences of a breach, and that at the time of contracting he must be advised of the facts concerning special harm which might result therefrom, in order that he may determine whether or not to accept the risk of contracting." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)
- "Contract damages must be clearly ascertainable in both nature and origin. A contracting party cannot be required to assume limitless responsibility for all consequences of a breach and must be advised of any special harm that might result in order to determine whether or not to accept the risk of contracting." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 560 [87 Cal.Rptr.2d 886, 981 P.2d 978], internal citations omitted.)
- " '[F]oreseeability is to be determined as of the time of the making of the contract'; 'what must be foreseeable is only that the loss would result if the breach occurred'; 'it is foreseeability only by the party in breach that is determinative'; 'foreseeability has an objective character'; and 'the loss need only have been foreseeable as a probable, as opposed to a necessary or certain, result of the breach.' " (*Ash, supra*, 223 Cal.App.4th at p. 1270.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 896

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.13 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, § 65.61 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[6], 7.08[3]

352. Loss of Profits—No Profits Earned

To recover damages for lost profits, [*name of plaintiff*] must prove that it is reasonably certain [he/she/*nonbinary pronoun*/it] would have earned profits but for [*name of defendant*]'s breach of the contract.

To decide the amount of damages for lost profits, you must determine the gross, or total, amount [*name of plaintiff*] would have received if the contract had been performed and then subtract from that amount the costs [including the value of the [labor/materials/rents/expenses/interest on loans invested in the business]] [*name of plaintiff*] would have had if the contract had been performed.

You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

Directions for Use

This instruction applies to both past and future lost profit claims. Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages*, or CACI No. 351, *Special Damages.*

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

Sources and Authority

- Damages Must Be Clearly Ascertainable. Civil Code section 3301.
- "Lost profits may be recoverable as damages for breach of a contract. '[T]he general principle [is] that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.' Such damages must 'be proven to be certain both as to their occurrence and their extent, albeit not with 'mathematical precision.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773–774 [149 Cal.Rptr.3d 614, 288 P.3d 1237].)
- "Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled." (*GHK Associates v. Mayer Group* (1990) 224 Cal.App.3d 856,

873–874 [274 Cal.Rptr. 168], internal citations omitted.)

- "Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. [Citations.] In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. [Citations.]" (*Sargon Enterprises, Inc.*, *supra*, 55 Cal.4th at p. 774.)
- "Regarding lost business profits, the cases have generally distinguished between established and unestablished businesses. '[W]here the operation of an established business is prevented or interrupted, as by a . . . breach of contract . . . , damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.' " (*Sargon Enterprises, Inc.*, *supra*, 55 Cal.4th at p. 774.)
- " 'On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. [Citations.] . . . But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." (*Sargon Enterprises, Inc.*, *supra*, 55 Cal.4th at p. 774.)
- "Unestablished businesses have been permitted to claim lost profit damages in situations where owners have experience in the business they are seeking to establish, and where the business is in an established market." (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698–1699 [42 Cal.Rptr.2d 136], internal citations omitted.)
- "Even if [plaintiff] was able to provide credible evidence of lost profits, it must be remembered that '[w]hen loss of anticipated profits is an element of damages, it means net and not gross profits. Net profits are the gains made from sales 'after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.' " (*Resort Video, Ltd., supra,* 35 Cal.App.4th at p. 1700, internal citations omitted.)
- "It is the generally accepted rule, in order to recover damages projected into the future, that a plaintiff must show with reasonable certainty that detriment from the breach of contract will accrue to him in the future. Damages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 62 [221 Cal.Rptr. 171], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 904–907

California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery

of Money Damages, §§ 4.11–4.17

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.79 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages*, § 65.21 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.12

353. Loss of Profits—Some Profits Earned

To recover damages for lost profits, [*name of plaintiff*] must prove that it is reasonably certain [he/she/*nonbinary pronoun*/it] would have earned more profits but for [*name of defendant*]'s breach of the contract.

To decide the amount of damages for lost profits, you must:

1. **First, calculate [*name of plaintiff*]'s estimated total profit by determining the gross amount [he/she/*nonbinary pronoun*/it] would have received if the contract had been performed, and then subtracting from that amount the costs [including the value of the [labor/materials/rents/expenses/interest on loans invested in the business]] [*name of plaintiff*] would have had if the contract had been performed;**
2. **Next, calculate [*name of plaintiff*]'s actual profit by determining the gross amount [he/she/*nonbinary pronoun*/it] actually received, and then subtracting from that amount [*name of plaintiff*]'s actual costs [including the value of the [labor/materials/rents/expenses/interest on loans invested in the business]]; and**
3. **Then, subtract [*name of plaintiff*]'s actual profit, which you determined in the second step, from [his/her/*nonbinary pronoun*/its] estimated total profit, which you determined in the first step. The resulting amount is [*name of plaintiff*]'s lost profit.**

You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages*, or CACI No. 351, *Special Damages.*

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

Sources and Authority

- Damages Must Be Clearly Ascertainable. Civil Code section 3301.
- "Lost profits may be recoverable as damages for breach of a contract. '[T]he general principle [is] that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.' Such damages must 'be proven to be certain both as to their occurrence

and their extent, albeit not with 'mathematical precision.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773–774 [149 Cal.Rptr.3d 614, 288 P.3d 1237].)

- "Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled." (*GHK Associates v. Mayer Group* (1990) 224 Cal.App.3d 856, 873–874 [274 Cal.Rptr. 168], internal citations omitted.)
- "Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. [Citations.] In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. [Citations.]" (*Sargon Enterprises, Inc.*, *supra*, 55 Cal.4th at p. 774].)
- "Regarding lost business profits, the cases have generally distinguished between established and unestablished businesses. '[W]here the operation of an established business is prevented or interrupted, as by a . . . breach of contract . . . , damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.' " (*Sargon Enterprises, Inc.*, *supra*, 55 Cal.4th at p. 774.)
- " 'On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. [Citations.] . . . But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." (*Sargon Enterprises, Inc.*, *supra*, 55 Cal.4th at p. 774.)
- "Unestablished businesses have been permitted to claim lost profit damages in situations where owners have experience in the business they are seeking to establish, and where the business is in an established market." (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698–1699 [42 Cal.Rptr.2d 136], internal citations omitted.)
- "Even if [plaintiff] was able to provide credible evidence of lost profits, it must be remembered that '[w]hen loss of anticipated profits is an element of damages, it means net and not gross profits.' Net profits are the gains made from sales 'after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.' " (*Resort Video, Ltd., supra,*

35 Cal.App.4th at p. 1700, internal citations omitted.)

- "It is the generally accepted rule, in order to recover damages projected into the future, that a plaintiff must show with reasonable certainty that detriment from the breach of contract will accrue to him in the future. Damages which are remote, contingent, or merely possible cannot serve as a legal basis for recovery." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 62 [221 Cal.Rptr. 171], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 904–907

California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.11–4.17

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.79 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.12

354. Owner's/Lessee's Damages for Breach of Contract to Construct Improvements on Real Property

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To recover damages for breach of a contract to construct improvements on real property, [*name of plaintiff***] must prove:**

[[The reasonable cost to [*name of plaintiff***] of completing the work;]**

[And the value of loss of use of the property;]

[And the reasonable cost of alternative housing from the date the work was to have been completed until the date the work was completed;]

[Less any amounts unpaid under the contract with [*name of defendant***];]]**

[or]

[The difference between the fair market value of the [lessee's interest in the] property and its fair market value had the improvements been constructed.]

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages.* The bracketed options state alternative measures of damage. Choose the option appropriate to the facts of the case. For a definition of "fair market value," see CACI No. 3501, *"Fair Market Value" Explained.*

Sources and Authority

- "The proper measure of damages for breach of a contract to construct improvements on real property where the work is to be done on plaintiff's property is ordinarily the reasonable cost to the plaintiff of completing the work and not the difference between the value of the property and its value had the improvements been constructed. A different rule applies, however, where improvements are to be made on property not owned by the injured party. 'In that event the injured party is unable to complete the work himself and, subject to the restrictions of sections 3300 and 3359 of the Civil Code, the proper measure of damages is the difference in value of the property with and without the promised performance, since that is the contractual benefit of which the injured party is deprived.' " (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.,* (1977) 66 Cal.App.3d 101, 123–124 [135 Cal.Rptr. 802], internal citations omitted.)
- "If the work were to be done on plaintiffs' property the proper measure of

damages would ordinarily be the reasonable cost to plaintiffs of completing the work. A different rule applies, however, when the improvements are to be made on property that is not owned by the injured party." (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 600 [262 P.2d 305], internal citations omitted.)

- "It is settled . . . that the measure of damages for the breach of a building construction contract is ordinarily such sum as is required to make the building conform to the contract. In such situations, the diminution of value rule cannot be invoked and the measure of damages is not the difference between the actual value of the property and its value had it been constructed in accordance with the plans and specifications." (*Kitchel v. Acree* (1963) 216 Cal.App.2d 119, 123 [30 Cal.Rptr. 714], internal citations omitted.)
- "The available damages for defective construction are limited to the cost of repairing the home, including lost use or relocation expenses, or the diminution in value." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 561 [87 Cal.Rptr.2d 886, 981 P.2d 978], internal citations omitted.)
- "Where the measure of damages turns on the value of property, whether liability sounds in tort or breach of contract, the normal standard is market value. The definition of market value and the principles governing its ascertainment are the same as those applicable to the valuation of property in eminent domain proceedings and in ad valorem taxation of property. In *Sacramento etc. R. R. Co. v. Heilbron*, market value was defined as 'the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.' That classic exposition with subsequent refinements has always been the accepted definition of market value in California." (*Glendale Federal Savings & Loan Assn., supra,* 66 Cal.App.3d at pp. 141–142, internal citations and footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 937–939

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.10 et seq. (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, § 65.100 (Matthew Bender)

15 California Legal Forms, Ch. 30D, *Construction Contracts And Subcontracts,* § 30D.223 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 10, *Seeking or Opposing Statutory Remedies in Contract Actions*, 10.05

355. Obligation to Pay Money Only

To recover damages for the breach of a contract to pay money, [*name of plaintiff***] must prove the amount due under the contract.**

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages.* If there is a dispute as to the appropriate rate of interest, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

Sources and Authority

- Damages for Breach of Obligation to Pay Money. Civil Code section 3302.
- Interest on Contract Damages. Civil Code section 3289.
- "The section is part of the original Civil Code and was intended to codify a common-law rule of damages for breach of a contract to pay a liquidated sum. In *Siminoff v. Jas. H. Goodman & Co. Bank,* the court after careful and extensive analysis concluded that section 3302 was not intended to abolish the common-law measure of damages for dishonor of a check. *Hartford,* in reaching the opposite conclusion, failed even to note the common-law rule or the California cases which had followed it, and did not discuss the strong arguments in its favor advanced in the *Siminoff* opinion. The *Hartford* holding on section 3302 no longer applies to the instant problem since section 3320 clearly constitutes 'a legislative recognition that a depositor whose check is wrongfully dishonored may thereby sustain "actual damage" beyond the amount of the check' and thus supersedes the *Hartford* holding on the measure of damages." (*Weaver v. Bank of America National Trust & Savings Assn.* (1963) 59 Cal.2d 428, 436, fn. 11 [30 Cal.Rptr. 4, 380 P.2d 644], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 936

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[7][a]

356. Buyer's Damages for Breach of Contract for Sale of Real Property (Civ. Code, § 3306)

To recover damages for the breach of a contract to sell real property, [*name of plaintiff***] must prove:**

1. **The difference between the fair market value of the property on the date of the breach and the contract price;**
2. **The amount of any payment made by [***name of plaintiff***] toward the purchase;**
3. **The amount of any reasonable expenses for examining title and preparing documents for the sale;**
4. **The amount of any reasonable expenses in preparing to occupy the property; and**
5. **[***Insert item(s) of claimed consequential damages***].**

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages.* If the appropriate rate of interest is in dispute, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

For a definition of "fair market value," see CACI No. 3501, *"Fair Market Value" Explained.*

Sources and Authority

- Damages for Breach of Contract to Convey Real Property. Civil Code section 3306.
- Interest on Contract Damages. Civil Code section 3289.
- " 'The rules of damages for a breach of a contract to sell or buy real property are special and unique. To the extent that the measure of compensatory damages available to a buyer or seller of real property for a breach of a contract are different from the general measure of compensatory damages for a breach of contract, the special provisions for damages for a breach of a real property sales contract prevail.' " (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 751 [118 Cal.Rptr.3d 531].)
- "A simple reading of the statute discloses that by its explicit terms it is adaptable only to a failure to convey, and not to a delay in conveying." (*Christensen v. Slawter* (1959) 173 Cal.App.2d 325, 330 [343 P.2d 341].)
- "This court itself has recently described section 3306 as providing for 'loss-of-

bargain damages' measured by the difference between the contract price and the fair market value on the date of the breach." (*Reese v. Wong* (2001) 93 Cal.App.4th 51, 56 [112 Cal.Rptr.2d 669], internal citation omitted.)

- "It is settled that when a seller of real property fails or refuses to convey, a buyer who has made advance payments toward the purchase price may recover interest on those payments as damages for breach of contract. This rule is not limited to sales of real property; it applies to sales in general." (*Al-Husry v. Nilsen Farms Mini-Market, Inc.* (1994) 25 Cal.App.4th 641, 648 [31 Cal.Rptr.2d 28], internal citations omitted.)
- Section 3306 does not ordinarily apply to breach of an unexercised option to buy property. (*Schmidt v. Beckelman* (1960) 187 Cal.App.2d 462, 470–471 [9 Cal.Rptr. 736].)
- " 'Generally, [consequential] damages are those which, in view of all facts known by the parties at the time of the making of the contract, may reasonably be supposed to have been considered as a likely consequence of a breach in the ordinary course of events. This provision would conform the measure of damages in real property conveyance breaches to the general contract measure of damages which is specified in Civil Code 3300: ". . . all the detriment proximately caused (by the breach), or which, in the ordinary course of things, would be likely to result therefrom." ' " (*Stevens Group Fund IV v. Sobrato Development Co.* (1991) 1 Cal.App.4th 886, 892 [2 Cal.Rptr.2d 460], quoting the Assembly Committee on Judiciary.)
- "Moreover, in none of the foregoing cases does it appear that the buyer demonstrated the existence of the other requisites for an award of consequential or special damages, i.e., that the seller knew of the buyer's purpose in purchasing the property and that the anticipated profits were proved with reasonable certainty as to their occurrence and amount." (*Greenwich S.F., LLC, supra*, 190 Cal.App.4th at p. 757.)
- "The plain language of section 3306, adding consequential damages to the general damages and other specified damages recoverable for breach of a contract to convey real property, the legislative history of the 1983 amendment acknowledging that the addition of consequential damages would conform the measure of damages to the general contract measure of damages, and the generally accepted inclusion of lost profits as a component of consequential or special damages in other breach of contract contexts and by other states in the context of breach of contracts to convey real property, taken together, persuade us that lost profits may be awarded as part of consequential damages under section 3306 upon a proper showing." (*Greenwich S.F., LLC, supra*, 190 Cal.App.4th at p. 758, internal citations omitted.)
- "Rents received from the lease of the property in this case are not properly an item of consequential damages. Here, plaintiff introduced evidence as to the fair market value of the property which included these profits. To allow these as consequential damages under these circumstances would have permitted a double

recovery for plaintiff." (*Stevens Group Fund IV, supra*, 1 Cal.App.4th at p. 892.)

- "[T]he phrase 'to enter upon the land' refers to the taking of possession rather than the use of the property." (*Schellinger Brothers v. Cotter* (2016) 2 Cal.App.5th 984, 1011 [207 Cal.Rptr.3d 82].)
- "We think the phrase 'and interest' should continue to be read as referring to the generally applicable provisions of [Civil Code] section 3287 regarding prejudgment interest. As amended in 1967, subdivision (a) of section 3287 establishes a right to recover prejudgment interest on damages 'capable of being made certain by calculation' and subdivision (b) gives the court general discretionary authority to award prejudgment interest where damages are 'based upon a cause of action in contract . . ..' The discretionary authority conferred by subdivision (b) will ordinarily apply to loss-of-bargain damages measured by the contract price/market value differential." (*Rifkin v. Achermann* (1996) 43 Cal.App.4th 391, 397 [50 Cal.Rptr.2d 661].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 926–928

California Real Property Remedies Practice (Cont.Ed.Bar 1980; 1999 supp.) Breach of Seller-Buyer Agreements, §§ 4.11–4.14

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 11-D, *Buyer's Remedies Upon Seller's Breach—Damages And Specific Performance*, ¶ 11:184 (The Rutter Group)

50 California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser*, § 569.22 (Matthew Bender)

9 California Legal Forms, Ch. 23, *Real Property Sales Agreements*, § 23.12 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[7][f]

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.37, 8.58

357. Seller's Damages for Breach of Contract to Purchase Real Property

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To recover damages for the breach of a contract to buy real property, [*name of plaintiff***] must prove:**

1. **The difference between the amount that was due to [***name of plaintiff***] under the contract and the fair market value of the property at the time of the breach; [and]**
2. **[***Insert item(s) of claimed consequential damages, e.g., resale expenses***].**

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages.* If there is a dispute regarding the appropriate rate of interest, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

For a definition of "fair market value," see CACI No. 3501, *"Fair Market Value" Explained.*

Sources and Authority

- Damages for Breach of Contract to Purchase Real Property. Civil Code section 3307.
- "It is generally accepted that the equivalent of value to the seller is fair market value. Fair market value is reckoned 'in terms of money.' " (*Abrams v. Motter* (1970) 3 Cal.App.3d 828, 840–841 [83 Cal.Rptr. 855], internal citations omitted.)
- "The "value of the property" to [plaintiff] is to be determined as of the date of the breach of the agreement by [defendant]." (*Allen v. Enomoto* (1964) 228 Cal.App.2d 798, 803 [39 Cal.Rptr. 815], internal citation omitted.)
- There can be no damages where the value to the owner equals or exceeds the contract price. (*Newhart v. Pierce* (1967) 254 Cal.App.2d 783, 792 [62 Cal.Rptr. 553], internal citation omitted.)
- "[T]he view that this section is exclusive, and precludes other consequential damages occasioned by the breach, was rejected in *Royer v. Carter*. Under Civil Code, section 3300, other damages are recoverable, usually embracing the out-of-pocket expenses lost by failure of the transaction." (*Wade v. Lake County Title Co.* (1970) 6 Cal.App.3d 824, 830 [86 Cal.Rptr. 182], internal citation omitted.)
- "[C]ourts have permitted consequential damages, only where the seller has diligently attempted resale after the buyer has breached the contract." (*Askari v.*

R & R Land Co. (1986) 179 Cal.App.3d 1101, 1107 [225 Cal.Rptr. 285], internal citation omitted.)

- "[I]f the property increases in value before trial and the vendor resells the property at a price higher than the value of the contract, there are no longer any loss of bargain damages." (*Spurgeon v. Drumheller* (1985) 174 Cal.App.3d 659, 664 [220 Cal.Rptr. 195].)
- "The same rule of no loss of bargain damages to the vendor applies where the resale is for the same price as the contract price." (*Spurgeon, supra,* 174 Cal.App.3d at p. 664, internal citations omitted.)
- "For the reason that no loss of bargain damages are available to a seller if there is a resale at the same or a higher price than the contract price, the law imposes on the seller of the property the duty to exercise diligence and to make a resale within the shortest time possible. In discussing the duty to mitigate where the vendee seeks return of a deposit, the *Sutter* court states the requirement that resales be made with reasonable diligence 'states a policy applicable to resales of real property. Whether the resale is made one, two or three months later, or whether it be a year or more, it should be made with reasonable diligence to qualify the vendor to an allowance of an off-set against the vendee's claim for restitution of money paid.' " (*Spurgeon, supra,* 174 Cal.App.3d at p. 665, internal citations omitted.)
- "Although it is well settled in the foregoing authorities that damages under Civil Code section 3307 for the difference between the contract price and property value may be insufficient to give the vendor the benefit of his bargain and he is entitled also to resale expenses and some costs of continued ownership, he should not be permitted to receive a windfall at the purchaser's expense." (*Smith v. Mady* (1983) 146 Cal.App.3d 129, 133 [194 Cal.Rptr. 42].)
- "Inasmuch as under *Abrams* and *Sutter* the vendor has an obligation to resell promptly in order to obtain consequential damages and the resale price may fix the property value as a basis for Civil Code section 3307 damages, we are impelled to conclude that there is no inherent separateness in the original sale and subsequent resale transactions. The increased resale price should not be disregarded in considering an offset to consequential damages awarded to a vendor against a defaulting purchaser of real property." (*Smith, supra,* 146 Cal.App.3d at p. 133.)
- "The owner of real or personal property may competently testify to its value." (*Newhart, supra,* 254 Cal.App.2d at p. 789, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 929–934

California Real Property Remedies Practice (Cont.Ed.Bar 1980; 1999 supp.), Breach of Seller-Buyer Agreements, §§ 4.37–4.43

California Practice Guide: Real Property Transactions, Ch. 11-C, ¶¶ 11:101–11:110, Seller's Remedies Upon Buyer's Breach-Damages and Specific Performance (The

Rutter Group)

50 California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser*, § 569.22 (Matthew Bender)

9 California Legal Forms, Ch. 23, *Real Property Sales Agreements*, § 23.12 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[7][f]

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.37, 8.58

358. Mitigation of Damages

If [*name of defendant*] breached the contract and the breach caused harm, [*name of plaintiff*] is not entitled to recover damages for harm that [*name of defendant*] proves [*name of plaintiff*] could have avoided with reasonable efforts or expenditures. You should consider the reasonableness of [*name of plaintiff*]'s efforts in light of the circumstances facing [him/her/*nonbinary pronoun*/it] at the time, including [his/her/*nonbinary pronoun*/its] ability to make the efforts or expenditures without undue risk or hardship.

If [*name of plaintiff*] made reasonable efforts to avoid harm, then your award should include reasonable amounts that [he/she/*nonbinary pronoun*/it] spent for this purpose.

New September 2003

Sources and Authority

- " ' "The doctrine of mitigation of damages holds that '[a] plaintiff who suffers damage as a result of . . . a breach of contract . . . has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided." ' Under the doctrine, '[a] plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion.' However, '[t]he duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable.' " (*Agam v. Gavra* (2015) 236 Cal.App.4th 91, 111 [186 Cal.Rptr.3d 295], internal citations omitted.)
- 'The rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights." (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691 [32 Cal.Rptr.2d 329].)
- "Whether a plaintiff acted reasonably to mitigate damages . . . is a factual matter to be determined by the trier of fact . . . ." (*Agam, supra,* 236 Cal.App.4th at p. 111.)
- "A plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided." (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 41 [21 Cal.Rptr.2d 110], internal citation omitted.)
- "A party injured by a breach of contract is required to do everything reasonably possible to negate his own loss and thus reduce the damages for which the other party has become liable. The plaintiff cannot recover for harm he could have foreseen and avoided by such reasonable efforts and without undue expense.

However, the injured party is not precluded from recovery to the extent that he has made reasonable but unsuccessful efforts to avoid loss." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 460 [277 Cal.Rptr. 40], internal citations omitted.)

- "The burden of proving that losses could have been avoided by reasonable effort and expense must always be borne by the party who has broken the contract. Inasmuch as the law denies recovery for losses that can be avoided by reasonable effort and expense, justice requires that the risks incident to such effort should be carried by the party whose wrongful conduct makes them necessary. Therefore, special losses that a party incurs in a reasonable effort to avoid losses resulting from a breach are recoverable as damages." (*Brandon & Tibbs, supra,* 226 Cal.App.3d at pp. 460–461, internal citations omitted.)

Secondary Sources

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.56 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.77 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, §§ 65.103, 65.121 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.12[6][b], 7.15[4]

359. Present Cash Value of Future Damages

To recover for future harm, [*name of plaintiff*] must prove that the harm is reasonably certain to occur and must prove the amount of those future damages. The amount of damages for future harm must be reduced to present cash value. This is necessary because money received now will, through investment, grow to a larger amount in the future. [*Name of defendant*] must prove the amount by which future damages should be reduced to present value.

To find present cash value, you must determine the amount of money that, if reasonably invested today, will provide [*name of plaintiff*] with the amount of [his/her/*nonbinary pronoun*/its] future damages.

[You may consider expert testimony in determining the present cash value of future damages.] [You must use [the interest rate of _____ percent/ [and] [*specify other stipulated information*]] agreed to by the parties in determining the present cash value of future damages.]

New September 2003; Revised December 2010, June 2013

Directions for Use

Give this instruction if future damages are sought and there is evidence from which a reduction to present value can be made. Give the next-to-last sentence if there has been expert testimony on reduction to present value. Unless there is a stipulation, expert testimony will usually be required to accurately establish present values for future losses. Give the last sentence if there has been a stipulation as to the interest rate to use or any other facts related to present cash value.

It would appear that because reduction to present value benefits the defendant, the defendant bears the burden of proof on the discount rate. (See *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613–614 [102 Cal.Rptr. 31] [no error to refuse instruction on reduction to present value when defendant presented no evidence].)

Present-value tables may assist the jury in making its determination of present cash value. Tables, worksheets, and an instruction on how to use them are provided in CACI No. 3904B, *Use of Present-Value Tables*.

Sources and Authority

- Future Damages. Civil Code section 3283.
- "In an action for damages for such a breach, the plaintiff in that one action recovers all his damages, past and prospective. A judgment for the plaintiff in such an action absolves the defendant from any duty, continuing or otherwise, to perform the contract. The judgment for damages is substituted for the wrongdoer's duty to perform the contract." (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 598 [262 P.2d 305], internal citations omitted.)

- "If the breach is partial only, the injured party may recover damages for non-performance only to the time of trial and may not recover damages for anticipated future non-performance. Furthermore, even if a breach is total, the injured party may treat it as partial, unless the wrongdoer has repudiated the contract. The circumstances of each case determine whether an injured party may treat a breach of contract as total." (*Coughlin, supra*, 41 Cal.2d at pp. 598–599, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1719

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.09[3]

360. Nominal Damages

If you decide that [*name of defendant*] breached the contract but also that [*name of plaintiff*] was not harmed by the breach, you may still award [him/her/*nonbinary pronoun*/it] nominal damages such as one dollar.

New September 2003

Sources and Authority

- Nominal Damages. Civil Code section 3360.
- "A plaintiff is entitled to recover nominal damages for the breach of a contract, despite inability to show that actual damage was inflicted upon him, since the defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages. The maxim that the law will not be concerned with trifles does not, ordinarily, apply to violation of a contractual right. Accordingly, nominal damages, which are presumed as a matter of law to stem merely from the breach of a contract may properly be awarded for the violation of such a right. And, by statute, such is also the rule in California." (*Sweet v. Johnson* (1959) 169 Cal.App.2d 630, 632–633 [337 P.2d 499], internal citations omitted.)
- "With one exception . . . an unbroken line of cases holds that nominal damages are limited to an amount of a few cents or a dollar." (*Avina v. Spurlock* (1972) 28 Cal.App.3d 1086, 1089 [105 Cal.Rptr. 198], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 903

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.14, 177.71 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[11]

361. Reliance Damages

If you decide that [*name of defendant***] breached the contract, [***name of plaintiff***] may recover the reasonable amount of money that [he/she/***nonbinary pronoun***/it] spent in preparing for contract performance. These amounts are called "reliance damages." [***Name of plaintiff***] must prove the amount that [he/she/***nonbinary pronoun***/it] was induced to spend in reliance on the contract.**

If [*name of plaintiff***] proves reliance damages, [***name of defendant***] may avoid paying [some/ [or] all] of those damages by proving [***include one or both of the following***]:**

[1. **That [some/ [or] all] of the money that [***name of plaintiff***] spent in reliance was unnecessary;]**

[or]

[2. **That [***name of plaintiff***] would have suffered a loss even if [***name of defendant***] had fully performed [his/her/***nonbinary pronoun***/its] obligations under the contract].**

New December 2015

Sources and Authority

- "One proper 'measure of damages for breach of contract is the amount expended [by the nonbreaching party] on the faith of the contract.' " (*Agam v. Gavra* (2015) 236 Cal.App.4th 91, 105 [186 Cal.Rptr.3d 295].)
- "Where, without fault on his part, one party to a contract who is willing to perform it is prevented from doing so by the other party, the primary measure of damages is the amount of his loss, which may consist of his reasonable outlay or expenditure toward performance, and the anticipated profits which he would have derived from performance." (*Buxbom v. Smith* (1944) 23 Cal.2d 535, 541 [145 P.2d 305].)
- "This measure of damages often is referred to as 'reliance damages.' It has been held to apply where, as here, 'one party to an established business association fails and refuses to carry out the terms of the agreement, and thereby deprives the other party of the opportunity to make good in the business . . . .' " (*Agam, supra*, 236 Cal.App.4th at p. 105, internal citations omitted.)
- "The lost earnings found by the jury constituted harm flowing not from the *breach* of any contract but from plaintiff's *entry into* the contract in the expectation of receiving the promised options. Such 'reliance' damages may sometimes be recovered on a contract claim '[a]s an alternative' to expectation damages." (*Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 788 [211 Cal.Rptr.3d 743], original italics.)

- "[I]n the context of reliance damages, the plaintiff bears the burden to establish the amount he or she expended in reliance on the contract. The burden then shifts to the defendant to show (1) the amount of plaintiff's expenses that were unnecessary and/or (2) how much the plaintiff would have lost had the defendant fully performed (i.e., absent the breach). The plaintiff's recovery must be reduced by those amounts." (*Agam, supra*, 236 Cal.App.4th at p. 107, internal citation omitted.)
- "Concerning reliance damages, Restatement [Second of Contracts] section 349 provides as follows: 'As an alternative to the measure of damages stated in [Restatement section] 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, *less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed*.' " (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 907 [28 Cal.Rptr.3d 894], original italics.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 894 et seq.

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.79 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, § 65.21 et seq. (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.15

362–369. Reserved for Future Use

370. Common Count: Money Had and Received

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

1. **That [***name of defendant***] received money that was intended to be used for the benefit of [***name of plaintiff***];**
2. **That the money was not used for the benefit of [***name of plaintiff***]; and**
3. **That [***name of defendant***] has not given the money to [***name of plaintiff***].**

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*New June 2005; Revised November 2024**

Directions for Use

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

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

Sources and Authority

- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim . . . . Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)
- "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. . . . The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)
- " 'A cause of action for money had and received is stated if it is alleged [that] the defendant "is indebted to the plaintiff in a certain sum 'for money had and received by the defendant for the use of the plaintiff.' " . . .' The claim is viable

' "wherever one person has received money which belongs to another, and which in equity and good conscience should be paid over to the latter." ' As juries are instructed in CACI No. 370, the plaintiff must prove that the defendant received money 'intended to be used for the benefit of [the plaintiff],' that the money was not used for the plaintiff's benefit, and that the defendant has not given the money to the plaintiff." (*Avidor v. Sutter's Place, Inc.* (2013) 212 Cal.App.4th 1439, 1454 [151 Cal.Rptr.3d 804], internal citations omitted.)

- " 'The action for money had and received is based upon an implied promise which the law creates to restore money which the defendant in equity and good conscience should not retain. The law implies the promise from the receipt of the money to prevent unjust enrichment. The measure of the liability is the amount received.' Recovery is denied in such cases unless the defendant himself has actually received the money." (*Rotea v. Izuel* (1939) 14 Cal.2d 605, 611 [95 P.2d 927], internal citations omitted.)
- "[S]ince the basic premise for pleading a common count . . . is that the person is thereby 'waiving the tort and suing in assumpsit,' any tort damages are out. Likewise excluded are damages for a breach of an express contract. The relief is something in the nature of a constructive trust and . . . 'one cannot be held to be a constructive trustee of something he had not acquired.' One must have acquired some money which in equity and good conscience belongs to the plaintiff or the defendant must be under a contract obligation with nothing remaining to be performed except the payment of a sum certain in money." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14–15 [101 Cal.Rptr. 499], internal citations omitted.)
- " 'This kind of action to recover back money which ought not in justice to be kept is very beneficial, and, therefore, much encouraged. It lies for money paid by mistake, or upon a consideration which happens to fail, or extortion, or oppression, or an undue advantage of the plaintiff's situation contrary to the laws made for the protection of persons under those circumstances.' " (*Minor v. Baldridge* (1898) 123 Cal. 187, 191 [55 P. 783], internal citation omitted.)
- " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." ' A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)
- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods

sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)

- "A common count is not a specific cause of action, . . . rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)
- "The cause of action [for money had and received] is available where, as here, the plaintiff has paid money to the defendant pursuant to a contract which is void for illegality." (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623 [33 Cal.Rptr.2d 276], internal citations omitted.)
- " 'It is well established in our practice that an action for money had and received will lie to recover money paid by mistake, under duress, oppression or where an undue advantage was taken of plaintiffs' situation whereby money was exacted to which the defendant had no legal right.' " (*J.C. Peacock, Inc. v. Hasko* (1961) 196 Cal.App.2d 353, 361 [16 Cal.Rptr. 518], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (6th ed. 2021) Pleading, § 561

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

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

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

371. Common Count: Goods and Services Rendered

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

1. **That [***name of defendant***] requested, by words or conduct, that [***name of plaintiff***] [perform services/deliver goods] for the benefit of [***name of defendant***];**
2. **That [***name of plaintiff***] [performed the services/delivered the goods] as requested;**
3. **That [***name of defendant***] has not paid [***name of plaintiff***] for the [services/goods]; and**
4. **The reasonable value of the [goods/services] that were provided.**

*New June 2005; Revised November 2024**

Directions for Use

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

Sources and Authority

- " ' "Quantum meruit refers to the well-established principle that 'the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered.' [Citation.] To recover in quantum meruit, a party need not prove the existence of a contract [citations], but it must show the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made.' " [Citation.]' 'The underlying idea behind quantum meruit is the law's distaste for unjust enrichment. If one has received a benefit which one may not justly retain, one should "restore the aggrieved party to his [or her] former position by return of the thing or its equivalent in money." [Citation.]' ' "The measure of recovery in *quantum meruit* is the reasonable value of the services rendered *provided* they were of direct benefit to the defendant." [Citations.]' In other words, quantum meruit is equitable payment for services already rendered." (*E. J. Franks Construction, Inc. v. Sahota* (2014) 226 Cal.App.4th 1123, 1127–1128 [172 Cal.Rptr.3d 778], original italics, internal citations omitted.)
- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim . . . . Because of the uninformative

character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- "To recover on a claim for the reasonable value of services under a quantum meruit theory, a plaintiff must establish both that he or she was acting pursuant to either an express or implied request for services from the defendant and that the services rendered were intended to and did benefit the defendant." (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 794 [9 Cal.Rptr.3d 734], internal citation omitted.)
- "[W]here services have been rendered under a contract which is unenforceable because not in writing, an action generally will lie upon a common count for quantum meruit." (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996 [90 Cal.Rptr.2d 665].)
- "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. . . . The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)
- " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." ' A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)
- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)
- "A common count is not a specific cause of action, . . . rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an

alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (6th ed. 2021) Pleading, § 554

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

4 California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars*, §§ 44.33, 44.40 (Matthew Bender)

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

372. Common Count: Open Book Account

A book account is a written record of the credits and debts between parties [to a contract/in a fiduciary relationship]. [The contract may be oral, in writing, or implied by the parties' words and conduct.] A book account is "open" if entries can be added to it from time to time.

[*Name of plaintiff***] claims that there was an open book account in which financial transactions between the parties were recorded and that [***name of defendant***] owes [him/her/***nonbinary pronoun***/it] money on the account. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] had financial transactions with each other;**
2. **That [***name of plaintiff***], in the regular course of business, kept [a written/an electronic] account of the debits and credits involved in the transactions;**
3. **That [***name of defendant***] owes [***name of plaintiff***] money on the account; and**
4. **The amount of money that [***name of defendant***] owes [***name of plaintiff***].**

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

Directions for Use

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

Include the second sentence in the opening paragraph if the account is based on a contract rather than a fiduciary relationship. It is the contract that may be oral or implied; the book account must be in writing. (See Code Civ. Proc., § 337a [book account must be kept in a reasonably permanent form]; *Joslin v. Gertz* (1957) 155 Cal.App.2d 62, 65–66 [317 P.2d 155] [book account is a detailed statement kept in a book].)

Do not give this instruction for a claim involving "consumer debt" incurred on or after July 1, 2024. (See Code Civ. Proc., § 337a(a), (b) [defining and excluding "consumer debt" from the definition of "book account"]; see also Code Civ. Proc., § 425.30 [exempting consumer debt from common counts].)

Sources and Authority

- "Book Account" and "Consumer Debt" for Book Accounts Defined. Code of Civil Procedure section 337a(a), (b).
- " 'A book account may be deemed to furnish the foundation for a suit in

assumpsit . . . only when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant.' . . . 'The term "account," . . . clearly requires the recording of sufficient information regarding the transaction involved in the suit, from which the debits and credits of the respective parties may be determined, so as to permit the striking of a balance to ascertain what sum, if any, is due to the claimant.' " (*Robin v. Smith* (1955) 132 Cal.App.2d 288, 291 [282 P.2d 135], internal citations omitted.)

- "A book account is defined . . . as 'a detailed statement, kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation.' It is, of course, necessary for the book to show against whom the charges are made. It must also be made to appear in whose favor the charges run. This may be shown by the production of the book from the possession of the plaintiff and his identification of it as the book in which he kept the account between him and the debtor. An open book account may consist of a single entry reflecting the establishment of an account between the parties, and may contain charges alone if there are no credits to enter. Money loaned is the proper subject of an open book account. Of course a mere private memorandum does not constitute a book account." (*Joslin, supra,* 155 Cal.App.2d at pp. 65–66, internal citations omitted.)
- "A book account may furnish the basis for an action on a common count ' ". . . when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant." ' A book account is described as 'open' when the debtor has made some payment on the account, leaving a balance due." (*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 708 [220 Cal.Rptr. 250], internal citations and footnote omitted.)
- "A *book account* is a detailed statement of debit/credit transactions kept by a creditor in the regular course of business, and in a reasonably permanent manner. In one sense, *an open-book account* is an account with one or more items unsettled. However, even if an account is technically settled, the parties may still have an open-book account, if they anticipate possible future transactions between them." (*Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 579, fn. 5 [53 Cal.Rptr.3d 887, 150 P.3d 764], original italics, internal citation omitted.)
- "[T]he most important characteristic of a suit brought to recover a sum owing on a book account is that the amount owed is determined by computing *all* of the credits and debits entered in the book account." (*Interstate Group Administrators, Inc., supra,* 174 Cal.App.3d at p. 708.)
- "It is apparent that the mere entry of dates and payments of certain sums in the credit column of a ledger or cash book under the name of a particular individual, without further explanation regarding the transaction to which they apply, may not be deemed to constitute a 'book account' upon which an action in *assumpsit*

may be founded." (*Tillson v. Peters* (1940) 41 Cal.App.2d 671, 679 [107 P.2d 434].)

- "The law does not prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of the business of which the record is kept. We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of bookkeeping as distinguished from mere private memoranda." (*Egan v. Bishop* (1935) 8 Cal.App.2d 119, 122 [47 P.2d 500].)
- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim. Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)
- "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned . . . . The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)
- "[S]ince the basic premise for pleading a common count . . . is that the person is thereby 'waiving the tort and suing in assumpsit,' any tort damages are out. Likewise excluded are damages for a breach of an express contract. The relief is something in the nature of a constructive trust and . . . 'one cannot be held to be a constructive trustee of something he had not acquired.' One must have acquired some money which in equity and good conscience belongs to the plaintiff or the defendant must be under a contract obligation with nothing remaining to be performed except the payment of a sum certain in money." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14–15 [101 Cal.Rptr. 499], internal citations omitted.)
- " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." ' A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)
- "In the common law action of general assumpsit, it is customary to plead an

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

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

Secondary Sources

4 Witkin, California Procedure (6th ed. 2021) Pleading, §§ 561, 565

1 California Forms of Pleading and Practice, Ch. 8, *Accounts Stated and Open Accounts*, §§ 8.20, 8.47 (Matthew Bender)

4 California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars*, § 43.20 et seq. (Matthew Bender)

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

373. Common Count: Account Stated

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

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

1. **That [***name of defendant***] owed [***name of plaintiff***] money from previous financial transactions;**
2. **That [***name of plaintiff***] and [***name of defendant***], by words or conduct, agreed that the amount that [***name of plaintiff***] claimed to be due from [***name of defendant***] was the correct amount owed;**
3. **That [***name of defendant***], by words or conduct, promised to pay the stated amount to [***name of plaintiff***];**
4. **That [***name of defendant***] has not paid [***name of plaintiff***] [any/all] of the amount owed under this account; and**
5. **The amount of money [***name of defendant***] owes [***name of plaintiff***].**

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

Directions for Use

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

Sources and Authority

- " 'An account stated is an agreement, based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing. [Citation.] To be an account stated, "it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing." [Citation.]' " (*Leighton v. Forster* (2017) 8 Cal.App.5th 467, 491 [213 Cal.Rptr.3d 899].)
- "The essential elements of an account stated are: (1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or implied, on the amount due from the debtor to the creditor; (3) a promise by the debtor, express or implied, to pay the

amount due." (*Zinn v. Fred R. Bright Co.* (1969) 271 Cal.App.2d 597, 600 [76 Cal.Rptr. 663], internal citations omitted.)

- "The agreement of the parties necessary to establish an account stated need not be express and frequently is implied from the circumstances. In the usual situation, it comes about by the creditor rendering a statement of the account to the debtor. If the debtor fails to object to the statement within a reasonable time, the law implies his agreement that the account is correct as rendered." (*Zinn, supra,* 271 Cal.App.2d at p. 600, internal citations omitted.)
- "An account stated is an agreement, based on the prior transactions between the parties, that the items of the account are true and that the balance struck is due and owing from one party to another. When the account is assented to, ' "it becomes a new contract. An action on it is not founded upon the original items, but upon the balance agreed to by the parties. . . ." Inquiry may not be had into those matters at all. It is upon the new contract by and under which the parties have adjusted their differences and reached an agreement.' " (*Gleason v. Klamer* (1980) 103 Cal.App.3d 782, 786–787 [163 Cal.Rptr. 483], internal citations omitted.)
- "To be an account stated, 'it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing.' The agreement necessary to establish an account stated need not be express and is frequently implied from the circumstances. When a statement is rendered to a debtor and no reply is made in a reasonable time, the law implies an agreement that the account is correct as rendered. Actions on accounts stated frequently arise from a series of transactions which also constitute an open book account. However, an account stated may be found in a variety of commercial situations. The acknowledgement of a debt consisting of a single item may form the basis of a stated account. The key element in every context is agreement on the final balance due." (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 752–753 [241 Cal.Rptr. 883], internal citations omitted.)
- "An account stated need not be submitted by the creditor to the debtor. A statement expressing the debtor's assent and acknowledging the agreed amount of the debt to the creditor equally establishes an account stated." (*Truestone, Inc. v. Simi West Industrial Park II* (1984) 163 Cal.App.3d 715, 726 [209 Cal.Rptr. 757], internal citations omitted.)
- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim . . . . Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by

the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- "The account stated may be attacked only by proof of 'fraud, duress, mistake, or other grounds cognizable in equity for the avoidance of an instrument.' The defendant 'will not be heard to answer when action is brought upon the account stated that the claim or demand was unjust, or invalid.' " (*Gleason, supra,* 103 Cal.App.3d at p. 787, internal citations omitted.)
- "An account stated need not cover all the dealings or claims between the parties. There may be a partial settlement and account stated as to some of the transactions." (*Gleason, supra,* 103 Cal.App.3d at p. 790, internal citation omitted.)
- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)
- "A common count is not a specific cause of action, . . . rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (6th ed. 2021) Pleading, § 561

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

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

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

374. Common Count: Mistaken Receipt

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

1. **That [***name of plaintiff***] [paid [***name of defendant***] money/sent goods to [***name of defendant***]] by mistake;**
2. **That [***name of defendant***] did not have a right to [that money/the goods];**
3. **That [***name of plaintiff***] has asked [***name of defendant***] to return the [money/goods];**
4. **That [***name of defendant***] has not returned the [money/goods] to [***name of plaintiff***]; and**
5. **The amount of money that [***name of defendant***] owes [***name of plaintiff***].**

*New December 2005; Revised November 2024**

Directions for Use

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

Sources and Authority

- " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." ' A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)
- "It is well settled that no contract is necessary to support an action for money had and received other than the implied contract which results by operation of law where one person receives the money of another which he has no right, conscientiously, to retain. Under such circumstances the law will imply a promise to return the money. The action is in the nature of an equitable one and is based on the fact that the defendant has money which, in equity and good conscience, he ought to pay to the plaintiffs. Such an action will lie where the

money is paid under a void agreement, where it is obtained by fraud or where it was paid by a mistake of fact." (*Stratton v. Hanning* (1956) 139 Cal.App.2d 723, 727 [294 P.2d 66], internal citations omitted.)

- "Money paid upon a mistake of fact may be recovered under the common count of money had and received. The plaintiff, however negligent he may have been, may recover if his conduct has not altered the position of the defendant to his detriment." (*Thresher v. Lopez* (1921) 52 Cal.App. 219, 220 [198 P. 419], internal citations omitted.)
- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim . . . . Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)
- "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. . . . The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)
- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)
- "A common count is not a specific cause of action, . . . rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

Restatement First of Restitution, section 28

4 Witkin, California Procedure (6th ed. 2021) Pleading, § 561

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

(Matthew Bender)

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

375. Restitution From Transferee Based on Quasi-Contract or Unjust Enrichment

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[*Name of plaintiff***] claims that [***name of defendant***] must restore to [***name of plaintiff***] [***specify, e.g., money***] that [***name of defendant***] received from [***name of third party***], but that really should belong to [***name of plaintiff***]. [***Name of plaintiff***] is entitled to restitution if [he/she/***nonbinary pronoun***] proves that [***name of defendant***] knew or had reason to know that [***name of third party***] [***specify act constituting unjust enrichment, e.g., embezzled money from [name of plaintiff]***].**

New November 2019

Directions for Use

This instruction is for use in a claim for restitution based on the doctrines of quasi-contract and unjust enrichment. Under quasi-contract, one is entitled to restitution of one's money or property that a third party has misappropriated and transferred to the defendant if the defendant had reason to believe that the thing received had been unlawfully taken from the plaintiff by the third party. (*Welborne v. Ryman-Carroll Foundation* (2018) 22 Cal.App.5th 719, 725–726 [231 Cal.Rptr.3d 806].) The elements of a claim for unjust enrichment are receipt of a benefit and unjust retention of the benefit at the expense of another. (*Professional Tax Appeal v. Kennedy-Wilson Holdings, Inc.* (2018) 29 Cal.App.5th 230, 238–242 [239 Cal.Rptr.3d 908].) Unlawfulness is not required.

Sources and Authority

- " ' "[Quasi-contract] is an *obligation* . . . created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to [its] former position by return of the thing or its equivalent in money. [Citations.]" ' The doctrine focuses on equitable principles; its key phrase is ' "unjust enrichment," ' which is used to identify the 'transfer of money or other valuable assets to an individual or a company that is not entitled to them.' " (*Welborne, supra*, 22 Cal.App.5th at p. 725, original italics, internal citations omitted.)
- "Under the law of restitution, an individual may be required to make restitution if he is unjustly enriched at the expense of another. A person is enriched if he receives a benefit at another's expense. The term 'benefit' 'denotes any form of advantage.' Thus, a benefit is conferred not only when one adds to the property of another, but also when one saves the other from expense or loss. Even when a person has received a benefit from another, he is required to make restitution 'only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.' " (*Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 51 [57 Cal.Rptr.2d 687, 924 P.2d 996], internal citations omitted.)
- "[T]he recipient of money who *has reason to believe* that the funds he or she

receives were stolen may be liable for restitution." (*Welborne, supra*, 22 Cal.App.5th at p. 726, original italics.)

- "A transferee who would be under a duty of restitution if he had knowledge of pertinent facts, is under such duty if, at the time of the transfer, he suspected their existence." (*Welborne, supra*, 22 Cal.App.5th at p. 726 [quoting Restatement of Restitution, § 10].)
- "[Defendant] also errs in its claim that this matter may not be tried to a jury. The gist of an action in which a party seeks only money damages is legal in nature even though equitable principles are to be applied. As appellant argues, this is an express holding of *Lectrodryer v. SeoulBank* (2000) 77 Cal.App.4th 723, 728 [91 Cal.Rptr.2d 881]." (*Welborne, supra*, 22 Cal.App.5th at p. 728, fn. 8, internal citation omitted.)
- "[U]njust enrichment is not a cause of action. Rather, it is a general principle underlying various doctrines and remedies, including quasi-contract." (*Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 911 [81 Cal.Rptr.3d 503], internal citation omitted.)
- "Unlike a claim for damages based on breach of a legal duty, appellants' unjust enrichment claim is grounded in equitable principles of restitution. An individual is required to make restitution when he or she has been unjustly enriched at the expense of another. A person is enriched if he or she receives a benefit at another's expense. The term 'benefit' connotes *any* type of advantage. [¶] Appellants have stated a valid cause of action for unjust enrichment based on [defendant]'s unjustified charging and retention of excessive fees which the title companies passed through to them." (*Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 721–722 [132 Cal.Rptr.2d 220], original italics, internal citations omitted.)
- "Although some California courts have suggested the existence of a separate cause of action for unjust enrichment, this court has recently held that ' "[t]here is no cause of action in California for unjust enrichment." [Citations.] Unjust enrichment is synonymous with restitution. [Citation.]' " (*Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1138 [117 Cal.Rptr.3d 262], internal citation omitted.)
- "California law on unjust enrichment is not narrowly and rigidly limited to quasi-contract principles, as defendants contend. '[T]he doctrine also recognizes an obligation *imposed* by law regardless of the intent of the parties. In these instances there need be no relationship that gives substance to an implied intent basic to the "contract" concept, rather the obligation is imposed because good conscience dictates that under the circumstances the person benefited should make reimbursement.' " (*Professional Tax Appeal, supra*, 29 Cal.App.5th at p. 240, original italics.)
- "Finally, plaintiff's complaint also stated facts that, if proven, are sufficient to defeat a claim that defendants were bona fide purchasers without notice of plaintiff's claim. '[A] bona fide purchaser is generally not required to make

restitution.' But, '[a] transferee with knowledge of the circumstances surrounding the unjust enrichment may be obligated to make restitution.' [¶] For a defendant to be ' "without notice" ' means to be 'without notice of the facts giving rise to the restitution claim.' 'A person has notice of a fact if the person either knows the fact or has reason to know it. [¶] . . . A person has reason to know a fact if [¶] (a) the person has received an effective notification of the fact; [¶] (b) knowledge of the fact is imputed to the person by statute . . . or by other law (including principles of agency); or [¶] (c) other facts known to the person would make it reasonable to infer the existence of the fact, or prudent to conduct further inquiry that would reveal it.' " (*Professional Tax Appeal, supra*, 29 Cal.App.5th at p. 241, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 1050 et seq.

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

376–379. Reserved for Future Use

380. Agreement Formalized by Electronic Means—Uniform Electronic Transactions Act (Civ. Code, § 1633.1 et seq.)

[*Name of plaintiff***] claims that the parties entered into a valid contract in which [some of] the required terms were supplied by [***specify electronic means, e.g., e-mail messages***]. If the parties agree, they may form a binding contract using an electronic record. An "electronic record" is one created, generated, sent, communicated, received, or stored by electronic means. [***E.g., E-Mail***] is an electronic record.**

[*Name of plaintiff***] must prove, based on the context and surrounding circumstances, including the conduct of the parties, that the parties agreed to use [***e.g., e-mail***] to formalize their agreement.**

[[*Name of plaintiff***] must have sent the contract documents to [***name of defendant***] in an electronic record capable of retention by [***name of defendant***] at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system limits or prohibits the ability of the recipient to print or store it.]**

New December 2012; Revised December 2016

Directions for Use

This instruction is for use if the plaintiff is relying on the Uniform Electronic Transactions Act (UETA, Civ. Code, § 1633.1 et seq.) to prove contract formation. If there are other contested issues as to whether a contract was formed, also give CACI No. 303, *Breach of Contract—Essential Factual Elements*.

The first paragraph asserts that electronic means were used to supply some or all of the essential elements of the contract. Give the third paragraph if a law requires a person to provide, send, or deliver information in writing to another person. (See Civ. Code, § 1633.8(a).)

The most likely jury issue is whether the parties agreed to rely on electronic records to finalize their agreement. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. (See Civ. Code, § 1633.5(b).)

The UETA does not specify any particular transmissions that meet the definition of "electronic record," such as e-mail or fax. (See Civ. Code, § 1633.2(g).) Nevertheless, there would seem to be little doubt that e-mail and fax meet the definition. The parties will probably stipulate accordingly, or the court may find that the particular transmission at issue meets the definition as a matter of law.

If a law requires a signature, an electronic signature satisfies the law. (Civ. Code, § 1633.7(d).) The UETA defines an electronic signature as an electronic sound, symbol, or process attached to or logically associated with an electronic record and

executed or adopted by a person with the intent to sign the electronic record. (Civ. Code, § 1633.2(h); see Gov. Code, § 16.5(d) (digital signature).) The validity of an electronic signature under this definition would most likely be a question of law for the court. If there is an issue of fact with regard to the parties' intent to use electronic signatures, this instruction will need to be modified accordingly.

Sources and Authority

- "Electronic Record" Defined Under UETA. Civil Code section 1633.2(g).
- "Electronic Signature" Defined Under UETA. Civil Code section 1633.2(h).
- Agreement to Conduct Transaction by Electronic Means. Civil Code section 1633.5(b).
- Enforceability of Electronic Transactions. Civil Code section 1633.7.
- Providing Required Information by Electronic Means. Civil Code section 1633.8(a).
- Attributing Electronic Record or Signature to Person. Civil Code section 1633.9.
- " 'Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. . . . 'The absence of an explicit agreement to conduct the transaction by electronic means is not determinative; however, it is a relevant factor to consider." (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 989 [182 Cal.Rptr.3d 154].)
- "Under Civil Code section 1633.7, enacted in 1999 as part of the Uniform Electronic Transactions Act, an electronic signature has the same legal effect as a handwritten signature." (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 843 [181 Cal.Rptr.3d 781], internal citations omitted.)
- "Civil Code section 1633.9 addresses how a proponent of an electronic signature may authenticate the signature—that is, show the signature is, in fact, the signature of the person the proponent claims it is." (*Ruiz, supra*, 232 Cal.App.4th at p. 843.)
- "We agree that a printed name or some other symbol might, under specific circumstances, be a signature under UETA . . . ." (*J.B.B. Investment Partners, Ltd., supra*, 232 Cal.App.4th at p. 988.)
- "The trial court's analysis was incomplete. Attributing the name on an e-mail to a particular person and determining that the printed name is '[t]he act of [this] person' is a necessary prerequisite but is insufficient, by itself, to establish that it is an 'electronic signature.' . . . UETA defines the term 'electronic signature.' Subdivision (h) of section 1633.2 states that ' "[e]lectronic signature" means an electronic sound, symbol, or process attached to or logically associated with an electronic record and *executed or adopted by a person with the intent to sign the electronic record*.' (Italics added; see CACI No. 380 [party suing to enforce an agreement formalized by electronic means must prove 'based on the context and surrounding circumstances, including the conduct of the parties, that the parties

agreed to use [e.g., e-mail] to formalize their agreement . . .]' " (*J.B.B. Investment Partners, Ltd., supra*, 232 Cal.App.4th at pp. 988–989, original italics.)

- "In the face of [plaintiff]'s failure to recall electronically signing the 2011 agreement, the fact the 2011 agreement had an electronic signature on it in the name of [plaintiff], and a date and time stamp for the signature, was insufficient to support a finding that the electronic signature was, in fact, 'the act of' [plaintiff]." (*Ruiz, supra*, 232 Cal.App.4th at p. 844.)
- "[W]hether [defendant]'s printed name constituted an 'electronic signature' within the meaning of UETA or under the law of contract, are legal issues . . . ." (*J.B.B. Investment Partners, Ltd., supra*, 232 Cal.App.4th at p. 984.)

Secondary Sources

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

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 15, *Attacking or Defending Existence of Contract—Failure to Comply With Applicable Formalities*, 15.32

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.26 (Matthew Bender)

27 California Legal Forms: Transaction Guide, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.17 (Matthew Bender)

381–399. Reserved for Future Use

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] and [*name of defendant*] enter into a contract?**

   _____ Yes _____ No

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

[2. Did [*name of plaintiff*] do all, or substantially all, of the significant things that the contract required [him/her/*nonbinary pronoun*/it] to do?

   _____ Yes _____ No

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

[3. Was [*name of plaintiff*] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/*nonbinary pronoun*/it] to do?

   _____ Yes _____ No

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

[4. Did all the conditions that were required for [*name of defendant*]'s performance occur?

   _____ Yes _____ No

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

[5. Were the required conditions that did not occur [excused/waived]?

   _____ Yes _____ No

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

6. [Did [*name of defendant*] fail to do something that the contract required [him/her/*nonbinary pronoun*/it] to do?

_____ Yes _____ No]

[or]

[Did [*name of defendant*] do something that the contract prohibited [him/her/*nonbinary pronoun*/it] from doing?

_____ Yes _____ No]

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

7. Was [*name of plaintiff*] harmed by [*name of defendant*]'s breach of contract?

_____ Yes _____ No

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

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

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New April 2004; Revised December 2010, June 2011, June 2013, June 2015, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 303, *Breach of Contract—Essential Factual Elements*. This form is intended for use in most contract disputes. If more specificity is desired, see verdict forms that follow.

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

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

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

Note that questions 4 and 5 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused. The defendant's nonperformance is the first option for question 6. If the defendant alleges that its nonperformance was excused or waived by the plaintiff, an additional question on excuse or waiver should be included after question 6.

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

If specificity is not required, users do not have to itemize the damages listed in question 8. The breakdown is optional depending on the circumstances.

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

VF-301. Breach of Contract—Affirmative Defense—Unilateral Mistake of Fact

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] mistaken about [***insert description of mistake***]?**

   _____ **Yes** _____ **No**

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

2. **Did [***name of plaintiff***] know that [***name of defendant***] was mistaken and use that mistake to take advantage of [him/her/***nonbinary pronoun***/it]?**

   _____ **Yes** _____ **No**

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

3. **Was [***name of defendant***]'s mistake caused by [his/her/***nonbinary pronoun***/its] excessive carelessness?**

   _____ **Yes** _____ **No**

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

4. **Would [***name of defendant***] have agreed to enter into the contract if [he/she/***nonbinary pronoun***/it] had known about the mistake?**

   _____ **Yes** _____ **No**

Signed: _____
Presiding Juror

Dated: _____

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

New April 2004; Revised December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may

need to be modified depending on the facts of the case. This form is not a stand-alone verdict form. It may be incorporated into VF-300, *Breach of Contract*, if the elements of the affirmative defense are at issue.

This verdict form is based on CACI No. 330, *Affirmative Defense—Unilateral Mistake of Fact*. The verdict forms do not address all available affirmative defenses. The parties may need to create their own verdict forms to fit the issues involved in the case.

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

VF-302. Breach of Contract—Affirmative Defense—Duress

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] use a wrongful act or wrongful threat to pressure [*name of defendant*] into consenting to the contract?**

   _____ Yes _____ No

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

2. **Was [*name of defendant*] so afraid or intimidated by the wrongful act or wrongful threat that [he/she/*nonbinary pronoun*] did not have the free will to refuse to consent to the contract?**

   _____ Yes _____ No

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

3. **Would [*name of defendant*] have consented to the contract without the wrongful act or wrongful threat?**

   _____ Yes _____ No

Signed: _____
Presiding Juror

Dated: _____

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

New April 2004; Revised December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This form is not a stand-alone verdict form. It may be incorporated into VF-300, *Breach of Contract*, if the elements of the affirmative defense are at issue.

This verdict form is based on CACI No. 332, *Affirmative Defense—Duress*. The verdict forms do not address all available affirmative defenses. The parties may need to create their own verdict forms to fit the issues involved in the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of

action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

VF-303. Breach of Contract—Contract Formation at Issue

We answer the questions submitted to us as follows:

1. **Were the contract terms clear enough so that the parties could understand what each was required to do?**

   _____ Yes _____ No

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

2. **Did the parties agree to give each other something of value?**

   _____ Yes _____ No

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

3. **Did the parties agree to the terms of the contract?**

   _____ Yes _____ No

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

[4. Did [*name of plaintiff***] do all, or substantially all, of the significant things that the contract required [him/her/***nonbinary pronoun***/it] to do?**

_____ Yes _____ No

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

[5. Was [*name of plaintiff***] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/***nonbinary pronoun***/it] to do?**

_____ Yes _____ No

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

[6. Did all the conditions that were required for [*name of defendant***]'s performance occur?**

_____ Yes _____ No

If your answer to question 6 is yes, [skip question 7 and] answer question 8. If you answered no, [answer question 7 *if excuse_or waiver is at issue*/**stop here, answer no further questions, and have the presiding juror sign and date this form.]**

[7. Were the required conditions that did not occur [excused/waived]?

_____ Yes _____ No

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

8. [Did [*name of defendant***] fail to do something that the contract required [him/her/***nonbinary pronoun***/it] to do?**

_____ Yes _____ No]

[or]

[Did [*name of defendant***] do something that the contract prohibited [him/her/***nonbinary pronoun***/it] from doing?**

_____ Yes _____ No]

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

9. Was [*name of plaintiff***] harmed by [***name of defendant***]'s breach of contract?**

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

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

$_____]

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

$_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New October 2004; Revised December 2010, June 2015, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 302, *Contract Formation—Essential Factual Elements*, and CACI No. 303, *Breach of Contract—Essential Factual Elements*. The elements concerning the parties' legal capacity and legal purpose will likely not be issues for the jury. If the jury is needed to make a factual determination regarding these issues, appropriate questions may be added to this verdict form.

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

Optional questions 4 and 5 address acts that the plaintiff must have performed before the defendant's duty to perform is triggered. Include question 4 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) Include question 5 if the plaintiff claims that the plaintiff was excused from having to perform an otherwise required obligation.

Optional questions 6 and 7 address conditions precedent to the defendant's performance. Include question 6 if the occurrence of conditions for performance is at issue. (See CACI No. 322, *Occurrence of Agreed Condition Precedent*.) Include question 7 if the plaintiff alleges that conditions that did not occur were excused. The most common form of excuse is the defendant's waiver. (See CACI No. 323, *Waiver of Condition Precedent*; see also Restatement Second of Contracts, section 225, Comment b.) Waiver must be proved by clear and convincing evidence. (*DRG/ Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515].)

Note that questions 6 and 7 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused. The defendant's nonperformance is the first option for question 8. If the defendant alleges that its nonperformance was excused or waived by the plaintiff, an additional question on excuse on waiver should be included after question 8.

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question 10.

If specificity is not required, users do not have to itemize all the damages listed in question 10. The breakdown is optional depending on the circumstances.

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

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

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We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] and [*name of defendant*] enter into a contract?

_____ Yes _____ No

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

[2. Did [*name of plaintiff*] do all, or substantially all, of the significant things that the contract required [him/her/*nonbinary pronoun*/it] to do?

_____ Yes _____ No]

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

[3. Was [*name of plaintiff*] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/*nonbinary pronoun*/it] to do?

_____ Yes _____ No

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

[4. Did all the conditions that were required for [*name of defendant*]'s performance occur?

_____ Yes _____ No

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

[5. Were the required conditions that did not occur [excused/waived]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have

the presiding juror sign and date this form.]

6. **Did [***name of defendant***] [***specify conduct that plaintiff claims prevented plaintiff from receiving the benefits under the contract***]?**

   _____ **Yes** _____ **No**

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

7. **In [***insert specified conduct from question 6***], did [***name of defendant***] fail to act fairly and in good faith?**

   _____ **Yes** _____ **No**

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

8. **Was [***name of plaintiff***] harmed by [***name of defendant***]'s conduct?**

   _____ **Yes** _____ **No**

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

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

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

   $_____]

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

   $_____]

   TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

Faith and Fair Dealing—Essential Factual Elements.

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

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

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

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

If specificity is not required, users do not have to itemize the damages listed in question 9. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*. If counts for both breach of express contractual terms and breach of the implied covenant are alleged, this verdict form may be combined with CACI No. VF-300, *Breach of Contract*. Use VF-3920 to direct the jury to separately address the damages awarded on each count and to avoid the jury's awarding the same damages on both counts. (See *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [272 Cal.Rptr. 387].)

VF-305–VF-399. Reserved for Future Use

NEGLIGENCE

400. Negligence—Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed by [*name of defendant*]'s negligence. To establish this claim, [*name of plaintiff*] must prove all of the following:

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

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

Directions for Use

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph.

The word "harm" is used throughout these instructions, instead of terms like "loss," "injury," and "damage," because "harm" is all-purpose and suffices in their place.

Sources and Authority

- General Duty to Exercise Due Care. Civil Code section 1714(a).
- "Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112 [70 Cal.Rptr. 97, 443 P.2d 561].)
- " 'The elements of a cause of action for negligence are well established. They are "(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury." ' " (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917 [50 Cal.Rptr.2d 309, 911 P.2d 496].)
- "Breach is the failure to meet the standard of care." (*Coyle v. Historic Mission Inn Corp.* (2018) 24 Cal.App.5th 627, 643 [234 Cal.Rptr.3d 330].)
- "The element of causation requires there to be a connection between the defendant's breach and the plaintiff's injury." (*Coyle*, *supra*, 24 Cal.App.5th at p. 645.)
- " 'In most cases, courts have fixed no standard of care for tort liability more

precise than that of a reasonably prudent person under like circumstances.' This is because '[e]ach case presents different conditions and situations. What would be ordinary care in one case might be negligence in another.' " (*Coyle*, *supra*, 24 Cal.App.5th at pp. 639–640, internal citation omitted.)

- " ' "[I]t is the further function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform." [Citation.] [¶] The formulation of the standard of care is a question of law for the court. [Citations.] Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether the defendant's conduct has conformed to the standard. [Citations.]' " (*Regents of University of California v. Superior Court* (2018) 29 Cal.App.5th 890, 902–903 [240 Cal.Rptr.3d 675].)
- "The first element, duty, 'may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship.' " (*Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1128 [214 Cal.Rptr.3d 552].)
- "[T]he existence of a duty is a question of law for the court." (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rptr.2d 756, 927 P.2d 1260].)
- "In the *Rowland* [*Rowland, supra*, 69 Cal.2d at p. 113] decision, this court identified several considerations that, when balanced together, may justify a departure from the fundamental principle embodied in Civil Code section 1714: 'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.' As we have also explained, however, in the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where 'clearly supported by public policy.' " (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771 [122 Cal.Rptr.3d 313, 248 P.3d 1170], internal citations omitted.)
- "[T]he analysis of foreseeability for purposes of assessing the existence or scope of a duty is different, and more general, than it is for assessing whether any such duty was breached or whether a breach caused a plaintiff's injuries. '[I]n analyzing duty, the court's task " ' "is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the *category* of negligent conduct at issue is sufficiently likely to result in the *kind* of harm experienced that liability may appropriately be imposed on the negligent party." ' " 'The jury, by contrast, considers "foreseeability" in two more focused, fact-specific settings. First, the jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the jury's determination

of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury.' " (*Staats v. Vintner's Golf Club, LLC* (2018) 25 Cal.App.5th 826, 837 [236 Cal.Rptr.3d 236], original italics, internal citation omitted.)

- "A defendant does not owe a legal duty to protect against third party conduct, unless there exists a special relationship between the defendant and the plaintiff. In that circumstance, '[i]n addition to the special relationship . . . , there must also be evidence showing facts from which the trier of fact could reasonably infer that the [defendant] had prior *actual knowledge*, and thus *must have known*, of the offender's assaultive propensities. [Citation.]' In short, the third party's misconduct must be foreseeable to the defendant." (*Doe v. Los Angeles County Dept. of Children & Family Services* (2019) 37 Cal.App.5th 675, 682–683 [250 Cal.Rptr.3d 62], original italics.)
- "[T]he concept of foreseeability of risk of harm in determining whether a duty should be imposed is to be distinguished from the concept of ' "foreseeability" in two more focused, fact-specific settings' to be resolved by a trier of fact. 'First, the [trier of fact] may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the [trier of fact's] determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury.' " (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 488, fn. 8 [93 Cal.Rptr.3d 130], internal citation omitted.)
- "By making exceptions to Civil Code section 1714's general duty of ordinary care only when foreseeability and policy considerations justify a categorical no-duty rule, we preserve the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make. . . . While the court deciding duty assesses the foreseeability of injury from 'the category of negligent conduct at issue,' if the defendant did owe the plaintiff a duty of ordinary care the jury 'may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place.' An approach that instead focused the duty inquiry on case-specific facts would tend to 'eliminate the role of the jury in negligence cases, transforming the question of whether a defendant breached the duty of care under the facts of a particular case into a legal issue to be decided by the court . . . .' " (*Cabral, supra*, 51 Cal.4th at pp. 772–773, original italics, internal citations omitted.)
- "[W]hile foreseeability with respect to duty is determined by focusing on the general character of the event and inquiring whether such event is 'likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct', foreseeability in evaluating negligence and causation requires a 'more focused, fact-specific' inquiry that takes into account a particular plaintiff's injuries and the particular defendant's conduct." (*Laabs v. Southern California Edison Company* (2009) 175 Cal.App.4th 1260, 1273 [97 Cal.Rptr.3d 241], internal citation omitted.)

- "The issue here is whether [defendant]—separate from other legal and practical reasons it had to prevent injury of any kind to the public—had a tort duty to guard against negligently causing what we and others have called 'purely economic loss[es].' We use that term as a shorthand for 'pecuniary or commercial loss that does not arise from actionable physical, emotional or reputational injury to persons or physical injury to property.' And although [defendant] of course had a tort duty to guard against the latter kinds of injury, we conclude it had no tort duty to guard against purely economic losses." (*Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 398 [247 Cal.Rptr.3d 632, 441 P.3d 881], internal citations omitted.)
- "[Defendant] relies on the rule that a person has no general duty to safeguard another from harm or to rescue an injured person. But that rule has no application where the person has caused another to be put in a position of peril of a kind from which the injuries occurred." (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 883 [174 Cal.Rptr.3d 339].)
- "A defendant may owe a duty to protect the plaintiff from third party conduct if the defendant has a special relationship with either the plaintiff or the third party." (*University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 440 [241 Cal.Rptr.3d 616].)
- " 'Typically, in special relationships, "the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare. [Citation.]" [Citation.] A defendant who is found to have a "special relationship" with another may owe an affirmative duty to protect the other person from foreseeable harm, or to come to the aid of another in the face of ongoing harm or medical emergency.' " (*Carlsen, supra*, 227 Cal.App.4th at p. 893.)
- "We agree that the same factors we discussed in *Giraldo* [*v. Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231] apply to the relationship between a law enforcement officer and arrestee: Once in custody, an arrestee is vulnerable, dependent, subject to the control of the officer and unable to attend to his or her own medical needs. Due to this special relationship, the officer owes a duty of reasonable care to the arrestee." (*Frausto v. Dept. of California Highway Patrol* (2020) 53 Cal.App.5th 973, 993 [267 Cal.Rptr.3d 889].)
- "Generally, a greater degree of care is owed to children because of their lack of capacity to appreciate risks and avoid danger. [Citation.] Consequently, California courts have frequently recognized special relationships between children and their adult caregivers that give rise to a duty to prevent harms caused by the intentional or criminal conduct of third parties." (*Doe, supra,* 8 Cal.App.5th at p. 1129, internal citations omitted.)
- "[P]ostsecondary schools *do* have a special relationship with students while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services." (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 624–625 [230 Cal.Rptr.3d 415, 413 P.3d 656], original italics.)

- "[A] university's duty to protect students from foreseeable acts of violence is governed by the ordinary negligence standard of care, namely 'that degree of care which people of ordinarily prudent behavior could be reasonably expected to exercise under the circumstances.' " (*Regents of University of California, supra*, 29 Cal.App.5th at p. 904.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1138, 1450–1460, 1484–1491

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.4–1.18

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.02, 1.12, Ch. 2, *Causation*, § 2.02, Ch. 3, *Proof of Negligence*, § 3.01 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.10 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.10, 165.20 (Matthew Bender)

401. Basic Standard of Care

Negligence is the failure to use reasonable care to prevent harm to oneself or to others.

A person can be negligent by acting or by failing to act. A person is negligent if that person does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.

You must decide how a reasonably careful person would have acted in [*name of plaintiff/defendant***]'s situation.**

New September 2003; Revised May 2020

Sources and Authority

- "The formulation of the standard of care is a question of law for the court. Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether a party's conduct has conformed to the standard." (*Ramirez v. Plough, Inc* (1993) 6 Cal.4th 539, 546 [25 Cal.Rptr.2d 97, 863 P.2d 167], internal citations omitted.)
- Restatement Second of Torts, section 282, defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."
- Restatement Second of Torts, section 283, provides: "Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."
- The California Supreme Court has stated: "Because application of [due care] is inherently situational, the amount of care deemed reasonable in any particular case will vary, while at the same time the standard of conduct itself remains constant, i.e., due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances. [Citations]." (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997 [35 Cal.Rptr.2d 685, 884 P.2d 142]; see also *Tucker v. Lombardo* (1956) 47 Cal.2d 457, 464 [303 P.2d 1041].)
- The proper conduct of a reasonable person in a particular situation may become settled by judicial decision or may be established by statute or administrative regulation. (*Ramirez, supra,* 6 Cal.4th at p. 547.) (See CACI Nos. 418 to 421 on negligence per se.)
- Negligence can be found in the doing of an act, as well as in the failure to do an act. (Rest.2d Torts, § 284.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 998, 999

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.3

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.01, 1.02, 1.30 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.31 (Matthew Bender)

402. Standard of Care for Minors

[*Name of plaintiff/defendant*] is a child who was _____ years old at the time of the incident. Children are not held to the same standards of behavior as adults. A child is required to use the amount of care that a reasonably careful child of the same age, intelligence, knowledge, and experience would use in that same situation.

New September 2003

Sources and Authority

- "Children are judged by a special subjective standard. . . . They are only required to exercise that degree of care expected of children of like age, experience and intelligence." (*Daun v. Truax* (1961) 56 Cal.2d 647, 654 [16 Cal.Rptr. 351, 365 P.2d 407].)
- If the negligence is negligence per se, violation of a statute will create a presumption of negligence that "may be rebutted by a showing that the child, in spite of the violation of the statute, exercised the care that children of his maturity, intelligence and capacity ordinarily exercise under similar circumstances." (*Daun, supra,* 56 Cal.2d at p. 655.)
- Restatement Second of Torts, section 283A, provides: "If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances."
- The standard of care for minors is not the standard of an "average" child of the same age; the standard is subjective, based on the conduct of a child of the same age, intelligence, and experience as the minor plaintiff or defendant. (*Cummings v. County of Los Angeles* (1961) 56 Cal.2d 258, 263 [14 Cal.Rptr. 668, 363 P.2d 900].)
- An exception to this reduced standard of care may be found if the minor was engaging in an adult activity, such as driving. (*Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 732 [47 Cal.Rptr. 904, 408 P.2d 360]; *Neudeck v. Bransten* (1965) 233 Cal.App.2d 17, 21 [43 Cal.Rptr. 250]; see also Rest.2d Torts, § 283A, com. c.)
- Children under the age of five are incapable of contributory negligence as a matter of law. (*Christian v. Goodwin* (1961) 188 Cal.App.2d 650, 655 [10 Cal.Rptr. 507].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1132–1134

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.19

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.31

(Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.121, 165.190 (Matthew Bender)

31 California Legal Forms, Ch. 100A, *Personal Affairs of Minors* (Matthew Bender)

403. Standard of Care for Person with a Physical Disability

A person with a physical disability is required to use the amount of care that a reasonably careful person who has the same physical disability would use in the same situation.

New September 2003; Revised May 2023

Directions for Use

By "same" disability, this instruction is referring to the effect of the disability, not the cause.

Sources and Authority

- Liability of Person of "Unsound Mind." Civil Code section 41.
- "[A] person [whose faculties are impaired] is bound to use that care which a person of ordinary prudence with faculties so impaired would use in the same circumstances." (*Conjorsky v. Murray* (1955) 135 Cal.App.2d 478, 482 [287 P.2d 505].)
- "The jury was properly instructed that negligence is failure to use ordinary care and that ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs. A person with faculties impaired is held to the same degree of care and no higher. He is bound to use that care which a person of ordinary prudence with faculties so impaired would use in the same circumstances." (*Jones v. Bayley* (1942) 49 Cal.App.2d 647, 654 [122 P.2d 293].)
- "We conclude sudden mental illness may not be posed as a defense to harmful conduct and that the harm caused by such individual's behavior shall be judged on the objective reasonable person standard in the context of a negligence action as expressed in Civil Code section 41." (*Bashi v. Wodarz* (1996) 45 Cal.App.4th 1314, 1323 [53 Cal.Rptr.2d 635].)
- Restatement Second of Torts, section 283B, provides: "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances."
- Restatement Second of Torts, section 283C, provides: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability."

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.21.2

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

404. Intoxication

A person is not necessarily negligent just because that person used alcohol [or drugs]. However, people who drink alcohol [or take drugs] must act just as carefully as those who do not.

New September 2003; Revised May 2020

Directions for Use

This instruction should be given only if there is evidence of alcohol or drug consumption. This instruction is not intended for situations in which intoxication is grounds for a negligence per se instruction (e.g., driving under the influence).

Sources and Authority

- Mere consumption of alcohol is not negligence in and of itself: "The fact that a person when injured was intoxicated is not in itself evidence of contributory negligence, but it is a circumstance to be considered in determining whether his intoxication contributed to his injury." (*Coakley v. Ajuria* (1930) 209 Cal. 745, 752 [290 P. 33].)
- Intoxication is not generally an excuse for failure to comply with the reasonable-person standard. (*Cloud v. Market Street Railway Co.* (1946) 74 Cal.App.2d 92, 97 [168 P.2d 191].)
- Intoxication is not negligence as a matter of law, but it is a circumstance for the jury to consider in determining whether such intoxication was a contributing cause of an injury and is also a question of fact for the jury. (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 217 [57 Cal.Rptr. 319]; *Barr v. Scott* (1955) 134 Cal.App.2d 823, 827–828 [286 P.2d 552]; see also *Emery v. Los Angeles Ry. Corp.* (1943) 61 Cal.App.2d 455, 461 [143 P.2d 112].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1477

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, §§ 20.02, 20.04 (Matthew Bender)

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

405. Comparative Fault of Plaintiff

[*Name of defendant*] claims that [*name of plaintiff*]'s own negligence contributed to [his/her/*nonbinary pronoun*] harm. To succeed on this claim, [*name of defendant*] must prove both of the following:

1. **That [*name of plaintiff*] was negligent; and**
2. **That [*name of plaintiff*]'s negligence was a substantial factor in causing [his/her/*nonbinary pronoun*] harm.**

If [*name of defendant*] proves the above, [*name of plaintiff*]'s damages are reduced by your determination of the percentage of [*name of plaintiff*]'s responsibility. I will calculate the actual reduction.

New September 2003; Revised December 2009

Directions for Use

This instruction should not be given absent substantial evidence that plaintiff was negligent. (*Drust v. Drust* (1980) 113 Cal.App.3d 1, 6 [169 Cal.Rptr. 750].)

If there are multiple defendants or alleged nondefendant tortfeasors, also give CACI No. 406, *Apportionment of Responsibility*.

Sources and Authority

- "[W]e conclude that: . . . The doctrine of comparative negligence is preferable to the 'all-or-nothing' doctrine of contributory negligence from the point of view of logic, practical experience, and fundamental justice; . . . ." (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 808 [119 Cal.Rptr. 858, 532 P.2d 1226].)
- "The comparative fault doctrine 'is designed to permit the trier of fact to consider all relevant criteria in apportioning liability. The doctrine "is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an "equitable apportionment or allocation of loss.' [Citation.]" (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1285 [164 Cal.Rptr.3d 112].)
- "Where contributory negligence is asserted as a defense, and where there is 'some evidence of a substantial character' to support a finding that such negligence occurred, it is prejudicial error to refuse an instruction on this issue, since defendant is thereby denied a basic theory of his defense." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548 [138 Cal.Rptr. 705, 564 P.2d 857].)
- "The use by the trial court of the phrase 'contributory negligence' in instructing 'on the concept of comparative negligence is innocuous. *Li v. Yellow Cab Co.* [citation] abolished the legal doctrine, but not the phrase or the concept of

'contributory negligence.' A claimant's negligence contributing causally to his own injury may be considered now not as a bar to his recovery, but merely as a factor to be considered in measuring the amount thereof." (*Bradfield v. Trans World Airlines, Inc.* (1979) 88 Cal.App.3d 681, 686 [152 Cal.Rptr. 172].)

- "Generally, a defendant has the burden of establishing that some nonzero percentage of fault is properly attributed to the plaintiff, other defendants, or nonparties to the action." (*Pfeifer, supra*, 220 Cal.App.4th at p. 1285.)
- "[W]ithin the comparative fault system, when an employer is liable solely on a theory of respondeat superior, 'the employer's share of liability for the plaintiff's damages corresponds to the share of fault that the jury allocates to the employee.' " (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1261 [218 Cal.Rptr.3d 664].)
- "[P]retreatment negligence by the patient does not warrant a jury instruction on contributory or comparative negligence. This view is supported by comment m to section 7 of the Restatement Third of Torts: Apportionment of Liability, which states: '[I]n a case involving negligent rendition of a service, including medical services, a factfinder does not consider any plaintiff's conduct that created the condition the service was employed to remedy.' " (*Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606, 632 [183 Cal.Rptr.3d 59].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1138, 1450–1460, 1484–1491

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.41–1.45

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.04 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.91 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.170 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.380 (Matthew Bender)

406. Apportionment of Responsibility

[[*Name of defendant***] claims that the [negligence/fault] of [***insert name(s) or description(s) of nonparty tortfeasor(s)***] [also] contributed to [***name of plaintiff***]'s harm. To succeed on this claim, [***name of defendant***] must prove both of the following:**

1. **That [***insert name(s) or description(s) of nonparty tortfeasor(s)***] [was/were] [negligent/at fault]; and**
2. **That the [negligence/fault] of [***insert name(s) or description(s) of nonparty tortfeasor(s)***] was a substantial factor in causing [name of plaintiff]'s harm.]**

If you find that the [negligence/fault] of more than one person including [*name of defendant***] [and] [[***name of plaintiff***]/ [and] [***name(s) or description(s) of nonparty tortfeasor(s)***]] was a substantial factor in causing [***name of plaintiff***]'s harm, you must then decide how much responsibility each has by assigning percentages of responsibility to each person listed on the verdict form. The percentages must total 100 percent.**

You will make a separate finding of [*name of plaintiff***]'s total damages, if any. In determining an amount of damages, you should not consider any person's assigned percentage of responsibility.**

["Person" can mean an individual or a business entity.]

New September 2003; Revised June 2006, December 2007, December 2009, June 2011

Directions for Use

This instruction is designed to assist the jury in completing CACI No. VF-402, *Negligence—Fault of Plaintiff and Others at Issue,* which must be given in a multiple-tortfeasor case to determine comparative fault. VF-402 is designed to compare the conduct of all defendants, the conduct of the plaintiff, and the conduct of any nonparty tortfeasors.

Throughout, select "fault" if there is a need to allocate responsibility between tortfeasors whose alleged liability is based on conduct other than negligence, e.g., strict products liability.

Include the first paragraph if the defendant has presented evidence that the conduct of one or more nonparties contributed to the plaintiff's harm. (See *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 33 [117 Cal.Rptr.3d 791] [defendant has burden to establish concurrent or alternate causes].) "Nonparties" include the universe of tortfeasors who are not present at trial, including defendants who settled before trial and nonjoined alleged tortfeasors. (*Dafonte v. Up-Right* (1992) 2 Cal.4th

593, 603 [7 Cal.Rptr.2d 238, 828 P.2d 140].) Include "also" if the defendant concedes some degree of liability.

If the plaintiff's comparative fault is also at issue, give CACI No. 405, *Comparative Fault of Plaintiff*, in addition to this instruction.

Include the last paragraph if any of the defendants or others alleged to have contributed to the plaintiff's harm is not an individual.

Sources and Authority

- Proposition 51. Civil Code section 1431.2.
- "[W]e hold that after *Li*, a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only 'in proportion to the amount of negligence attributable to the person recovering.' " (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 590 [146 Cal.Rptr. 182, 578 P.2d 899], citing *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226].)
- "In light of *Li*, however, we think that the long-recognized common law equitable indemnity doctrine should be modified to permit, in appropriate cases, a right of partial indemnity, under which liability among multiple tortfeasors may be apportioned on a comparative negligence basis. . . . Such a doctrine conforms to *Li's* objective of establishing 'a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.' " (*American Motorcycle Assn., supra*, 20 Cal.3d at p. 583.)
- "[W]e hold that section 1431.2, subdivision (a), does not authorize a reduction in the liability of intentional tortfeasors for noneconomic damages based on the extent to which the negligence of other actors—including the plaintiffs, any codefendants, injured parties, and nonparties—contributed to the injuries in question." (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 29 [267 Cal.Rptr.3d 203, 471 P.3d 329].)
- "The comparative fault doctrine 'is designed to permit the trier of fact to consider all relevant criteria in apportioning liability. The doctrine "is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an 'equitable apportionment or allocation of loss.' " [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1285 [164 Cal.Rptr.3d 112].)
- " 'Generally, a defendant has the burden of establishing that some nonzero percentage of fault is properly attributed to the plaintiff, other defendants, or nonparties to the action.' More specifically, a defendant has 'the burden to establish concurrent or alternate causes by proving: that [the plaintiff] was exposed to defective asbestos-containing products of other companies; that the defective designs of the other companies' products were legal causes of the

plaintiffs' injuries; and the percentage of legal cause attributable to the other companies.' " (*Phipps v. Copeland Corp. LLC* (2021) 64 Cal.App.5th 319, 332 [278 Cal.Rptr.3d 688], internal citations omitted.)

- "[A] 'defendant['s]' liability for noneconomic damages cannot exceed his or her proportionate share of fault *as compared with all fault responsible for the plaintiff's injuries*, not merely that of 'defendant[s]' present in the lawsuit." (*Dafonte, supra,* 2 Cal.4th at p. 603, original italics.)
- "The proposition that a jury may apportion liability to a nonparty has been adopted in the Judicial Council of California Civil Jury Instructions (CACI) special verdict form applicable to negligence cases. (See CACI Verdict Form 402 and CACI Instruction No. 406 ['[Verdict Form] 402 is designed to compare the conduct of all defendants, the conduct of the plaintiff, and the conduct of any nonparty tortfeasors. [¶] . . . [¶] . . . "Nonparties" include the universe of tortfeasors who are not present at trial, including defendants who settled before trial and nonjoined alleged tortfeasors.']." (*Vollaro v. Lispi* (2014) 224 Cal.App.4th 93, 100 fn. 5 [168 Cal.Rptr.3d 323], internal citation omitted.)
- "[U]nder Proposition 51, fault will be allocated to an entity that is immune from *paying* for its tortious acts, but will not be allocated to an entity that is not a tortfeasor, that is, one whose actions have been declared not to be tortious." (*Taylor v. John Crane, Inc.* (2003) 113 Cal.App.4th 1063, 1071 [6 Cal.Rptr.3d 695], original italics.)
- "A defendant bears the burden of proving affirmative defenses and indemnity cross-claims. Apportionment of noneconomic damages is a form of equitable indemnity in which a defendant may reduce his or her damages by establishing others are also at fault for the plaintiff's injuries. Placing the burden on defendant to prove fault as to nonparty tortfeasors is not unjustified or unduly onerous." (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 369 [129 Cal.Rptr.2d 336].)
- "[T]here must be substantial evidence that a nonparty is at fault before damages can be apportioned to that nonparty." (*Scott v. C. R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 785 [180 Cal.Rptr.3d 479].)
- "When a defendant is liable *only* by reason of a derivative nondelegable duty arising from his status as employer or landlord or vehicle owner or coconspirator, or from his role in the chain of distribution of a single product in a products liability action, his liability is *secondary* (vicarious) to that of the actor and he is not entitled to the benefits of Proposition 51." (*Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396, 400 [71 Cal.Rptr.3d 518], original italics, internal citations omitted.)
- "Under the doctrine of strict products liability, all defendants in the chain of distribution are jointly and severally liable, meaning that each defendant can be held liable to the plaintiff for all damages the defective product caused." (*Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1010 [169 Cal.Rptr.3d 208].)

- Proposition 51 does not apply in a strict products liability action when a single defective product produced a single injury to the plaintiff. That is, all the defendants in the stream of commerce of that single product remain jointly and severally liable. . . . [I]n strict products liability asbestos exposure actions, . . . Proposition 51 applies when there are multiple products that caused the plaintiff's injuries and there is evidence that provides a basis to allocate fault for noneconomic damages between the defective products." (*Romine*, *supra*, 224 Cal.App.4th at pp. 1011–1012, internal citations omitted.)
- "[T]he jury found that defendants are parties to a joint venture. The incidents of a joint venture are in all important respects the same as those of a partnership. One such incident of partnership is that all partners are jointly and severally liable for partnership obligations, irrespective of their individual partnership interests. Because joint and several liability arises from the partnership or joint venture, Civil Code section 1431.2 is not applicable." (*Myrick v. Mastagni* (2010) 185 Cal.App.4th 1082, 1091 [111 Cal.Rptr.3d 165], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 156, 158–163, 167, 168, 171, 172, 176

Haning et al., California Practice Guide: Personal Injury, Ch. 9-M, *Verdicts And Judgment*, ¶ 9:662.3 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.52–1.59

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, §§ 4.04–4.03, 4.07–4.08 (Matthew Bender)

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.03 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.91 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.14A, Ch. 9, *Damages*, § 9.01 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution*, § 300.61 (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.04 et seq. (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.284, 165.380 (Matthew Bender)

407. Comparative Fault of Decedent

[*Name of defendant*] claims that [*name of decedent*]'s own negligence contributed to [his/her/*nonbinary pronoun*] death. To succeed on this claim, [*name of defendant*] must prove both of the following:

1. **That [*name of decedent*] was negligent; and**
2. **That [*name of decedent*]'s negligence was a substantial factor in causing [his/her/*nonbinary pronoun*] death.**

If [*name of defendant*] proves the above, [*name of plaintiff*]'s damages are reduced by your determination of the percentage of [*name of decedent*]'s responsibility. I will calculate the actual reduction.

New September 2003; Revised December 2009

Directions for Use

This instruction should not be given absent evidence that the decedent was negligent. (*Drust v. Drust* (1980) 113 Cal.App.3d 1, 6 [169 Cal.Rptr. 750].)

Sources and Authority

- "[P]rinciples of comparative fault and equitable indemnification support an apportionment of liability among those responsible for the loss, including the decedent, whether it be for personal injury or wrongful death." (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 285 [87 Cal.Rptr.2d 222, 980 P.2d 927].)
- "[I]n wrongful death actions, the fault of the decedent is attributable to the surviving heirs whose recovery must be offset by the same percentage. [Citation.]" (*Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1395 [273 Cal.Rptr. 231].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1560

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.07 (Matthew Bender)

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, § 55.05 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions,* § 181.12 (Matthew Bender)

6 California Points and Authorities, Ch. 66, *Death and Survival Actions*, § 66.20 et seq. (Matthew Bender)

408–410. Reserved for Future Use

411. Reliance on Good Conduct of Others

Every person has a right to expect that every other person will use reasonable care [and will not violate the law], unless that person knows, or should know, that the other person will not use reasonable care [or will violate the law].

New September 2003; Revised May 2020

Directions for Use

This instruction should not be used if the only other actor is the plaintiff and there is no evidence that the plaintiff acted unreasonably. (*Springer v. Reimers* (1970) 4 Cal.App.3d 325, 336 [84 Cal.Rptr. 486].)

Sources and Authority

- "[E]very person has a right to presume that every other person will perform his duty and obey the law and in the absence of reasonable grounds to think otherwise, it is not negligence to assume that he is not exposed to danger which could come to him only from violation of law or duty by such other person." (*Celli v. Sports Car Club of America, Inc.* (1972) 29 Cal.App.3d 511, 523 [105 Cal.Rptr. 904].)
- "However, this rule does not extend to a person who is not exercising ordinary care, nor to one who knows or, by the exercise of such care, would know that the law is not being observed." (*Malone v. Perryman* (1964) 226 Cal.App.2d 227, 234 [37 Cal.Rptr. 864].)
- "[CACI No. 411] is a pattern jury instruction designed for use in civil negligence cases involving a plaintiff suing a defendant for failing to prevent harm caused by a third party. The principle it espouses is essentially that a defendant will not be liable for harm caused by a third party's negligent or criminal conduct, unless the third party's conduct was foreseeable . . . ." (*People v. Elder* (2017) 11 Cal.App.5th 123, 135 [217 Cal.Rptr.3d 493].)
- "[Defendant], if exercising ordinary care himself, was entitled to assume that plaintiff's employer had furnished to plaintiff a safe place within which to work and he could further assume that the plaintiff would reasonably use the protection afforded to him by the employer." (*Tucker v. Lombardo* (1956) 47 Cal.2d 457, 467 [303 P.2d 1041] [approved language in jury instruction].)
- "If there is evidence on both sides of the question as to whether the conduct of a third person is or is not foreseeable, the jury instruction is correct. Its application or effect will depend on the finding of the jury as to whether the act of the third person should have been anticipated or foreseen." (*Whitton v. State of California* (1979) 98 Cal.App.3d 235, 246 [159 Cal.Rptr. 405].)
- "If the likelihood that a third person may act in a particular manner is the hazard

or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." (*Bigbee v. Pacific Telephone and Telegraph Co.* (1983) 34 Cal.3d 49, 58 [192 Cal.Rptr. 857, 665 P.2d 947]; see also Rest.2d Torts, § 449.)

- "Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678 [25 Cal.Rptr.2d 137, 863 P.2d 207], disapproved on other grounds in *Reid v. Google Inc.* (2010) 50 Cal.4th 512, 527 fn. 5 [113 Cal.Rptr.3d 327, 235 P.3d 988].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1468–1470

1 Levy et al., California Torts, Ch. 1, *Negligence*, § 1.02 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, §§ 90.88, 90.90 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.21 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.51 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.120 et seq. (Matthew Bender)

412. Duty of Care Owed Children

An adult must anticipate the ordinary behavior of children. An adult must be more careful when dealing with children than with other adults.

New September 2003

Directions for Use

This instruction is to be used where the plaintiff seeks damages for injury to a minor.

For standard of care for minors, see CACI No. 402, *Standard of Care for Minors*.

Sources and Authority

- " 'A child of immature years is expected to exercise only such care as pertains to childhood, and all persons dealing with such a child are chargeable with such knowledge. As a result, one dealing with children is bound to exercise a greater amount of caution than he would were he dealing with an adult.' [Citations]." *(Kataoka v. May Dept. Stores Co.* (1943) 60 Cal.App.2d 177, 182–183 [140 P.2d 467].)
- *Schwartz v. Helms Bakery, Ltd.* (1967) 67 Cal.2d 232, 240, 243 [60 Cal.Rptr. 510, 430 P.2d 68]; *Hilyar v. Union Ice Co.* (1955) 45 Cal.2d 30, 37 [286 P.2d 21].
- "A greater degree of care is generally owed to children because of their lack of capacity to appreciate risks and to avoid danger." (*McDaniel v. Sunset Manor Co*. (1990) 220 Cal.App.3d 1, 7 [269 Cal.Rptr. 196], citing *Casas v. Maulhardt Buick, Inc.* (1968) 258 Cal.App.2d 692, 697–700 [66 Cal.Rptr. 44].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1136, 1137

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.19

1 Levy et al., California Torts, Ch. 1, *Negligence*, § 1.31 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.88 (Matthew Bender)

California Products Liability Actions, Ch. 10, *Trial*, § 10.05 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 364, *Minors* (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.120 (Matthew Bender)

413. Custom or Practice

You may consider customs or practices in the community in deciding whether [*name of plaintiff/defendant*] acted reasonably. Customs and practices do not necessarily determine what a reasonable person would have done in [*name of plaintiff/defendant*]'s situation. They are only factors for you to consider.

Following a custom or practice does not excuse conduct that is unreasonable. You should consider whether the custom or practice itself is reasonable.

New September 2003

Directions for Use

An instruction stating that evidence of custom is not controlling on the issue of standard of care should not be given in professional malpractice cases in which expert testimony is used to set the standard of care. (See *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 277 [7 Cal.Rptr.2d 101].) The instruction may be used if the standard of care is within common knowledge. (See *Leonard v. Watsonville Community Hospital* (1956) 47 Cal.2d 509, 519 [305 P.2d 36].)

This instruction is also inappropriate in cases involving strict liability (*Titus v. Bethlehem Steel Corp.* (1979) 91 Cal.App.3d 372, 378 [154 Cal.Rptr. 122]) or cases involving negligence in the use of public roads (*Shuff v. Irwindale Trucking Co.* (1976) 62 Cal.App.3d 180, 187 [132 Cal.Rptr. 897]).

Sources and Authority

- Evidence of custom and practice is relevant, but not conclusive, on the issue of the standard of care in cases of ordinary negligence. (*Holt v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 427, 435 [218 Cal.Rptr. 1].)
- Restatement Second of Torts, section 295A, provides: "In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them."

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1029, 1030

1 Levy et al., California Torts, Ch. 1, *Negligence*, § 1.30, Ch. 3, *Proof of Negligence*, § 3.33 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, §§ 2.11, 2.21 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.31 (Matthew Bender)

414. Amount of Caution Required in Dangerous Situations

People must be extremely careful when they deal with dangerous items or participate in dangerous activities. [*Insert type of dangerous item or activity***] is dangerous in and of itself. The risk of harm is so great that the failure to use extreme caution is negligence.**

New September 2003; Revised May 2020

Directions for Use

An instruction on the standard of care for extremely dangerous activities is proper only "in situations where the nature of the activity or substance is so inherently dangerous or complex, as such, that the hazard persists despite the exercise of ordinary care." (*Benwell v. Dean* (1964) 227 Cal.App.2d 226, 233 [38 Cal.Rptr. 542]; see also *Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 544 [67 Cal.Rptr. 775, 439 P.2d 903].)

This instruction should not be given at the same time as an instruction pertaining to standard of care for employees who have to work in dangerous situations. In appropriate cases, juries may be instructed that a person of ordinary prudence is required to exercise extreme caution when engaged in a dangerous activity. (*Borenkraut v. Whitten* (1961) 56 Cal.2d 538, 544–546 [15 Cal.Rptr. 635, 364 P.2d 467].) However, this rule does not apply when a person's lawful employment requires that person to work in a dangerous situation. (*McDonald v. City of Oakland* (1967) 255 Cal.App.2d 816, 827 [63 Cal.Rptr. 593].) This is because "reasonable [employees] who are paid to give at least part of their attention to their job" may not be as able to maintain the same standards for personal safety as nonemployees. (*Young v. Aro Corp.* (1974) 36 Cal.App.3d 240, 245 [111 Cal.Rptr. 535].) (See CACI No. 415, *Employee Required to Work in Dangerous Situations*.)

Sources and Authority

- Even a slight deviation from the standards of care will constitute negligence in cases involving dangerous instrumentalities. (*Borenkraut, supra,* 56 Cal.2d at p. 545.)
- Dangerous instrumentalities include fire, firearms, explosive or highly inflammable materials, and corrosive or otherwise dangerous or noxious fluids. (*Warner v. Santa Catalina Island Co.* (1955) 44 Cal.2d 310, 317 [282 P.2d 12].)
- In *Menchaca*, the Court held that "[d]riving a motor vehicle may be sufficiently dangerous to warrant special instructions, but it is not so hazardous that it always requires 'extreme caution.' " (*Menchaca, supra,* 68 Cal.2d at p. 544.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1050–1054

1 Levy et al., California Torts, Ch. 1, *Negligence*, §§ 1.02, 1.30 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.14 (Matthew Bender)

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

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

415. Employee Required to Work in Dangerous Situations

An employee required to work under dangerous conditions must use the amount of care for [his/her/*nonbinary pronoun*] own safety that a reasonably careful employee would use under the same conditions.

In deciding whether [*name of plaintiff*] was negligent, you should consider how much attention [his/her/*nonbinary pronoun*] work demanded. You should also consider whether [*name of plaintiff*]'s job required [him/her/*nonbinary pronoun*] to take risks that a reasonably careful person would not normally take under ordinary circumstances.

New September 2003

Directions for Use

This type of instruction should not be given in cases involving freeway collisions between private and commercial vehicles. (*Shuff v. Irwindale Trucking Co.* (1976) 62 Cal.App.3d 180, 187 [132 Cal.Rptr. 897].)

An instruction on this principle is "aimed at situations where the employment conditions lessen the plaintiff's ability to take precautions." (*Von Beltz v. Stuntman, Inc.* (1989) 207 Cal.App.3d 1467, 1485 [255 Cal.Rptr. 755].) It does not apply where the plaintiff has ample opportunity to consider various precautions (*ibid.*) or when employees act pursuant to choice rather than necessity. (*Roberts v. Guillory* (1972) 25 Cal.App.3d 859, 861–862].)

Sources and Authority

- This type of instruction "soften[ed] the impact of instructing on the issue of contributory negligence" (*Young v. Aro Corp.* (1974) 36 Cal.App.3d 240, 244 [111 Cal.Rptr. 535]) at a time when contributory negligence was a complete bar to a plaintiff's recovery. The instruction may be given in cases involving comparative fault. (See, e.g., *Johnson v. Tosco Corp.* (1991) 1 Cal.App.4th 123, 136–137 [1 Cal.Rptr.2d 747].)
- "It has long been recognized that 'where a person must work in a position of possible danger the amount of care which he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case.' [Citations]." (*Austin v. Riverside Portland Cement Co.* (1955) 44 Cal.2d 225, 239 [282 P.2d 69].)
- "Considered in the light of the realities of his working life, the laborer's duty may become considerably restricted in scope. In some instances he may find himself powerless to abandon the task at hand with impunity whenever he senses a possible danger; in others, he may be uncertain as to which person has supervision of the job or control of the place of employment, and therefore unsure as to whom he should direct his complaint; in still others, having been

encouraged to continue working under conditions where danger lurks but has not materialized, he may be baffled in making an on-the-spot decision as to the imminence of harm. All of these factors enter into a determination whether his conduct falls below a standard of due care." (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 501 [102 Cal.Rptr. 795, 498 P.2d 1043], citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1484

2 Wilcox, California Employment Law, Ch. 30, Employer's Tort Liability to Third Parties for Conduct of Employees, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.14 (Matthew Bender)

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

416. Amount of Caution Required in Transmitting Electric Power

People and companies must be very careful in constructing, insulating, inspecting, maintaining, and repairing power lines and transmission equipment at all places where it is reasonably probable that they will cause harm to persons or property.

New September 2003

Directions for Use

The cases have crafted a specific standard of care for the construction and maintenance of power lines, and juries must be instructed on this standard upon request. (*Scally v. Pacific Gas and Electric Co.* (1972) 23 Cal.App.3d 806, 816 [100 Cal.Rptr. 501].)

Sources and Authority

- Electric power lines are considered dangerous instrumentalities. (*Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 525 [159 P.2d 931].)
- The requirement to insulate wires applies to only those wires that may come into contact with people or property: "While an electric company is not under an absolute duty to insulate or make the wires safe in any particular manner, it does have a duty to make the wires safe under all the exigencies created by the surrounding circumstances. The duty of an electric company is alternative, i.e., either to insulate the wires or to so locate them to make them comparatively harmless." (*Scally, supra,* 23 Cal.App.3d at pp. 815–816.)
- *Dunn v. Pacific Gas and Electric Co.* (1954) 43 Cal.2d 265, 272–274 [272 P.2d 745]; *McKenzie v. Pacific Gas & Electric Co.* (1962) 200 Cal.App.2d 731, 736 [19 Cal.Rptr. 628] (disapproved on another ground in *Di Mare v. Cresci* (1962) 58 Cal.2d 292, 299 [23 Cal.Rptr. 772, 373 P.2d 860].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1051

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 7.1–7.12

23 California Forms of Pleading and Practice, Ch. 277, *Gas and Electricity* (Matthew Bender)

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

1. **That [***name of plaintiff***]'s harm ordinarily would not have happened unless someone was negligent;**
2. **That the harm was caused by something that only [***name of defendant***] controlled; and**
3. **That [***name of plaintiff***]'s voluntary actions did not cause or contribute to the event[s] that harmed [him/her/***nonbinary pronoun***].**

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

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

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

New September 2003; Revised June 2011, December 2011

Directions for Use

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

If the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find that the accident resulted from the defendant's negligence unless the defendant comes forward with evidence that would support a contrary

finding. (See Cal. Law Revision Com. com. to Evid. Code, § 646.) The last two paragraphs of the instruction assume that the defendant has presented evidence that would support a finding that the defendant was not negligent or that any negligence on the defendant's part was not a proximate cause of the accident. In this case, the presumption drops out, and the plaintiff must then prove the elements of negligence without the benefit of the presumption of res ipsa loquitur. (See *Howe, supra*, 189 Cal.App.4th at pp. 1163–1164; see also Evid. Code, § 646(c).)

Sources and Authority

- Res Ipsa Loquitur. Evidence Code section 646(c).
- Presumption Affecting Burden of Producing Evidence. Evidence Code section 604.
- "In California, the doctrine of res ipsa loquitur is defined by statute as 'a presumption affecting the burden of producing evidence.' The presumption arises when the evidence satisfies three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. The presumed fact, in this context, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant . . . .' If the defendant introduces 'evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,' the trier of fact determines whether defendant was negligent without regard to the presumption, simply by weighing the evidence." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825–826 [15 Cal.Rptr.2d 679, 843 P.2d 624], internal citations omitted.)
- " 'The doctrine of res ipsa loquitur is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible.' " (*Howe, supra*, 189 Cal.App.4th at p. 1161.)
- "Res ipsa loquitur is an evidentiary rule for 'determining whether circumstantial evidence of negligence is sufficient.' " (Howe, supra, 189 Cal.App.4th at p. 1161, internal citation omitted.)
- The doctrine "is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, permitting a common sense inference of negligence from the happening of the accident." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 [215 Cal.Rptr. 834].)
- "All of the cases hold, in effect, that it must appear, either as a matter of common experience or from evidence in the case, *that the accident* is of a type which probably would not happen unless someone was negligent." (*Zentz v.*

Coca Cola Bottling Co. of Fresno (1952) 39 Cal.2d 436, 442–443 [247 P.2d 344].)

- The purpose of the second "control" requirement is to "link the defendant with the probability, already established, that the accident was negligently caused." (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 362 [124 Cal.Rptr. 193, 540 P.2d 33].)
- "The purpose of [the third] requirement, like that of control by the defendant is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he was entirely inactive at the time of the accident in order to satisfy this requirement, so long as the evidence is such as to eliminate his conduct as a factor contributing to the occurrence." (*Newing, supra,* 15 Cal.3d at p. 363, internal citations omitted.)
- The third condition "should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof. . . . [I]ts purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident." (*Zentz, supra,* 39 Cal.2d at p. 444.)
- "[Evidence Code section 646] . . . classified the doctrine as a presumption affecting the burden of producing evidence. Under that classification, when the predicate facts are established to give rise to the presumption, the burden of producing evidence to rebut it shifts to the defendant to prove lack of negligence or lack of proximate cause that the injury claimed was the result of that negligence. As a presumption affecting the burden of producing evidence (as distinguished from a presumption affecting the burden of proof), if evidence is presented to rebut the presumed fact, the presumption is out of the case—it 'disappears.' But if no such evidence is submitted, the trier of fact must find the presumed fact to be established." (*Howe, supra*, 189 Cal.App.4th at p. 1162.)
- " 'If evidence is produced that would support a finding that the defendant was not negligent or that any negligence on his part was not a proximate cause of the accident, the presumptive effect of the doctrine vanishes.' '[T]he mere introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact causes the presumption, as a matter of law, to disappear.' When the presumptive effect vanishes, it is the plaintiff's burden to introduce actual evidence that would show that the defendant is negligent and that such negligence was the proximate cause of the accident." (*Howe, supra*, 189 Cal.App.4th at p. 1163, internal citations omitted.)
- "As the [Law Revision Commission] Comment [to Evidence Code section 646] explains, even though the presumptive effect of the doctrine vanishes, 'the jury may still be able to draw an inference that the accident was caused by the defendant's lack of due care from the facts that gave rise to the presumption. . . . [¶] . . . [¶] . . . An inference of negligence may well be warranted from all of the evidence in the case even though the plaintiff fails to establish all the elements of res ipsa loquitur. In appropriate cases, therefore, the

jury may be instructed that, even though it does not find that the facts giving rise to the presumption have been proved by a preponderance of the evidence, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more probable than not that the defendant was negligent.' " (*Howe, supra*, 189 Cal.App.4th at p. 1163, internal citation omitted.)

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

Secondary Sources

1 Witkin, California Evidence (6th ed. 2023) Burden of Proof and Presumptions, §§ 121 et seq.

7 Witkin, California Procedure (6th ed. 2021) Trial, § 315

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

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

1A California Trial Guide, Unit 11, *Opening Statement*, § 11.42[3], Unit 90, *Closing Argument*, § 90.90[1] (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.111 (Matthew Bender)

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

418. Presumption of Negligence per se

[*Insert citation to statute, regulation, or ordinance***] states:**

_____.

If [*name of plaintiff/defendant***] proves**

1. **That [***name of defendant/plaintiff***] violated this law and**
2. **That the violation was a substantial factor in bringing about the harm,**

then you must find that [*name of defendant/plaintiff***] was negligent [unless you also find that the violation was excused].**

If you find that [*name of defendant/plaintiff***] did not violate this law or that the violation was not a substantial factor in bringing about the harm [or if you find the violation was excused], then you must still decide whether [***name of defendant/plaintiff***] was negligent in light of the other instructions.**

New September 2003; Revised December 2005, June 2011, November 2020

Directions for Use

This jury instruction addresses the establishment of the two factual elements underlying the presumption of negligence. If they are not established, then a finding of negligence cannot be based on the alleged statutory violation. However, negligence can still be proven by other means. (See *Nunneley v. Edgar Hotel* (1950) 36 Cal.2d 493, 500–501 [225 P.2d 497].)

If a rebuttal is offered on the ground that the violation was excused, then the bracketed portion in the second and last paragraphs should be read. For an instruction on excuse, see CACI No. 420, *Negligence per se: Rebuttal of the Presumption of Negligence—Violation Excused.*

If the statute is lengthy, the judge may want to read it at the end of this instruction instead of at the beginning. The instruction would then need to be revised, to tell the jury that they will be hearing the statute at the end.

Rebuttal of the presumption of negligence is addressed in the instructions that follow (see CACI Nos. 420 and 421).

Sources and Authority

- Negligence per se. Evidence Code section 669.
- "Although compliance with the law does not prove the absence of negligence, violation of the law does raise a presumption that the violator was negligent. This is called negligence per se." (*Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc*. (2010) 190 Cal.App.4th 1502, 1526 [119 Cal.Rptr.3d 529]; see also

Cal. Law Revision Com. com. to Evid. Code, § 669.)

- " 'The negligence per se doctrine is codified in Evidence Code section 669, subdivision (a), under which negligence is presumed if the plaintiff establishes four elements: (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.' 'The burden is on the proponent of a negligence per se instruction to demonstrate that these elements are met.' " (*Taulbee v. EJ Distribution Corp*. (2019) 35 Cal.App.5th 590, 596 [247 Cal.Rptr.3d 538], internal citations omitted.)
- "The first two elements are normally questions for the trier of fact and the last two are determined by the trial court as a matter of law. That is, the trial court decides whether a statute or regulation defines the standard of care in a particular case." (*Jacobs Farm/Del Cabo, Inc., supra,* 190 Cal.App.4th at p. 1526, internal citations omitted; see also Cal. Law Revision Com. com. to Evid. Code, § 669.)
- "[T]he doctrine of negligence per se is not a separate cause of action, but creates an evidentiary presumption that affects the standard of care in a cause of action for negligence." (*Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 534 [238 Cal.Rptr.3d 528].)
- "Under the doctrine of negligence per se, the plaintiff 'borrows' statutes to prove duty of care and standard of care. [Citation.] The plaintiff still has the burden of proving causation." (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 584 [172 Cal.Rptr.3d 204].)
- "Where a statute establishes a party's duty, ' "proof of the [party's] violation of a statutory standard of conduct raises a presumption of negligence that may be rebutted only by evidence establishing a justification or excuse for the statutory violation." ' This rule, generally known as the doctrine of negligence per se, means that where the court has adopted the conduct prescribed by statute as the standard of care for a reasonable person, a violation of the statute is presumed to be negligence." (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 263 [155 Cal.Rptr.3d 306], internal citation omitted.)
- "[I]n negligence per se actions, the plaintiff must produce evidence of a violation of a statute and a substantial probability that the plaintiff's injury was caused by the violation of the statute before the burden of proof shifts to the defendant to prove the violation of the statute did not cause the plaintiff's injury." (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 371 [199 Cal.Rptr.3d 522].)
- " 'The significance of a statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. The decision as to what the civil standard should be still rests

with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it. In the absence of such a standard the case goes to the jury, which must determine whether the defendant has acted as a reasonably prudent man would act in similar circumstances. The jury then has the burden of deciding not only what the facts are but what the unformulated standard is of reasonable conduct. When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them [citations], except where they would serve to impose liability without fault.' " (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547 [25 Cal.Rptr.2d 97, 863 P.2d 167].), internal citations omitted.)

- "There is no doubt in this state that a federal statute or regulation may be adopted as a standard of care." (*DiRosa v. Showa Denko K. K.* (1996) 44 Cal.App.4th 799, 808 [52 Cal.Rptr.2d 128].)
- "[T]he courts and the Legislature may create a negligence duty of care, but an administrative agency cannot independently impose a duty of care if that authority has not been properly delegated to the agency by the Legislature." (*Cal. Serv. Station Etc. Ass'n v. Am. Home Assur. Co.* (1998) 62 Cal.App.4th 1166, 1175 [73 Cal.Rptr.2d 182].)
- "In combination, the [1999] language and the deletion [to Lab. Code, § 6304.5] indicate that henceforth, Cal-OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions, including third party actions." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 928 [22 Cal.Rptr.3d 530, 102 P.3d 915].)
- "While courts have applied negligence per se to building code violations, it has only been applied in limited situations." (*Jones v. Awad* (2019) 39 Cal.App.5th 1200, 1212 [252 Cal.Rptr.3d 596].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1002–1028

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-H, *Negligence Predicated On Statutory Violation* (*"Negligence Per Se"*), ¶ 2:1845 (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8G-C, *Procedural Considerations—Presumptions*, ¶ 8:3604 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28–1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, §§ 3.10, 3.13 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, §§ 90.88, 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 7, *Proof*, § 7.04 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.50 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.70, 165.80, 165.81 (Matthew Bender)

419. Presumption of Negligence per se (Causation Only at Issue)

[*Insert citation to statute, regulation, or ordinance***] states:**

_____.

A violation of this law has been established and is not an issue for you to decide.

[However, you must decide whether the violation was excused. If it was not excused, then you] [You] must decide whether the violation was a substantial factor in harming [*name of plaintiff***].**

If you decide that the violation was a substantial factor, then you must find that [*name of plaintiff/defendant***] was negligent.**

New September 2003; Revised December 2011

Directions for Use

The California Law Revision Commission comment on Evidence Code section 669 states that the trier of fact usually decides the question of whether the violation occurred. However, "if a party admits the violation or if the evidence of the violation is undisputed, it is appropriate for the judge to instruct the jury that a violation of the statute, ordinance, or regulation has been established as a matter of law." In such cases, the jury would decide causation and, if applicable, the existence of any justification or excuse. For an instruction on excuse, see CACI No. 420, *Negligence per se: Rebuttal of the Presumption of Negligence—Violation Excused.* See also Sources and Authority to CACI No. 418, *Presumption of Negligence per se*.

Sources and Authority

- Presumption of Negligence per se. Evidence Code section 669(a).
- "Under the doctrine of negligence per se, the plaintiff 'borrows' statutes to prove duty of care and standard of care. [Citation.] The plaintiff still has the burden of proving causation." (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 584 [172 Cal.Rptr.3d 204].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1002–1028

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28–1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.10 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.89 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.110 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.70, 165.80 (Matthew Bender)

420. Negligence per se: Rebuttal of the Presumption of Negligence—Violation Excused

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A violation of a law is excused if [*name of plaintiff/name of defendant***] proves that one of the following is true:**

(a) The violation was reasonable because of [*name of plaintiff/defendant***]'s [***specify type of "incapacity"***]; [or]**

(b) Despite using reasonable care, [*name of plaintiff/name of defendant***] was not able to obey the law; [or]**

(c) [*Name of plaintiff/name of defendant***] faced an emergency that was not caused by [his/her/***nonbinary pronoun***] own misconduct; [or]**

(d) Obeying the law would have involved a greater risk of harm to [*name of plaintiff/defendant***] or to others; [or]**

(e) [*Other reason excusing or justifying noncompliance***.]**

New September 2003; Revised May 2020

Directions for Use

The burden of proof shifts from the party asserting a negligence per se claim to the party claiming an excuse for violating a law. (*Baker-Smith v. Skolnick* (2019) 37 Cal.App.5th 340, 347 [249 Cal.Rptr.3d 514].) Factor (b), regarding an attempt to comply with the applicable statute or regulation, should not be given if the evidence does not show such an attempt. (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 423 [94 Cal.Rptr. 49].) Factor (b) should be used only in special cases because it relies on the concept of due care to avoid a charge of negligence per se. (*Casey v. Russell* (1982) 138 Cal.App.3d 379, 385 [188 Cal.Rptr. 18].)

Sources and Authority

- Rebuttal of Presumption of Negligence per se. Evidence Code section 669(b)(1).
- "In our opinion the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." (*Alarid v. Vanier* (1958) 50 Cal.2d 617, 624 [327 P.2d 897].)
- "[T]he presumption of negligence codified in Evidence Code section 669, subdivision (a), may be rebutted by proof that '[t]he person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.' " (*Taulbee v. EJ Distribution Corp.* (2019) 35 Cal.App.5th 590, 597 [247 Cal.Rptr.3d 538].)

- "An excuse instruction is improper unless special circumstances exist." (*Baker-Smith, supra,* 37 Cal.App.5th at p. 345.)
- "The Restatement Second of Torts illustrates the types of situations which may justify or excuse a violation of the statute: [¶] '(a) [T]he violation is reasonable because of the actor's incapacity [e.g., a small child runs into the street without looking, in violation of statute requiring pedestrians to look both ways before crossing]; [¶] '(b) [H]e neither knows nor should know of the occasion for compliance; [¶] '(c) [H]e is unable after reasonable diligence or care to comply [e.g., a statute provides that railroads must keep fences clear of snow. A heavy blizzard covers the fences with snow and, acting promptly and reasonably, the railroad company is unable to remove all the snow for 3 days. Someone crosses the fence on the snow mound and is injured. The violation of the statute is excused]; [¶] '(d) [H]e is confronted by an emergency not due to his own misconduct [e.g., swerving into left lane to avoid child suddenly darting into the road]; [¶] '(e) [C]ompliance would involve a greater risk of harm to the actor or to others.' Thus, in emergencies or because of some unusual circumstances, it may be difficult or impossible to comply with the statute, and the violation may be excused." (*Casey, supra,* 138 Cal.App.3d at p. 384, internal citations omitted.)
- "To determine whether excuse could be a defense in a negligence per se case, California law weighs the benefits and burdens of accident precautions." (*Baker-Smith, supra,* 37 Cal.App.5th at p. 345.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1002–1028

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28–1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.13 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.81 (Matthew Bender)

421. Negligence per se: Rebuttal of the Presumption of Negligence (Violation of Minor Excused)

[*Name of plaintiff/defendant***] claims that even if [he/she/***nonbinary pronoun***] violated the law, [he/she/***nonbinary pronoun***] is not negligent because [he/she/***nonbinary pronoun***] was _____ years old at the time of the incident. If you find that [***name of plaintiff/defendant***] was as careful as a reasonably careful child of the same age, intelligence, knowledge, and experience would have been in the same situation, then [***name of plaintiff/defendant***] was not negligent.**

New September 2003

Directions for Use

This instruction does not apply if the minor is engaging in an adult activity. (Evid. Code, § 669(b)(2).)

Sources and Authority

- Rebuttal of Presumption of Negligence per se: Minor. Evidence Code section 669(b)(2).
- "The per se negligence instruction is predicated on the theory that the Legislature has adopted a statutory standard of conduct that no reasonable man would violate, and that all reasonable adults would or should know such standard. But this concept does not apply to children." (*Daun v. Truax* (1961) 56 Cal.2d 647, 654 [16 Cal.Rptr. 351, 365 P.2d 407].)
- An exception to this reduced standard of care may be found if the minor was engaging in an adult activity, such as driving. (*Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 732 [47 Cal.Rptr. 904, 408 P.2d 360]; *Neudeck v. Bransten* (1965) 233 Cal.App.2d 17, 21 [43 Cal.Rptr. 250]; see also Rest.2d Torts, § 283A, com. c.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1002–1028

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28–1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.13 (Matthew Bender)

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

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

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

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

1. **[That [*name of defendant*] was [required to be] licensed to sell alcoholic beverages;]**

   [*or*]

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

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

   [or]

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

3. **That [*name of alleged minor*] was less than 21 years old at the time;**

4. **That when [*name of defendant*] provided the alcoholic beverages, [*name of alleged minor*] displayed symptoms that would lead a reasonable person to conclude that [he/she/*nonbinary pronoun*] was obviously intoxicated;**

5. **That [*name of alleged minor*] harmed [*name of plaintiff*]; and**

6. **That [*name of defendant*]'s [selling/giving] alcoholic beverages to [*name of alleged minor*] was a substantial factor in causing [*name of plaintiff*]'s harm.**

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

New September 2003; Revised December 2009, June 2014, December 2014, May 2020

Directions for Use

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

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

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

Sources and Authority

- Liability for Providing Alcohol to Minors. Business and Professions Code section 25602.1.
- Sales Under the Alcoholic Beverage Control Act. Business and Professions Code section 23025.
- "In sum, if a plaintiff can establish the defendant provided alcohol to an obviously intoxicated minor, and that such action was the proximate cause of the plaintiff's injuries or death, section 25602.1—the applicable statute in this case—permits liability in two circumstances: (1) the defendant was either licensed to sell alcohol, required to be licensed, or federally authorized to sell alcoholic beverages in certain places, and the defendant sold, furnished, or gave the minor alcohol or caused alcohol to be sold, furnished, or given to the minor; or (2) the defendant was 'any other person' (i.e., neither licensed nor required to be licensed), and he or she sold alcohol to the minor or caused it to be sold. Whereas licensees (and those required to be licensed) may be liable if they merely furnish or give an alcoholic beverage away, a nonlicensee may be liable only if a *sale* occurs; that is, a nonlicensee, such as a social host, who merely furnishes or gives drinks away—even to an obviously intoxicated minor—retains his or her statutory immunity." (*Ennabe, supra*, 58 Cal.4th at pp. 709–710, original italics.)
- "[W]e conclude that the placement of section 25602.1 in the Business and Professions Code does not limit the scope of that provision to commercial enterprises. First, the structure of section 25602.1 suggests it applies to noncommercial providers of alcohol. The statute addresses four categories of persons and we assume those falling in the first three categories—those licensed

by the Department of ABC, those without licenses but who are nevertheless required to be licensed, and those authorized to sell alcohol by the federal government—are for the most part engaged in some commercial enterprise. The final category of persons addressed by section 25602.1 is more of a catchall: 'any other person' who sells alcohol. Consistent with the plain meaning of the statutory language and the views of the Department of ABC, we find this final category includes private persons and ostensible social hosts who, for whatever reason, charge money for alcoholic drinks." (*Ennabe, supra*, 58 Cal.4th at p. 711.)

- "[Business and Professions Code] Section 23025's broad definition of a sale shows the Legislature intended the law to cover a wide range of transactions involving alcoholic beverages: a qualifying sale includes '*any* transaction' in which title to an alcoholic beverage is passed for '*any* consideration.' (Italics added.) Use of the term 'any' to modify the words 'transaction' and 'consideration' demonstrates the Legislature intended the law to have a broad sweep and thus include both indirect as well as direct transactions." (*Ennabe, supra*, 58 Cal.4th at p. 714, original italics.)
- " 'The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are "plain" and "easily seen or discovered." If such outward manifestations exist and the seller still serves the customer so affected, he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.' " (*Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1140 [19 Cal.Rptr.2d 205], original italics.)
- "[T]he standard for determining 'obvious intoxication' is measured by that of a reasonable person." (*Schaffield, supra,* 15 Cal.App.4th at p. 1140.)
- "We shall make no effort to state definitively the meaning of the word 'furnishes' . . . . As used in a similar context the word 'furnish' has been said to mean: ' "To supply; to offer for use, to give, to hand." ' It has also been said the word 'furnish' is synonymous with the words 'supply' or 'provide.' In relation to a physical object or substance, the word 'furnish' connotes possession or control over the thing furnished by the one who furnishes it. The word 'furnish' implies some type of affirmative action on the part of the furnisher; failure to protest or attempt to stop another from imbibing an alcoholic beverage does not constitute 'furnishing.' " (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 904–905 [141 Cal.Rptr. 682], internal citations omitted.)
- "As used in liquor laws, 'furnish' means to provide in any way, and includes giving as well as selling. . . . [¶] California courts have interpreted the terms 'furnish' and 'furnished' as requiring an affirmative act by the purported furnisher to supply the alcoholic beverage to the drinker." (*Fiorini v. City Brewing Co., LLC* (2014) 231 Cal.App.4th 306, 320–321 [179 Cal.Rptr.3d 827] [beverage manufacturer does not "furnish" beverage to the consumer], footnote and internal citation omitted.)

- "As instructed by the court, the jury was told to consider several outward manifestations of obvious intoxication, which included incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, or argumentative behavior. This instruction was correct." (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611], internal citation omitted.)
- "[S]ection 25602.1's phrase 'causes to be sold' requires an affirmative act directly related to the sale of alcohol which necessarily brings about the resultant action to which the statute is directed, i.e., the furnishing of alcohol to an obviously intoxicated minor." (*Hernandez v. Modesto Portuguese Pentecost Assn.* (1995) 40 Cal.App.4th 1274, 1276 [48 Cal.Rptr.2d 229].)
- "The undisputed evidence shows [defendant]'s checker sold beer to Spitzer and that Spitzer later gave some of that beer to Morse. As in *Salem* [*Salem v. Superior Court* (1989) 211 Cal.App.3d 595, 600 [259 Cal.Rptr. 447]], we conclude defendant cannot be held liable because the person to whom it sold alcohol was not the person whose negligence allegedly caused the injury at issue." (*Ruiz v. Safeway, Inc.* (2013) 209 Cal.App.4th 1455, 1462 [147 Cal.Rptr.3d 809].)
- "[O]bviously intoxicated minors who are served alcohol by a licensed purveyor of liquor, may bring a cause of action for negligence against the purveyor for [their own] subsequent injuries." (*Chalup, supra,* 175 Cal.App.3d at p. 979.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1218

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

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

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

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

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

423. Public Entity Liability for Failure to Perform Mandatory Duty

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[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed because [*name of defendant*] violated [*insert reference to statute, regulation, or ordinance*] which states: _____ [*insert relevant language*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] violated [*insert reference to statute, regulation, or ordinance*];**
2. **That [*name of plaintiff*] was harmed; and**
3. **That [*name of defendant*]'s failure to perform its duty was a substantial factor in causing [*name of plaintiff*]'s harm.**

[*Name of defendant*], however, is not responsible for [*name of plaintiff*]'s harm if [*name of defendant*] proves that it made reasonable efforts to perform its duties under the [statute/regulation/ordinance].

New September 2003

Directions for Use

The judge decides the issues of whether the statute imposes a mandatory duty and whether it was designed to protect against the type of harm suffered. (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499 [93 Cal.Rptr.2d 327, 993 P.2d 983].)

Sources and Authority

- Government Liability for Failure to Perform Mandatory Duty. Government Code section 815.6.
- " 'Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.' (Gov. Code, § 815.6.) Thus, the government may be liable when (1) a mandatory duty is imposed by enactment, (2) the duty was designed to protect against the kind of injury allegedly suffered, and (3) breach of the duty proximately caused injury." (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 348 [188 Cal.Rptr.3d 309, 349 P.3d 1013].)
- "In order to recover plaintiffs have to show that there is some specific statutory mandate that was violated by the County, which violation was a proximate cause of the accident." (*Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890, 896–897 [45 Cal.Rptr.2d 646], internal citations omitted.)
- "[T]he term 'enactment' refers to 'a constitutional provision, statute, charter provision, ordinance or regulation.' . . . A 'contract cannot give rise to "a

mandatory duty imposed by an enactment . . . .” ’ ” (*Tuthill v. City of San Buenaventura* (2014) 223 Cal.App.4th 1081, 1091–1092 [167 Cal.Rptr.3d 820].)

- “The first element of liability under Government Code section 815.6 requires that ‘ “the enactment at issue be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken. [Citation.] It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion. [Citation.]’ [Citation.] Courts have construed this first prong rather strictly, finding a mandatory duty only if the enactment ‘affirmatively imposes the duty and provides implementing guidelines.” ’ ” (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 180 [195 Cal.Rptr.3d 220, 361 P.3d 319], original italics.)
- “ ‘It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function *if the function itself involves the exercise of discretion*.’ Moreover, ‘[c]ourts have . . . [found] a mandatory duty only if the enactment “affirmatively imposes the duty and provides implementing guidelines.” ’ ‘ “ ‘[T]he mandatory nature of the duty must be phrased in explicit and forceful language.’ [Citation.] ‘It is not enough that some statute contains mandatory language. In order to recover plaintiffs have to show that there is some specific statutory mandate that was violated by the [public entity].’ ” [Citations.]’ ” (*State Dept. of State Hospitals, supra*, 61 Cal. 4th at pp. 348–349, internal citations omitted.)
- “Courts have recognized that as a practical matter the standard for determining whether a mandatory duty exists is ‘virtually identical’ to the test for an implied statutory duty of care under Evidence Code section 669.” (*Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1185, fn. 3 [89 Cal.Rptr.2d 768], disapproved on other grounds in *B.H., supra*, 62 Cal.4th at p. 188, fn. 6, internal citations omitted.)
- “The injury must be ‘ “ ‘one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty.’ ” ’ . . . ‘That the enactment “confers some benefit” on the class to which plaintiff belongs is not enough; if the benefit is “incidental” to the enactment’s protective purpose, the enactment cannot serve as a predicate for liability under section 815.6.” (*Tuthill, supra*, 223 Cal.App.4th at p. 1092, internal citation omitted.)
- “Financial limitations of governments have never been, and cannot be, deemed an excuse for a public employee’s failure to comply with mandatory duties imposed by law.” (*Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 146 [32 Cal.Rptr.2d 643], internal citations omitted.)
- “Questions of statutory immunity do not become relevant until it has been determined that the defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity. However, a defendant may not be held liable for the breach of a duty if such an immunity in fact

exists." (*Washington, supra,* 38 Cal.App.4th at p. 896, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 296–300

5 Levy et al., California Torts, Ch. 60, *General Principles of Liability and Immunity of Public Entities and Employees*, § 60.22 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.61 (Matthew Bender)

45 California Forms of Pleading and Practice, Ch. 514, *Schools: Injuries to Students*, § 514.17 (Matthew Bender)

19 California Points and Authorities, Ch. 196, *Public Entities*, § 196.182 (Matthew Bender)

424. Negligence Not Contested—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by [***name of defendant***]'s negligence. [***Name of defendant***] agrees that [he/she/***nonbinary pronoun***/it] was negligent, but denies that the negligence caused [[***name of plaintiff***] any harm/the full extent of the harm claimed by [***name of plaintiff***]].**

To establish [his/her/*nonbinary pronoun***/its] claim against [***name of defendant***], [***name of plaintiff***] must prove both of the following:**

1. **That [***name of plaintiff***] was harmed; and**
2. **That [***name of defendant***]'s negligence was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2005

Directions for Use

This instruction is intended for cases in which the defendant "admits" liability, but contests causation and damages. This instruction can be modified for use in cases involving claims that are not based on negligence.

Secondary Sources

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, Ch. 2, *Causation* (Matthew Bender)

425. "Gross Negligence" Explained

Gross negligence is the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others.

A person can be grossly negligent by acting or by failing to act.

New April 2008; Revised December 2015

Directions for Use

Give this instruction if a particular statute that is at issue in the case creates a distinction based on a standard of gross negligence. (See, e.g., Gov. Code, § 831.7(c)(1)(E) [immunity for public entity or employee to liability to participant in or spectator to hazardous recreational activity does not apply if act of gross negligence is proximate cause of injury].) Courts generally resort to this definition if gross negligence is at issue under a statute. (See, e.g., *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 971 [4 Cal.Rptr.3d 340].)

Give this instruction with CACI No. 400, *Negligence—Essential Factual Elements*, but modify that instruction to refer to gross negligence.

This instruction may also be given if case law has created a distinction between gross and ordinary negligence. For example, under the doctrine of express assumption of risk, a signed waiver of liability may release liability for ordinary negligence only, not for gross negligence. (See *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777 [62 Cal.Rptr.3d 527, 161 P.3d 1095]; see also CACI No. 451, *Affirmative Defense—Contractual Assumption of Risk*.) Once the defendant establishes the validity and applicability of the release, the plaintiff must prove gross negligence by a preponderance of the evidence. (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 732, 734 [183 Cal.Rptr.3d 234].) A lack of gross negligence can be found as a matter of law if the plaintiff's showing is insufficient to suggest a triable issue of fact. (See *Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 638–639 [184 Cal.Rptr.3d 155]; cf. *Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 555 [188 Cal.Rptr.3d 228] [whether conduct constitutes gross negligence is generally a question of fact, depending on the nature of the act and the surrounding circumstances shown by the evidence].)

Sources and Authority

- " 'Gross negligence' long has been defined in California and other jurisdictions as either a ' " 'want of even scant care' " ' or ' " 'an extreme departure from the ordinary standard of conduct.' " ' " (*City of Santa Barbara, supra*, 41 Cal.4th at p. 754, internal citations omitted.)
- "By contrast, 'wanton' or 'reckless' misconduct (or ' "willful and wanton negligence" ') describes conduct by a person who may have no intent to cause

harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result." (*City of Santa Barbara, supra*, 41 Cal.4th at p. 754, fn. 4, internal citations omitted.)

- "California does not recognize a distinct cause of action for 'gross negligence' independent of a statutory basis." (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 856 [120 Cal.Rptr.3d 90].)
- "Gross negligence is pleaded by alleging the traditional elements of negligence: duty, breach, causation, and damages. However, to set forth a claim for 'gross negligence' the plaintiff must allege extreme conduct on the part of the defendant." (*Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1082 [122 Cal.Rptr.3d 22], internal citation omitted.)
- "The theory that there are degrees of negligence has been generally criticized by legal writers, but a distinction has been made in this state between ordinary and gross negligence. Gross negligence has been said to mean the want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Constr. Co.* (1956) 46 Cal.2d 588, 594 [297 P.2d 644], internal citation omitted.)
- "Numerous California cases have discussed the doctrine of gross negligence. Invariably these cases have turned upon an interpretation of a statute which has used the words 'gross negligence' in the text." (*Cont'l Ins. Co. v. Am. Prot. Indus.* (1987) 197 Cal.App.3d 322, 329 [242 Cal.Rptr. 784].)
- "[I]n cases involving a waiver of liability for future negligence, courts have held that conduct that substantially or unreasonably increased the inherent risk of an activity or actively concealed a known risk could amount to gross negligence, which would not be barred by a release agreement. Evidence of conduct that evinces an extreme departure from manufacturer's safety directions or an industry standard also could demonstrate gross negligence. Conversely, conduct demonstrating the failure to guard against, or warn of, a dangerous condition typically does not rise to the level of gross negligence." (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 881 [208 Cal.Rptr.3d 792], internal citations omitted.)
- "[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable." (*City of Santa Barbara, supra*, 41 Cal.4th at p. 777, original italics.)
- " 'Prosser on Torts (1941) page 260, also cited by the *Van Meter* court for its definition of gross negligence, reads as follows: "Gross Negligence. This is very great negligence, or the want of even scant care. It has been described as a failure to exercise even that care which a careless person would use. Many

courts, dissatisfied with a term so devoid of all real content, have interpreted it as requiring wilful misconduct, or recklessness, or such utter lack of all care as will be evidence of either—sometimes on the ground that this must have been the purpose of the legislature. But most courts have considered that 'gross negligence' falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind. *So far as it has any accepted meaning, it is merely an extreme departure from the ordinary standard of care.*" ' " (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358 [257 Cal.Rptr. 356], original italics, internal citations omitted.)

- "In assessing where on the spectrum a particular negligent act falls, ' "[t]he amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it." ' " (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 32 [236 Cal.Rptr.3d 682].)
- "[A]lthough the existence of gross negligence is a matter generally for the trier of fact, it may be determined as a matter of law on summary judgment in an appropriate case." (*Joshi v. Fitness Internat., LLC* (2022) 80 Cal.App.5th 814, 828 [295 Cal.Rptr.3d 572], internal citation omitted.)
- "The Legislature has enacted numerous statutes . . . which provide immunity to persons providing emergency assistance except when there is gross negligence. (See Bus. & Prof. Code, § 2727.5 [immunity for licensed nurse who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of nurse's employment unless the nurse is grossly negligent]; Bus. & Prof. Code, § 2395.5 [immunity for a licensed physician who serves on-call in a hospital emergency room who in good faith renders emergency obstetrical services unless the physician was grossly negligent, reckless, or committed willful misconduct]; Bus. & Prof. Code, § 2398 [immunity for licensed physician who in good faith and without compensation renders voluntary emergency medical assistance to a participant in a community college or high school athletic event for an injury suffered in the course of that event unless the physician was grossly negligent]; Bus. & Prof. Code, § 3706 [immunity for certified respiratory therapist who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of employment unless the respiratory therapist was grossly negligent]; Bus. & Prof. Code, § 4840.6 [immunity for a registered animal health technician who in good faith renders emergency animal health care at the scene of an emergency unless the animal health technician was grossly negligent]; Civ. Code, § 1714.2 [immunity to a person who has completed a basic cardiopulmonary resuscitation course for cardiopulmonary resuscitation and emergency cardiac care who in good faith renders emergency cardiopulmonary resuscitation at the scene of an emergency unless the individual was grossly negligent]; Health & Saf. Code, § 1799.105 [immunity for poison control center personnel who in good faith provide emergency information and advice unless they are grossly negligent]; Health & Saf. Code, § 1799.106 [immunity for a firefighter, police officer or

other law enforcement officer who in good faith renders emergency medical services at the scene of an emergency unless the officer was grossly negligent]; Health & Saf. Code, § 1799.107 [immunity for public entity and emergency rescue personnel acting in good faith within the scope of their employment unless they were grossly negligent].)" (*Decker, supra*, 209 Cal.App.3d at pp. 356–357.)

- "The jury here was instructed: 'It is the duty of one who undertakes to perform the services of a police officer or paramedic to have the knowledge and skills ordinarily possessed and to exercise the care and skill ordinarily used in like cases by police officers or paramedics in the same or similar locality and under similar circumstances. A failure to perform such duty is negligence. [para.] The standard to be applied in this case is gross negligence. The term gross negligence means the failure to provide even scant care or an extreme departure from the ordinary standard of conduct.' " (*Wright v. City of L.A.* (1990) 219 Cal.App.3d 318, 343 [268 Cal.Rptr. 309] [construing "gross negligence" under Health & Saf. Code, § 1799.106, which provides that a police officer or paramedic who renders emergency medical services at the scene of an emergency shall only be liable in civil damages for acts or omissions performed in a grossly negligent manner or not performed in good faith].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1000

Advising and Defending Corporate Directors and Officers (Cont.Ed.Bar) § 3.13

1 Levy et al., California Torts, Ch. 1, *General Principles of Liability*, § 1.01 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, §§ 380.10, 380.171 (Matthew Bender)

426. Negligent Hiring, Supervision, or Retention of Employee

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by [***name of employee***] and that [***name of employer defendant***] is responsible for that harm because [***name of employer defendant***] negligently [hired/ supervised/ [or] retained] [***name of employee***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of employer defendant***] hired [***name of employee***];]**
2. **That [***name of employee***] [[was/became] [unfit [or] incompetent] to perform the work for which [he/she/***nonbinary pronoun***] was hired/ [***specify other particular risk***]];**
3. **That [***name of employer defendant***] knew or should have known that [***name of employee***] [[was/became] [unfit/ [or] incompetent]/ [***other particular risk***]] and that this [unfitness [or] incompetence/ [***other particular risk***]] created a particular risk to others;**
4. **That [***name of employee***]'s [unfitness [or] incompetence/[***other particular risk***]] harmed [***name of plaintiff***]; and**
5. **That [***name of employer defendant***]'s negligence in [hiring/ supervising/ [or] retaining] [***name of employee***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2009; Revised December 2015, June 2016

Directions for Use

Give this instruction if the plaintiff alleges that the employer of an employee who caused harm was negligent in the hiring, supervision, or retention of the employee after actual or constructive notice that the employee created a particular risk or hazard to others. For instructions holding the employer vicariously liable (without fault) for the acts of the employee, see the Vicarious Responsibility series, CACI No. 3700 et seq.

Include optional question 1 if the employment relationship between the defendant and the negligent person is contested. (See *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1185–1189 [183 Cal.Rptr.3d 394].) It appears that liability may also be imposed on the hirer of an independent contractor for the negligent selection of the contractor. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 662–663 [109 Cal.Rptr. 269].) Therefore, it would not seem to be necessary to instruct on the test to determine whether the relationship is one of employer-employee or hirer-independent contractor. (See CACI No. 3704, *Existence of "Employee" Status Disputed*.)

Choose "became" in elements 2 and 3 in a claim for negligent retention.

In most cases, "unfitness" or "incompetence" (or both) will adequately describe the particular risk that the employee represents. However, there may be cases in which neither word adequately describes the risk that the employer should have known about.

Sources and Authority

- "California case law recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054 [58 Cal.Rptr.2d 122].)
- "Negligence liability will be imposed on an employer if it 'knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.' " (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 [91 Cal.Rptr.3d 864].)
- "[Plaintiff] brought several claims against [defendant employer], including negligent hiring, supervising, and retaining [employee], and failure to warn. To prevail on his negligent hiring/retention claim, [plaintiff] will be required to prove [employee] was [defendant employer]'s agent and [defendant employer] knew or had reason to believe [employee] was likely to engage in sexual abuse. On the negligent supervision and failure to warn claims, [plaintiff] will be required to show [defendant employer] knew or should have known of [employee]'s alleged misconduct and did not act in a reasonable manner when it allegedly recommended him to serve as [plaintiff]'s Bible instructor." (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 591 [201 Cal.Rptr.3d 156], internal citations omitted.)
- "[A] negligent supervision claim depends, in part, on a showing that the risk of harm was reasonably foreseeable. [Citations.] 'Foreseeability is determined in light of all the circumstances and does not require prior identical events or injuries.' [Citations.] ' "It is not necessary to prove that the very injury which occurred must have been foreseeable by the school authorities . . .. Their negligence is established if a reasonably prudent person would foresee that injuries of the same general type would be likely to happen in the absence of [adequate] safeguards." ' " (*D.Z. v. Los Angeles Unified School Dist*. (2019) 35 Cal.App.5th 210, 229 [247 Cal.Rptr.3d 127], internal citations omitted.)
- "Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability." (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 [52 Cal.Rptr.3d 376].)
- "Liability for negligent hiring and supervision is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees. The tort has developed in California in factual settings where the plaintiff's injury occurred in the workplace, or the contact between the plaintiff and the employee was generated by the employment relationship." (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339–1340 [78 Cal.Rptr.2d 525].)

- "To establish negligent supervision, a plaintiff must show that a person in a supervisorial position over the actor had prior knowledge of the actor's propensity to do the bad act." (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902 [189 Cal.Rptr.3d 570].)
- "Apparently, [defendant] had no actual knowledge of [the employee]'s past. But the evidence recounted above presents triable issues of material fact regarding whether the [defendant] had reason to believe [the employee] was unfit or whether the [defendant] failed to use reasonable care in investigating [the employee]." (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 843 [10 Cal.Rptr.2d 748]; cf. *Flores v. AutoZone West Inc.* (2008) 161 Cal.App.4th 373, 384–386 [74 Cal.Rptr.3d 178] [employer had no duty to investigate and discover that job applicant had a juvenile delinquency record].)
- "We note that the jury instructions issued by our Judicial Council include 'substantial factor' causation as an element of the tort of negligent hiring, retention, or supervision. The fifth element listed in CACI No. 426 is '[t]hat [name of employer defendant]'s negligence in [hiring/ supervising/ [or] retaining] [name of employee] *was a substantial factor in causing [name of plaintiff]'s harm.*' [¶] CACI No. 426 is consistent with California case law on the causation element of [plaintiff]'s claim against [employer]." (*Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co., Inc.* (2018) 5 Cal.5th 216, 224, fn.5 [233 Cal.Rptr.3d 487, 418 P.3d 400], original italics.)
- "A claim that an employer was negligent in hiring or retaining an employee-driver rarely differs in substance from a claim that an employer was negligent in entrusting a vehicle to the employee. Awareness, constructive or actual, that a person is unfit or incompetent to drive underlies a claim that an employer was negligent in hiring or retaining that person as a driver. (See Judicial Council of Cal. Civ. Jury Instns. (2011) CACI No. 426.) That same awareness underlies a claim for negligent entrustment. (See CACI No. 724.) In a typical case, like this, the two claims are functionally identical." (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1157 [126 Cal.Rptr.3d 443, 253 P.3d 535].)
- "The language of the instruction used specifies the particular risk at issue in this case. That is consistent with the model instruction, which prompts the user to 'specify other particular risk,' as well as the Directions for Use for CACI No. 426, which state: 'In most cases, "unfitness" or "incompetence" (or both) will adequately describe the particular risk that the employee represents. However, there may be cases in which neither word adequately describes the risk that the employer should have known about.' It is also consistent with the case law, discussed above, holding that a claim for negligent supervision requires a showing of foreseeability of a *particular* risk of harm." (*D.Z., supra*, 35 Cal.App.5th at p. 235, original italics.)
- "[I]f an employer admits vicarious liability for its employee's negligent driving in the scope of employment, 'the damages attributable to both employer and employee will be coextensive.' Thus, when a plaintiff alleges a negligent entrustment or hiring cause of action against the employer and the employer

admits vicarious liability for its employee's negligent driving, the universe of defendants who can be held responsible for plaintiff's damages is reduced by one—the employer—for purposes of apportioning fault under Proposition 51. Consequently, the employer would not be mentioned on the special verdict form. The jury must divide fault for the accident among the listed tortfeasors, and the employer is liable only for whatever share of fault the jury assigns to the employee." (*Diaz, supra*, 41 Cal.4th at p. 1159, internal citations omitted.)

- "[W]hen an employer . . . admits vicarious liability, neither the complaint's allegations of employer misconduct relating to the recovery of punitive damages nor the evidence supporting those allegations are superfluous. Nothing in *Diaz* or *Armenta* suggests otherwise." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1264 [218 Cal.Rptr.3d 664].)
- "[A] public school district may be vicariously liable under [Government Code] section 815.2 for the negligence of administrators or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 879 [138 Cal.Rptr.3d 1, 270 P.3d 699].)
- "[P]laintiff premises her direct negligence claim on the hospital's alleged failure to properly screen [doctor] before engaging her and to properly supervise her after engaging her. Since hiring and supervising medical personnel, as well as safeguarding incapacitated patients, are clearly within the scope of services for which the hospital is licensed, its alleged failure to do so necessarily states a claim for professional negligence. Accordingly, plaintiff cannot pursue a claim of direct negligence against the hospital." (*So v. Shin* (2013) 212 Cal.App.4th 652, 668 [151 Cal.Rptr.3d 257].)
- "[Asking] whether [defendant] hired [employee] was necessary given the dispute over who hired [employee]—[defendant] or [decedent]. As the trial court noted, 'The employment was neither stipulated nor obvious on its face.' However, if the trial court began the jury instructions or special verdict form with, 'Was [employee] unfit or incompetent to perform the work for which he was hired,' confusion was likely to result as the question assumed a hiring. Therefore, the jury needed to answer the question of whether [defendant] hired [employee] before it could determine if [defendant] negligently hired, retained, or supervised him." (*Jackson, supra*, 233 Cal.App.4th at pp. 1187–1188.)
- "Any claim alleging negligent hiring by an employer will be based in part on events predating the employee's tortious conduct. Plainly, that sequence of events does not itself preclude liability." (*Liberty Surplus Ins. Corp., supra,* 5 Cal.5th at p. 225, fn. 7.)
- "We find no relevant case law approving a claim for direct liability based on a public entity's allegedly negligent hiring and supervision practices. . . . Here, . . . there is no statutory basis for declaring a governmental entity liable for negligence in its hiring and supervision practices and, accordingly, plaintiffs' claim against County based on that theory is barred . . . ." (*de Villers v. County*

of San Diego (2007) 156 Cal.App.4th 238, 252–253 [67 Cal.Rptr.3d 253].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1350

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-I, *Employment Torts and Related Claims—Negligence*, ¶ 5:800 et seq. (The Rutter Group)

3 California Torts, Ch. 40B, *Employment Discrimination and Harassment*, § 40B.21 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.12 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.22 (Matthew Bender)

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

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

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

1. **That [***name of defendant***] was an adult;**
2. **That [***name of defendant***] knowingly furnished alcoholic beverages to [him/her/***nonbinary pronoun***/[***name of minor***]] at [***name of defendant***]'s home;**
3. **That [***name of defendant***] knew or should have known that [he/she/** *nonbinary pronoun***/[***name of minor***]] was less than 21 years old at the time;**
4. **That [***name of plaintiff***] was harmed [by [***name of minor***]]; and**
5. **That [***name of defendant***]'s furnishing alcoholic beverages to [[***name of plaintiff***]/[***name of minor***]] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2011; Revised May 2020

Directions for Use

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

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

Sources and Authority

- No Social Host Liability for Furnishing Alcohol. Civil Code section 1714(c).
- Exception to Nonliability. Civil Code section 1714(d).
- "Although the claim against [host] appears to fall within the section 1714, subdivision (d) exception, plaintiffs cannot bootstrap respondents into that exception by alleging that respondents conspired with or aided and abetted [host] by providing alcoholic beverages that were furnished to [minor]. Subdivision (b)

of section 1714 unequivocally states that 'the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication . . . .' This provision necessarily precludes liability against anyone who furnished alcohol to someone who caused injuries due to intoxication. The exception set forth in subdivision (d) vitiates subdivision (b) for a very narrow class of claims: claims against an adult who knowingly furnishes alcohol at his or her residence to a person he or she knows is under the age of 21. Because respondents are not alleged to have furnished alcohol to [minor] at their residences, plaintiffs' claims against them are barred because, as a matter of statutory law, plaintiffs cannot establish that respondents' actions proximately caused plaintiffs' injuries." (*Rybicki v. Carlson* (2013) 216 Cal.App.4th 758, 764 [157 Cal.Rptr.3d 660].)

- "We shall make no effort to state definitively the meaning of the word 'furnishes' . . . . As used in a similar context the word 'furnish' has been said to mean: ' "To supply; to offer for use, to give, to hand." ' It has also been said the word 'furnish' is synonymous with the words 'supply' or 'provide.' In relation to a physical object or substance, the word 'furnish' connotes possession or control over the thing furnished by the one who furnishes it. The word 'furnish' implies some type of affirmative action on the part of the furnisher; failure to protest or attempt to stop another from imbibing an alcoholic beverage does not constitute 'furnishing.' " (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 904–905 [141 Cal.Rptr. 682], internal citations omitted.)
- "As used in liquor laws, 'furnish' means to provide in any way, and includes giving as well as selling. . . . [¶] California courts have interpreted the terms 'furnish' and 'furnished' as requiring an affirmative act by the purported furnisher to supply the alcoholic beverage to the drinker." (*Fiorini v. City Brewing Co.*, LLC (2014) 231 Cal.App.4th 306, 320–321 [179 Cal.Rptr.3d 827] [beverage manufacturer does not "furnish" beverage to the consumer], footnote and internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1215 et seq.

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

3 California Forms of Pleading and Practice, Ch. 19, *Alcoholic Beverages: Civil Liability*, §§ 19.11, 19.13 (Matthew Bender)

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

428. Parental Liability (Nonstatutory)

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed because of [***name of defendant***]'s negligent supervision of [***name of minor***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***insert one or both of the following:***]**

   [observed [*name of minor***]'s dangerous behavior that led to [***name of plaintiff***]'s injury;] [or]**

   [was aware of [*name of minor***]'s habits or tendencies that created an unreasonable risk of harm to other persons;]**

2. **That [***name of defendant***] had the opportunity and ability to control the conduct of [***name of minor***];**

3. **That [***name of defendant***] was negligent because [he/she/***nonbinary pronoun***] failed to [***insert one or both of the following:***]**

   [exercise reasonable care to prevent [*name of minor***]'s conduct;] [or]**

   [take reasonable precautions to prevent harm to others;]

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

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

New September 2003; Renumbered from CACI No. 410 December 2013

Directions for Use

This instruction is not intended for use for claims of statutory liability against parents or guardians based on a minor's willful conduct, e.g., Civil Code section 1714.1 (willful misconduct), section 1714.3 (discharging firearm), or Education Code section 48904(a)(1) (willful misconduct).

Sources and Authority

- "While it is the rule in California . . . that there is no vicarious liability on a parent for the torts of a child there is 'another rule of the law relating to the torts of minors, which is somewhat in the nature of an exception, and that is that a parent may become liable for an injury caused by the child where the parent's negligence made it possible for the child to cause the injury complained of, and probable that it would do so.' " (*Ellis v. D'Angelo* (1953) 116 Cal.App.2d 310, 317 [253 P.2d 675], internal citations omitted.)
- "Parents are responsible for harm caused by their children only when it has been shown that 'the parents as reasonable persons previously became aware of habits

or tendencies of the infant which made it likely that the child would misbehave so that they should have restrained him in apposite conduct and actions.' " (*Reida v. Lund* (1971) 18 Cal.App.3d 698, 702 [96 Cal.Rptr. 102], internal citation omitted.)

- "In cases where the parent did not observe the child's conduct which led to the injury, the parent has been held liable where he had been aware of the child's dangerous propensity or habit and negligently failed to exercise proper control or negligently failed to give appropriate warning. In other cases, where the parent did not observe and was not in a position to control the conduct which endangered the plaintiff, recovery was denied on the ground that there was no showing that the parent knew of any dangerous tendency. What is said about 'propensity' or 'habit' in those cases has no applicability where the parent is present and observes the dangerous behavior and has an opportunity to exercise control but neglects to do so." (*Costello v. Hart* (1972) 23 Cal.App.3d 898, 900–901 [100 Cal.Rptr. 554], internal citations omitted.)
- " 'The ability to control the child, rather than the relationship as such, is the basis for a finding of liability on the part of a parent. . . . [The] absence of such ability is fatal to a claim of legal responsibility.' The ability to control is inferred from the relationship of parent to minor child, as it is from the relationship of custodian to charge; yet it may be disproved by the circumstances surrounding the particular situation." (*Robertson v. Wentz* (1986) 187 Cal.App.3d 1281, 1290 [232 Cal.Rptr. 634], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1378–1385

California Tort Guide (Cont.Ed.Bar 3d ed.) General Principles, § 1.25

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.12; Ch. 8, *Vicarious Liability*, § 8.08 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.16 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 367A, *Minors: Tort Actions*, § 367A.32 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.131 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* § 165.130 (Matthew Bender)

31 California Legal Forms, Ch. 100A, *Personal Affairs of Minors,* § 100A.251 (Matthew Bender)

1 California Civil Practice: Torts §§ 3:32–3:35 (Thomson Reuters)

429. Negligent Sexual Transmission of Disease

[*Name of plaintiff***] claims that [***name of defendant***] sexually transmitted [***specify sexually transmitted disease, e.g., HIV***] to [him/her/***nonbinary pronoun***]. [***Name of defendant***] may be negligent for this transmission if [***name of plaintiff***] proves that [***name of defendant***] knew, or had reason to know, that [he/she/***nonbinary pronoun***] was infected with [***e.g., HIV***].**

New May 2017; Revised May 2020

Directions for Use

This instruction should be given with CACI No. 400, *Negligence—Essential Factual Elements*. In a claim for negligent transmission of a sexually communicable disease, the elements of negligence, duty, breach, and causation of harm must be proved. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1188 [45 Cal.Rptr.3d 316, 137 P.3d 153].)

One has a duty to avoid transmitting an infectious disease if that person should have known of the infection (constructive knowledge). (*John B., supra*, 38 Cal.4th at pp. 1190–1191.) While the existence of a duty is a question of law for the court, what a person should have known is a question of fact.

It must be noted that in *John B.*, the court limited its holding on constructive knowledge to the facts of the case before it, which involved a couple who were engaged and subsequently married; a defendant who was alleged to have falsely represented himself as monogamous and disease-free, and who insisted the couple stop using condoms; and a plaintiff who agreed to stop using condoms in reliance on those allegedly false representations. The court did not consider the existence or scope of a duty for persons whose relationship did not extend beyond the sexual encounter itself, whose relationship did not contemplate sexual exclusivity, who had not represented themselves as disease-free, or who had not insisted on having sex without condoms. (*John B., supra*, 38 Cal.4th at p. 1193.) Therefore, this instruction may not be appropriate on facts that were expressly reserved in *John B*.

Sources and Authority

- "[A] person who unknowingly contracts a sexually transmitted disease such as herpes may maintain an action for damages against one who either negligently or through deceit infects her with the disease." (*Doe v. Roe* (1990) 218 Cal.App.3d 1538, 1543 [267 Cal.Rptr. 564].)
- "[T]o be *stricken with disease* through another's negligence is in legal contemplation as it often is in the seriousness of consequences, no different from *being struck with an automobile* through another's negligence." (*John B., supra*, 38 Cal.4th at p. 1188, original italics.)
- "Because ' "[a]ll persons are required to use ordinary care to prevent others

being injured as a result of their conduct" ', this court has repeatedly recognized a cause of action for negligence not only against those who have actual knowledge of unreasonable danger, but also against those who have constructive knowledge of it." (*John B., supra*, 38 Cal.4th at p. 1190, internal citation omitted.)

- " '[C]onstructive knowledge,' which means knowledge 'that one using reasonable care or diligence should have, and therefore is attributed by law to a given person', encompasses a variety of mental states, ranging from one who is deliberately indifferent in the face of an unjustifiably high risk of harm to one who merely should know of a dangerous condition. (*John B., supra*, 38 Cal.4th at pp. 1190–1191, internal citations omitted.)
- "[T]he tort of negligent transmission of HIV does not depend solely on actual knowledge of HIV infection and would extend at least to those situations where the actor, under the totality of the circumstances, has reason to know of the infection. Under the reason-to-know standard, 'the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.' In other words, 'the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist.' " (*John B., supra*, 38 Cal.4th at p. 1191, internal citations omitted.)
- "[W]e are mindful that our precedents direct us to consider whether a duty of care exists ' "on a case-by-case basis." ' Accordingly, our conclusion that a claim of negligent transmission of HIV lies against those who know or at least have reason to know of the disease must be understood in the context of the allegations in this case, which involves a couple who were engaged and subsequently married; a defendant who falsely represented himself as monogamous and disease-free and insisted the couple stop using condoms; and a plaintiff who agreed to stop using condoms in reliance on those false representations. We need not consider the existence or scope of a duty for persons whose relationship does not extend beyond the sexual encounter itself, whose relationship does not contemplate sexual exclusivity, who have not represented themselves as disease-free, or who have not insisted on having sex without condoms." (*John B., supra*, 38 Cal.4th at p. 1193.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1044

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.13 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.32[2] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.170 (Matthew Bender)

430. Causation: Substantial Factor

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

New September 2003; Revised October 2004, June 2005, December 2005, December 2007, May 2018, May 2020, November 2020

Directions for Use

As phrased, this definition of "substantial factor" subsumes the "but for" test of causation, that is, "but for" the defendant's conduct, the plaintiff's harm would not have occurred. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052 [1 Cal.Rptr.2d 913, 819 P.2d 872]; see Rest.2d Torts, § 431.) The optional last sentence makes this explicit, and in some cases it may be error not to give this sentence. (See *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 572–573 [34 Cal.Rptr.2d 607, 882 P.2d 298]; Rest.2d Torts, § 432(1).)

"Conduct," in this context, refers to the culpable acts or omissions on which a claim of legal fault is based, e.g., negligence, product defect, breach of contract, or dangerous condition of public property. This is in contrast to an event that is not a culpable act but that happens to occur in the chain of causation, e.g., that the plaintiff's alarm clock failed to go off, causing her to be at the location of the accident at a time when she otherwise would not have been there. The reference to "conduct" may be changed as appropriate to the facts of the case.

The "but for" test of the last optional sentence does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the same harm. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240 [135 Cal.Rptr.2d 629, 70 P.3d 1046]; *Barton v. Owen* (1977) 71 Cal.App.3d 484, 503–504 [139 Cal.Rptr. 494]; see Rest.2d Torts, § 432(2).) Accordingly, do not include the last sentence in a case involving concurrent independent causes. (See also *Major v. R.J. Reynolds Tobacco Co.* (2017) 14 Cal.App.5th 1179, 1198 [222 Cal.Rptr.3d 563] [court did not err in refusing to give last sentence of instruction in case involving exposure to carcinogens in cigarettes].)

In cases of multiple (concurrent dependent) causes, CACI No. 431, *Causation: Multiple Causes,* should also be given.

A case in which the plaintiff's claim is based on disease resulting from asbestos exposure requires a different instruction. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 [67 Cal.Rptr.2d 16, 941 P.2d 1203]; *Lopez v. The Hillshire*

Brands Co. (2019) 41 Cal.App.5th 679, 688 [254 Cal.Rptr.3d 377] [citing previous discussion of issues related to asbestos cases in Directions for Use of this instruction and CACI No. 435].) Give CACI No. 435, *Causation for Asbestos-Related Cancer Claims*, and do not give this instruction. (But see *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298–299 [220 Cal.Rptr.3d 185] [not error to give both CACI Nos. 430 and 435 in case with both product liability and premises liability defendants].)

Sources and Authority

- "The test for joint tort liability is set forth in section 431 of the Restatement of Torts 2d, which provides: 'The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.' Section 431 correctly states California law as to the issue of causation in tort cases." (*Wilson v. Blue Cross of So. Cal.* (1990) 222 Cal.App.3d 660, 671–672 [271 Cal.Rptr. 876].)
- "California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations. Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. The substantial factor standard generally produces the same results as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred 'but for' that conduct. The substantial factor standard, however, has been embraced as a clearer rule of causation—one which subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact." (*Rutherford, supra,* 16 Cal.4th at pp. 968–969, internal citations omitted.)
- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford, supra,* 16 Cal.4th at pp. 968–969, internal citations omitted.)
- "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor', but a very minor force

that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath, supra,* 21 Cal.4th at p. 79, internal citations omitted.)

- "[G]iving CACI No. 430, which states that a factor is not substantial when it is 'remote or trivial,' could be misleading in an asbestos case, where the long latency period necessitates exposures will have been several years earlier. Jury instructions therefore should not suggest that a long latency period, in which the exposure was temporally 'remote,' precludes an otherwise sufficient asbestos claim. ' "Remote" often connotes a time limitation. Nothing in *Rutherford* suggests such a limitation; indeed, asbestos cases are brought long after exposure due to the long-term latent nature of asbestos-related diseases.' It was not error for the court to give CACI No. 435 alone instead of CACI No. 430." (*Lopez, supra,* 41 Cal.App.5th at p. 688, internal citation omitted.)
- "The text of Restatement Torts second section 432 demonstrates how the 'substantial factor' test subsumes the traditional 'but for' test of causation. Subsection (1) of section 432 provides: 'Except as stated in Subsection (2), the actor's negligent conduct *is not a substantial factor* in bringing about harm to another *if the harm would have been sustained even if the actor had not been negligent*.' . . . Subsection (2) states that if 'two forces are actively operating . . . and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.' " (*Viner, supra,* 30 Cal.4th at p. 1240, original italics.)
- "Because the 'substantial factor' test of causation subsumes the 'but for' test, the 'but for' test has been phrased in terms of 'substantial factor,' as follows, in the context, as here, of a combination of causes dependent on one another: A defendant's negligent conduct may combine with another factor to cause harm; if a defendant's negligence was a substantial factor in causing the plaintiff's harm, then the defendant is responsible for the harm; a defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing the plaintiff's harm; but conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)
- "Giving CACI No. 430 in its entirety also would have meant instructing the jury on the principle of 'but-for' causation. Although generally subsumed within the substantial factor test, 'the but-for test is inappropriate in cases when two forces are actively operating and each is sufficient to bring about the harm.' . . . 'If a plaintiff [or decedent] has developed a disease after having been exposed to multiple defendants' asbestos products, medical science [is] unable to determine which defendant's product included the specific fibers that caused the plaintiff's [or decedent's] disease.' A 'but-for' instruction is therefore inappropriate in the asbestos context, at least when there are multiple sources of exposure. (*Lopez, supra,* 41 Cal.App.5th at p. 688, internal citations omitted.)
- "That the Use Notes caution against giving the more general CACI No. 430 in a

mesothelioma case, when the more specific instruction CACI No. 435 is more applicable, does not support a conclusion that it was error to give both instructions. CACI No. 430 is a correct statement of the law relating to substantial factor causation, even though, as *Rutherford* [*v. Owens-Illinois, Inc.*] noted, more specific instructions *also* must be given in a mesothelioma case. Because the more specific CACI No. 435 also was given, we do not find that the trial court erred by giving both instructions." (*Petitpas, supra,* 13 Cal.App.5th p. 299, original italics.)

- "A tort is a legal cause of injury only when it is a substantial factor in producing the injury. If the external force of a vehicle accident was so severe that it would have caused identical injuries notwithstanding an abstract 'defect' in the vehicle's collision safety, the defect cannot be considered a substantial factor in bringing them about. [¶] The general causation instruction given by the trial court correctly advised that plaintiff could not recover for a design defect unless it was a 'substantial factor' in producing plaintiff's 'enhanced' injuries. However, this instruction dealt only by 'negative implication' with [defendant]'s theory that any such defect was not a 'substantial factor' in this case because this particular accident would have broken plaintiff's ankles in any event. As we have seen, [defendant] presented substantial evidence to that effect. [Defendant] was therefore entitled to its special instruction, and the trial court's refusal to give it was error." (*Soule, supra,* 8 Cal.4th at p. 572–573, original italics, footnote and internal citations omitted.)
- "The first element of legal cause is cause in fact . . . . The 'but for' rule has traditionally been applied to determine cause in fact. The Restatement formula uses the term *substantial factor* 'to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.' " (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1095 [44 Cal.Rptr.3d 14], internal citations omitted.)
- "If the accident would have happened anyway, whether the defendant was negligent or not, then his or her negligence was not a cause in fact, and of course cannot be the legal or responsible cause." (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 370 [199 Cal.Rptr.3d 522].)
- "We have recognized that proximate cause has two aspects. ' "One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event." ' This is sometimes referred to as 'but-for' causation. In cases where concurrent independent causes contribute to an injury, we apply the 'substantial factor' test of the Restatement Second of Torts, section 423, which subsumes traditional 'but for' causation. This case does not involve concurrent independent causes, so the 'but for' test governs questions of factual causation." (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 354 [188 Cal.Rptr.3d 309, 349 P.3d 1013], original italics, footnote omitted.)
- "The second aspect of proximate cause 'focuses on public policy considerations. Because the purported [factual] causes of an event may be traced back to the dawn of humanity, the law has imposed additional "limitations on liability other

than simple causality." [Citation.] "These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy." [Citation.] Thus, "proximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.' " [Citation.]' " (*State Dept. of State Hospitals, supra,* 61 Cal.4th at p. 353, internal citation omitted.)

- "On the issue . . . of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1104 [236 Cal.Rptr.3d 128].)
- " 'Whether a defendant's conduct actually caused an injury is a question of fact . . . that is ordinarily for the jury . . . .' '[C]ausation in fact is ultimately a matter of probability and common sense: "[A plaintiff] is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable [persons] may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no [person] can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case." ' . . . ' "A mere possibility of . . . causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." ' " (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029–1030 [68 Cal.Rptr.3d 897], internal citations omitted.)
- "Ordinarily, proximate cause is a question of fact which cannot be decided as a matter of law from the allegations of a complaint. . . . Nevertheless, where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact." (*Modisette v. Apple Inc.* (2018) 30 Cal.App.5th 136, 152 [241 Cal.Rptr.3d 209].)
- "[E]vidence of causation 'must rise to the level of a reasonable probability based upon competent testimony. [Citations.] "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." [Citation.] The defendant's conduct is not the cause in fact of harm " 'where the

evidence indicates that there is less than a probability, i.e., a 50-50 possibility or a mere chance,' " that the harm would have ensued.' " (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 312 [111 Cal.Rptr.3d 787].)

- "However the test is phrased, causation in fact is ultimately a matter of probability and common sense." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253 [7 Cal.Rptr.2d 101], relying on Rest.2d Torts, § 433B, com. b.)
- "As a general matter, juries may decide issues of causation without hearing expert testimony. But '[w]here the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation.' " (*Webster v. Claremont Yoga* (2018) 26 Cal.App.5th 284, 290 [236 Cal.Rptr.3d 802], internal citation omitted.)
- "The Supreme Court . . . set forth explicit guidelines for plaintiffs attempting to allege injury resulting from exposure to toxic materials: A plaintiff must 'allege that he was exposed to each of the toxic materials claimed to have caused a specific illness'; 'identify each product that allegedly caused the injury'; allege 'the toxins entered his body' 'as a result of the exposure'; allege that 'he suffers from a specific illness, and that each toxin that entered his body was a substantial factor in bringing about, prolonging, or aggravating that illness'; and, finally, allege that 'each toxin he absorbed was manufactured or supplied by a named defendant.' " (*Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1194 [130 Cal.Rptr.3d 571], quoting *Bockrath, supra*, 21 Cal.4th at p. 80, footnote omitted.)
- "[M]ultiple sufficient causes exist not only when there are two causes each of which is sufficient to cause the harm, but also when there are more than two causes, partial combinations of which are sufficient to cause the harm. As such, the trial court did not err in refusing to instruct the jury with the but-for test." (*Major*, *supra*, 14 Cal.App.5th at p. 1200.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1334–1341

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.13–1.15

1 Levy et al., California Torts, Ch. 2, *Causation,* § 2.02 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument,* § 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products,* § 2.22, Ch. 7, *Proof,* § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.71 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* §§ 165.260–165.263 (Matthew Bender)

431. Causation: Multiple Causes

A person's negligence may combine with another factor to cause harm. If you find that [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm, then [*name of defendant*] is responsible for the harm. [*Name of defendant*] cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [*name of plaintiff*]'s harm.

New September 2003

Directions for Use

This instruction will apply only when negligence is the theory asserted against the defendant. This instruction should be modified if the defendant is sued on a theory of product liability or intentional tort.

Sources and Authority

- " 'Where several persons act in concert and damages result from their joint tort, each person is held for the entire damages unless segregation as to causation can be established. Even though persons are not acting in concert, if the results produced by their acts are indivisible, each person is held liable for the whole." (*Hughey v. Candoli* (1958) 159 Cal.App.2d 231, 240 [323 P.2d 779].)
- "In cases where concurrent independent causes contribute to an injury, we apply the 'substantial factor' test of the Restatement Second of Torts, section 423, which subsumes traditional 'but for' causation." (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 352 fn. 12 [188 Cal.Rptr.3d 309, 349 P.3d 1012].)
- "A defendant's negligent conduct may combine with another factor to cause harm; if a defendant's negligence was a substantial factor in causing the plaintiff's harm, then the defendant is responsible for the harm; a defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing the plaintiff's harm; but conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)
- "We are also not persuaded CACI No. 431 confused the jury or diluted the standard for causation. The [defendants] conflate the legal concepts of substantial factor for causation and concurrent cause. CACI No. 431 is necessary to explain to the jury a 'plaintiff need not prove that the defendant's negligence was the sole cause of plaintiff's injury in order to recover. Rather it is sufficient that defendant's negligence is a legal cause of injury, even though it operated in combination with other causes, whether tortious or nontortious.' " (*Uriell v. Regents of University of California* (2015) 234 Cal.App.4th 735, 746–747 [184

Cal.Rptr.3d 79] [CACI No. 431 properly explained concurrent substantial causes to the jury].)

- "For there to be comparative fault there must be more than one contributory or concurrent legal cause of the injury for which recompense is sought." (*Doupnik v. General Motors Corp.* (1991) 225 Cal.App.3d 849, 866 [275 Cal.Rptr. 715].)
- "Because we conclude that, in this case, in which causation was the most critical contested issue and in which there was substantial evidence of multiple causes of [decedent]' s death, the trial court improperly [refused to instruct] the jury with respect to concurrent causation . . . ." (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1152 [84 Cal.Rptr.2d 257].)
- "Clearly, where a defendant's negligence is a concurring cause of an injury, the law regards it as a legal cause of the injury, *regardless of the extent to which it contributes to the injury*." (*Espinosa v. Little Company of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1317–1318 [37 Cal.Rptr.2d 541], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1344

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.16

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.11 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.280–165.284 (Matthew Bender)

432. Affirmative Defense—Causation: Third-Party Conduct as Superseding Cause

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*/it] is not responsible for [*name of plaintiff*]'s harm because of the later misconduct of [*insert name of third party*]. To avoid legal responsibility for the harm, [*name of defendant*] must prove all of the following:

1. **That [*name of third party*]'s conduct occurred after the conduct of [*name of defendant*];**
2. **That a reasonable person would consider [*name of third party*]'s conduct a highly unusual or an extraordinary response to the situation;**
3. **That [*name of defendant*] did not know and had no reason to expect that [*name of third party*] would act in a [negligent/wrongful] manner; and**
4. **That the kind of harm resulting from [*name of third party*]'s conduct was different from the kind of harm that could have been reasonably expected from [*name of defendant*]'s conduct.**

New September 2003; Revised June 2011, December 2011

Directions for Use

A superseding cause instruction should be given if the issue is raised by the evidence. (See *Paverud v. Niagara Machine and Tool Works* (1987) 189 Cal.App.3d 858, 863 [234 Cal.Rptr. 585]; disapproved in *Soule v. General Motors Corp.* (1994) 8 Cal. 4th 548, 574, 580 [34 Cal.Rptr.2d 607, 882 P.2d. 298] [there is no rule of automatic reversal or inherent prejudice applicable to any category of civil instructional error].) The issue of superseding cause should be addressed directly in a specific instruction. (See *Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 10 [116 Cal.Rptr. 575]; disapproved in *Soule, supra*, 8 Cal. 4th at p. 580.)

Superseding cause is an affirmative defense that must be proved by the defendant. (*Maupin v. Widling* (1987) 192 Cal.App.3d 568, 578 [237 Cal.Rptr. 521].) Therefore, the elements of this instruction are phrased in the affirmative and require the defendant to prove that they are all present in order to establish superseding cause. (See *Martinez v. Vintage Petroleum* (1998) 68 Cal.App.4th 695, 702 [80 Cal.Rptr.2d 449].)

If, as a matter of law, a party is liable for subsequent negligence, as in subsequent medical negligence, this instruction should not be given.

Sources and Authority

- " 'It is well established . . . that one's general duty to exercise due care includes

the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct (including the reasonably foreseeable negligent conduct) of a third person.' In determining whether one has a duty to prevent injury that is the result of third party conduct, the touchstone of the analysis is the foreseeability of that intervening conduct." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1148 [210 Cal.Rptr.3d 283, 384 P.3d 283], internal citation omitted.)

- "This issue is concerned with whether or not, assuming that a defendant was negligent and that his negligence was an actual cause of the plaintiff's injury, the defendant should be held responsible for the plaintiff's injury where the injury was brought about by a later cause of independent origin. This question, in turn, revolves around a determination of whether the later cause of independent origin, commonly referred to as an intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type which was foreseeable. If either of these questions is answered in the affirmative, then the defendant is not relieved from liability towards the plaintiff; if, however, it is determined that the intervening cause was not foreseeable and that the results which it caused were not foreseeable, then the intervening cause becomes a supervening cause and the defendant is relieved from liability for the plaintiff's injuries." (*Akins v. County of Sonoma* (1967) 67 Cal.2d 185, 199 [60 Cal.Rptr. 499, 430 P.2d 57].)
- " 'A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.' If the cause is superseding, it relieves the actor from liability whether or not that person's negligence was a substantial factor in bringing about the harm." (*Brewer v. Teano* (1995) 40 Cal.App.4th 1024, 1031 [47 Cal.Rptr.2d 348], internal citation omitted; see Restatement 2d of Torts, § 440.)
- "The rules set forth in sections 442–453 of the Restatement of Torts for determining whether an intervening act of a third person constitutes a superseding cause which prevents antecedent negligence of the defendant from being a proximate cause of the harm complained of have been accepted in California. Under these rules the fact that an intervening act of a third person is done in a negligent manner does not make it a superseding cause if a reasonable man knowing the situation existing when the act of the third person is done would not regard it as highly extraordinary that the third person so acted or the act is a normal response to a situation created by the defendant's conduct and the manner in which the intervening act is done is not extraordinarily negligent." (*Stewart v. Cox* (1961) 55 Cal.2d 857, 864 [13 Cal.Rptr. 521, 362 P.2d 345], internal citations omitted.)
- "This test is but another way of saying that foreseeable intervening ordinary negligence will not supersede but such negligence, if 'highly extraordinary,' will supersede. [¶] '[T]he fact that an intervening act of a third person is done in a negligent manner does not make it a superseding cause if . . . the act is a normal response to a situation created by the defendant's conduct and the

manner in which the intervening act is done is not extraordinarily negligent. . . .' This test is but another way of saying a normal, but negligent, intervening response will not supersede but an extraordinarily negligent response will supersede." (*Martinez, supra*, 68 Cal.App.4th at p. 701 [holding that highly extraordinary negligence or extraordinarily negligent response obviates need to prove unforeseeable risk of harm].)

- "Intervening negligence cuts off liability, and becomes known as a superseding cause, if ' "it is determined that the intervening cause was not foreseeable *and* that the results which it caused were not foreseeable . . . ." ' " (*Martinez, supra*, 68 Cal.App.4th at pp. 700–701, original italics.)
- " '[T]he defense of "superseding cause[]" . . . absolves [the original] tortfeasor, even though his conduct *was a* substantial contributing factor, when an independent event [subsequently] intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible.' . . . [¶] To determine whether an independent intervening act was reasonably foreseeable, we look to the act and the nature of the harm suffered. To qualify as a superseding cause so as to relieve the defendant from liability for the plaintiff's injuries, both the intervening act and the results of that act must not be foreseeable. Significantly, 'what is required to be foreseeable is the general character of the event or harm . . . not its precise nature or manner of occurrence.' " (*Chanda v. Federal Home Loans Corp.* (2013) 215 Cal.App.4th 746, 755–756 [155 Cal.Rptr.3d 693], original italics, internal citations omitted.)
- " 'Third party negligence which is the immediate cause of an injury may be viewed as a superseding cause when it is so highly extraordinary as to be unforeseeable. . . . "The foreseeability required is of the risk of harm, not of the particular intervening act. In other words, the defendant may be liable if his conduct was 'a substantial factor' in bringing about the harm, though he neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred." . . . It must appear that the intervening act has produced "harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible." . . . [¶] . . . [F]oreseeability is a question for the jury unless undisputed facts leave no room for a reasonable difference of opinion. . . . Thus, the issue of superseding cause is generally one of fact. . . .' " (*Lawson v. Safeway Inc.* (2010) 191 Cal.App.4th 400, 417 [119 Cal.Rptr.3d 366].)
- "The intervening negligence (or even recklessness) of a third party will not be considered a superseding cause if it is a 'normal response to a situation created by the defendant's conduct' and is therefore ' ". . . within the scope of the reasons [for] imposing the duty upon [the defendant] to refrain from negligent conduct" ' in the first place." (*Pedeferri v. Seidner Enterprises* (2013) 216 Cal.App.4th 359, 373 [163 Cal.Rptr.3d 55], internal citations omitted.)
- "Under the theory of supervening cause, the chain of causation that would otherwise flow from an initial negligent act is broken when an independent act

intervenes and supersedes the initial act." (*Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 26 [22 Cal.Rptr.2d 106].)

- "[T]he intervening and superseding act itself need not necessarily be a negligent or intentional tort. For example, the culpability of the third person committing the intervening or superseding act is just one factor in determining if an intervening force is a new and independent superseding cause." (*Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1277 [168 Cal.Rptr.3d 499] [unforeseeable bankruptcy can be superseding cause].)
- "Whether an intervening force is superseding or not generally presents a question of fact, but becomes a matter of law where only one reasonable conclusion may be reached." (*Ash, supra*, 223 Cal.App.4th at p. 1274.)
- "[O]ne does not reach the issue of superseding cause until one is satisfied that the record supports a finding of negligence on the part of the defendant and a further finding that but for such negligence the accident would not have occurred. This, at least, has been the approach of our Supreme Court. . . . [S]uch an approach may be analytically wrong, because a finding that plaintiff's harm was due to a superseding cause, is, in reality, a finding that the cause which injured the plaintiff was not a part of the risk created by the defendant." (*Ewart v. Southern California Gas Co.* (1965) 237 Cal.App.2d 163, 169 [46 Cal.Rptr. 631].)
- "The potential for error in the [instruction] lies in the ambiguity of the words 'extraordinary' and 'abnormal.' These terms could be interpreted as meaning either: A. Unforeseeable (unpredictable, statistically extremely improbable, etc.); *or* B. Outside the scope of that which would be done by ordinary man. The instruction was correct if interpreted in sense A, since defendant's conduct would not in fact give rise to liability if the criminal act were unforeseeable. However, the instruction was incorrect if interpreted in sense B. Such an interpretation would almost invariably preclude liability for failure to police against criminal conduct, since there are very few situations indeed to which ordinary men would respond by committing serious criminal offenses. Yet it is not the law that one has no duty to protect against foreseeable criminal acts." (*Campodonico v. State Auto Parks, Inc.* (1970) 10 Cal.App.3d 803, 807 [89 Cal.Rptr. 270], original italics.)
- "Proximate cause analysis is also concerned with intervening forces operating independent of defendant's conduct. Multiple elements are weighed in determining whether an intervening force is a superseding cause of harm to the plaintiff, thus absolving defendant from liability: '(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence; [¶] (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation; [¶] (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation; [¶] (d) the fact that the operation of the intervening

force is due to a third person's act or to his failure to act; [¶] (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; [¶] (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.' " (*Novak v. Continental Tire North America* (2018) 22 Cal.App.5th 189, 197 [231 Cal.Rptr.3d 324], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1348, 1349

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-O, *Causation Issues*, ¶ 2:2444 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶ 2:1326 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.17

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.11 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.74 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.301, 165.321 (Matthew Bender)

433. Affirmative Defense—Causation: Intentional Tort/Criminal Act as Superseding Cause

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] is not responsible for [***name of plaintiff***]'s harm because of the later [criminal/intentional] conduct of [***insert name of third party***]. [***Name of defendant***] is not responsible for [***name of plaintiff***]'s harm if [***name of defendant***] proves [both/all] of the following:**

[1. That [*name of third party***] committed [an intentional/a criminal] act;]]**

2. That [*name of third party***]'s [intentional/criminal] conduct happened after the conduct of [***name of defendant***]; and**

3. That [*name of defendant***] did not know and could not have reasonably foreseen that another person would be likely to take advantage of the situation created by [***name of defendant***]'s conduct to commit this type of act.**

New September 2003; Revised June 2014

Directions for Use

Give the optional first element if there is a dispute of fact as to whether the third party actually committed the criminal or intentional act that is alleged to constitute superseding cause. The element may be modified to describe the alleged act more particularly if desired.

Sources and Authority

- "California has adopted the modern view embodied in section 448 of the Restatement Second of Torts: 'The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.' Present California decisions establish that a criminal act will be deemed a superseding cause unless it involves a particular and foreseeable hazard inflicted upon a member of a foreseeable class." (*Kane v. Hartford Accident and Indemnity Co.* (1979) 98 Cal.App.3d 350, 360 [159 Cal.Rptr. 446].)
- "[A]n intervening act does not amount to a 'superseding cause' relieving the negligent defendant of liability if it was reasonably foreseeable: '[An] actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such

act was reasonably foreseeable at the time of his negligent conduct.' Moreover, under section 449 of the Restatement Second of Torts that foreseeability may arise directly from the risk created by the original act of negligence: 'If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.' " (*Landeros v. Flood* (1976) 17 Cal.3d 399, 411 [131 Cal.Rptr. 69, 551 P.2d 389], internal citations omitted.)

- "The trial court's modification of CACI No. 433 appears to have been intended to apply the principle of negligence law that unforeseeable criminal conduct cuts off a tortfeasor's liability. CACI No. 433 sets forth the heightened foreseeability that is required before an intervening criminal act will relieve a defendant of liability for negligence. A third party's criminal conduct becomes actionable if the negligent tortfeasor has created a situation that facilitated the crime." (*Collins v. Navistar, Inc.* (2013) 214 Cal.App.4th 1486, 1508 [155 Cal.Rptr.3d 137], internal citations omitted.)
- "Criminal conduct which causes injury will ordinarily be deemed the proximate cause of an injury, superseding any prior negligence which might otherwise be deemed a contributing cause." (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1449 [23 Cal.Rptr.2d 34].)
- "The common law rule that an intervening criminal act is, by its very nature, a superseding cause has lost its universal application and its dogmatic rigidity." (*Kane, supra,* 98 Cal.App.3d at p. 360.)
- "CACI No. 433 is neither a concurrent causation nor a comparative fault instruction allowing the jury to apportion relative degrees of fault. CACI No. 433, a superseding cause instruction, applies when a third party takes advantage of or utilizes a situation created by the tortfeasor's conduct to engage in intentional or criminal conduct inflicting harm on another person." (*Crouch v. Trinity Christian Center of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1023 [253 Cal.Rptr.3d 1].)
- "CACI No. 433 erroneously allowed [defendant] a complete defense based on a heightened standard of foreseeability inapplicable to plaintiffs' design defect claims. Specifically, CACI No. 433 allowed [defendant] to secure a defense verdict by showing it 'could not have reasonably foreseen that another person would be likely to take advantage of the situation created by . . . [defendant]'s conduct to commit this type of act.' However, [defendant] did not create a situation that [third party] took advantage of in order to commit a crime. [Third party] did not throw the concrete at [decedent]'s truck because he perceived a defective angle or composition of the windshield. CACI No. 433 erroneously introduced a test that does not make sense in this products liability case." (*Collins, supra*, 214 Cal.App.4th at p. 1509.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1365, 1367

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.17

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.11 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.301, 165.303, 165.322 (Matthew Bender)

434. Alternative Causation

You may decide that more than one of the defendants was negligent, but that the negligence of only one of them could have actually caused [*name of plaintiff***]'s harm. If you cannot decide which defendant caused [***name of plaintiff***]'s harm, you must decide that each defendant is responsible for the harm.**

However, if a defendant proves that [he/she/*nonbinary pronoun***/it] did not cause [***name of plaintiff***]'s harm, then you must conclude that defendant is not responsible.**

New September 2003; Revised November 2019

Directions for Use

This instruction is based on the rule stated in the case of *Summers v. Tice* (1948) 33 Cal.2d 80, 86 [199 P.2d 1], in which the court held that the burden of proof on causation shifted to the two defendants to prove that each was not the cause of plaintiff's harm.

Sources and Authority

- "When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless." (*Summers, supra*, 33 Cal.2d 80 at p. 86.)
- "California courts have applied the [*Summers*] alternative liability theory only when all potential tortfeasors have been joined as defendants." (*Setliff v. E. I. Du Pont de Nemours & Co*. (1995) 32 Cal.App.4th 1525, 1534–1535 [38 Cal.Rptr.2d 763].)
- "There is an important difference between the situation involved in *Summers* and the present case. There, all the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants. Here, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury-producing drug." (*Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 602 [163 Cal.Rptr. 132, 607 P.2d 924].)
- "According to the Restatement, the burden of proof shifts to the defendants only if the plaintiff can demonstrate that all defendants acted tortiously and that the harm resulted from the conduct of one of them. (Rest.2d Torts, § 433B, com. g,

p. 446.) It goes on to state that the rule thus far has been applied only where all the actors involved are joined as defendants and where the conduct of all is simultaneous in time, but cases might arise in which some modification of the rule would be necessary if one of the actors is or cannot be joined, or because of the effects of lapse of time, or other circumstances." (*Sindell, supra*, 26 Cal.3d at p. 602, fn. 16.)

- "*Summers* applies to multiple *tortfeasors* not to multiple *defendants*, and it is immaterial in this case that the matter went to trial only as against respondent, for A, B, and/or C was also a tortfeasor." (*Vahey v. Sacia* (1981) 126 Cal.App.3d 171, 177 [178 Cal.Rptr. 559], original italics, footnote omitted.)
- "[Restatement Second of Torts] Section 433B, subdivision (3) sets forth the rule of *Summers v. Tice, supra*, 33 Cal. 2d 80, using its facts as an example. Comment *h* provides: 'The cases thus far decided in which the rule stated in Subsection (3) has been applied all have been cases in which all of the actors involved have been joined as defendants. All of these cases have involved conduct simultaneous in time, or substantially so, and all of them have involved conduct of substantially the same character, creating substantially the same risk of harm, on the part of each actor. It is possible that cases may arise in which some modification of the rule stated may be necessary because of complications arising from the fact that one of the actors involved is not or cannot be joined as a defendant, or because of the effect of lapse of time, or because of substantial differences in the character of the conduct of the actors or the risks which they have created. Since such cases have not arisen, and the situations which might arise are difficult to forecast, no attempt is made to deal with such problems in this Section. The rule stated in Subsection (3) is not intended to preclude possible modification if such situations call for it.' " (*Setliff, supra*, 32 Cal.App.4th at p. 1535.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1345

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.16

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

California Products Liability Actions, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.72 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.330 (Matthew Bender)

435. Causation for Asbestos-Related Cancer Claims

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It does not have to be the only cause of the harm.

[*Name of plaintiff***] may prove that exposure to asbestos from [***name of defendant***]'s [product/ [,/or] activities/ [,/or] property/ [,/or] operations] was a substantial factor causing [his/her/***nonbinary pronoun***/[***name of decedent***]'s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his/her/***nonbinary pronoun***] risk of developing cancer.**

New September 2003; Revised December 2007, May 2018, November 2018, May 2020, November 2020

Directions for Use

This instruction is to be given in a case in which the plaintiff's claim is that the plaintiff contracted an asbestos-related disease from exposure to the defendant's asbestos-containing product or asbestos-related activities. (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 [67 Cal.Rptr.2d 16, 941 P.2d 1203]; *Lopez v. The Hillshire Brands Co.* (2019) 41 Cal.App.5th 679, 688 [254 Cal.Rptr.3d 377] [addressing causation standard for exposure to asbestos from a defendant's property or operation when the defendant is not a manufacturer or supplier of asbestos-containing products]; but see *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 290 [220 Cal.Rptr.3d 185] [court gave CACI No. 435 with regard to premises liability defendant].) If the plaintiff's claim is based on anything other than disease resulting from asbestos exposure, then this instruction is not to be given.

If the issue of medical causation is tried separately, revise this instruction to focus on that issue.

If necessary, CACI No. 431, *Causation: Multiple Causes*, may also be given.

Sources and Authority

- "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related cancer case, the plaintiff need *not* prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial

factor contributing to the plaintiff's or decedent's *risk* of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation remain correct in this context and should also be given." (*Rutherford, supra,* 16 Cal.4th at pp. 982–983, original italics, internal citation and footnotes omitted.)

- "Squarely faced with the issue of CACI No. 435's correctness for a non-manufacturer/non-supplier, we conclude that CACI No. 435 applied to plaintiffs' asbestos-related claim, even though [defendant] is not a manufacturer or supplier of asbestos. [¶] CACI No. 435 was developed to address the special considerations that apply when the injury was allegedly caused by asbestos exposure. These include the long latency period, the occupational settings that often expose workers to multiple forms and brands of asbestos, and, in a case of exposure to asbestos from multiple sources, the difficulty of proving that a plaintiff's or decedent's illness was caused by particular asbestos fibers traceable to the defendant. These considerations are similar whether the defendant was a manufacturer/supplier or otherwise created the exposure to asbestos." (*Lopez, supra,* 41 Cal.App.5th at p. 687, internal citation omitted.)
- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford, supra*, 16 Cal.4th at p. 969, internal citations omitted.)
- "[A] very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citation omitted.)
- "Contrary to defendant's assertion, the California Supreme Court's decision in *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046] (*Viner*) did not alter the causation requirement in asbestos-related cases. In *Viner*, the court noted that subsection (1) of section 432 of the Restatement Second of Torts, which provides that 'the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent,' 'demonstrates how the "substantial factor" test subsumes the traditional "but for" test of causation.' Defendant argues that *Viner* required plaintiffs to show that defendant's product 'independently caused [plaintiff's] injury or that, but for that exposure, [plaintiff]

would not have contracted lung cancer.' *Viner*, however, is a legal malpractice case. It does not address the explicit holding in *Rutherford* that 'plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth.' " *Viner* is consistent with *Rutherford* insofar as *Rutherford* requires proof that an individual asbestos-containing product is a substantial factor contributing to the plaintiff's risk or probability of developing cancer." (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn. 3 [35 Cal.Rptr.3d 144], internal citations omitted.)

- " 'A threshold issue in asbestos litigation is exposure to the defendant's product. . . . If there has been no exposure, there is no causation.' Plaintiffs bear the burden of 'demonstrating that exposure to [defendant's] asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [plaintiff's] risk of developing cancer.' 'Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [plaintiff].' Therefore, '[plaintiffs] cannot prevail against [defendant] without evidence that [plaintiff] was exposed to asbestos-containing materials manufactured or furnished by [defendant] with enough frequency and regularity as to show a reasonable medical probability that this exposure was a factor in causing the plaintiff's injuries.' " (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084 [109 Cal.Rptr.3d 371], internal citations omitted.)
- "[G]iving CACI No. 430, which states that a factor is not substantial when it is 'remote or trivial,' could be misleading in an asbestos case, where the long latency period necessitates exposures will have been several years earlier. Jury instructions therefore should not suggest that a long latency period, in which the exposure was temporally 'remote,' precludes an otherwise sufficient asbestos claim. ' "Remote" often connotes a time limitation. Nothing in *Rutherford* suggests such a limitation; indeed, asbestos cases are brought long after exposure due to the long-term latent nature of asbestos-related diseases.' It was not error for the court to give CACI No. 435 alone instead of CACI No. 430." (*Lopez, supra,* 41 Cal.App.5th at p. 688, internal citation omitted.)
- "That the Use Notes caution against giving the more general CACI No. 430 in a mesothelioma case, when the more specific instruction CACI No. 435 is more applicable, does not support a conclusion that it was error to give both instructions. CACI No. 430 is a correct statement of the law relating to substantial factor causation, even though, as *Rutherford* noted, more specific instructions *also* must be given in a mesothelioma case. Because the more specific CACI No. 435 also was given, we do not find that the trial court erred

by giving both instructions." (*Petitpas, supra,* 13 Cal.App.5th at p. 299, original italics.)

- "Further, '[t]he mere "possibility" of exposure' is insufficient to establish causation. '[P]roof that raises mere speculation, suspicion, surmise, guess or conjecture is not enough to sustain [the plaintiff's] burden' of persuasion." (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 969 [180 Cal.Rptr.3d 382], internal citations omitted.)
- "[T]here is no requirement that plaintiffs show that [defendant] was the exclusive, or even the primary, supplier of asbestos-containing gaskets to PG&E." (*Turley v. Familian Corp.* (2017) 18 Cal.App.5th 969, 981 [227 Cal.Rptr.3d 321].)
- "[T]o establish exposure in an asbestos case a plaintiff has no obligation to prove a specific exposure to a specific product on a specific date or time. Rather, it is sufficient to establish 'that defendant's product was definitely at his work site and that it was sufficiently prevalent to warrant an inference that plaintiff was exposed to it' during his work there." (*Turley*, *supra*, 18 Cal.App.5th at p. 985.)
- "To support an allocation of liability to another party in an asbestos case, a defendant must 'present evidence that the aggregate dose of asbestos particles arising from' exposure to that party's asbestos 'constituted a substantial factor in the causation of [the decedent's] cancer.' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 205 [191 Cal.Rptr.3d 263].)
- " '[G]iven the long latency period of asbestos-related disease, and the occupational settings that commonly exposed the worker to multiple forms and brands of asbestos products with varying degrees of toxicity,' our Supreme Court has held that a plaintiff 'need *not* prove with medical exactitude that fibers from a particular defendant's asbestos-containing products were those, or among those, that actually began the cellular process of malignancy.' Rather, a 'plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer.' " (*Izell, supra*, 231 Cal.App.4th at p. 975, original italics, internal citation omitted.)
- "Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff's asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. [Citation.] Additional factors may also be significant in individual cases, such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff's injury. [Citations.] 'Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.' [Citation.] " (*Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1363–1364 [169 Cal.Rptr.3d 373].)

- "In this case, [defendant] argues the trial court's refusal to give its proposed instruction was error because the instruction set forth 'the requirement in *Rutherford* that causation be decided by taking into account "the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, [and] any other potential causes to which the disease could be attributed." ' But *Rutherford* does not require the jury to take these factors into account when deciding whether a plaintiff's exposure to an asbestos-containing product was a substantial factor in causing mesothelioma. Instead, those factors are ones that a medical expert may rely upon in forming his or her expert medical opinion." (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 495 [199 Cal.Rptr.3d 583], internal citation omitted.)
- "Mere presence at a site where asbestos was present is insufficient to establish legally significant asbestos exposure." (*Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 252 [192 Cal.Rptr.3d 346].)
- "We disagree with the trial court's view that *Rutherford* mandates that a medical doctor must expressly link together the evidence of substantial factor causation. The *Rutherford* court did not create a requirement that specific words must be recited by appellant's expert. Nor did the *Rutherford* court specify that the testifying expert in asbestos cases must always be 'somebody with an M.D. after his name.' The *Rutherford* court agreed with the *Lineaweaver* court that 'the reference to "medical probability" in the standard "is no more than a recognition that asbestos injury cases (like medical malpractice cases) involve the use of medical evidence." [Citation.]' The Supreme Court has since clarified that medical evidence does not necessarily have to be provided by a medical doctor." (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 675 [156 Cal.Rptr.3d 90], internal citations omitted.)
- "Nothing in *Rutherford* precludes a plaintiff from establishing legal causation through opinion testimony by a competent medical expert to the effect that every exposure to respirable asbestos contributes to the risk of developing mesothelioma. On the contrary, *Rutherford* acknowledges the scientific debate between the 'every exposure' and 'insignificant exposure' camps, and recognizes that the conflict is one for the jury to resolve." (*Izell, supra*, 231 Cal.App.4th at p. 977.)
- "[T]he identified-exposure theory is a more rigorous standard of causation than the every-exposure theory. As a single example of the difference, we note [expert]'s statement that it 'takes significant exposures' to increase the risk of disease. This statement uses the plural 'exposures' and also requires that those exposures be 'significant.' The use of 'significant' as a limiting modifier appears to be connected to [expert]'s earlier testimony about the concentrations of airborne asbestos created by particular activities done by [plaintiff], such as filing, sanding and using an airhose to clean a brake drum." (*Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1088 [217 Cal.Rptr.3d 147].)
- "Nor is there a requirement that 'specific words must be recited by [plaintiffs']

expert.' [¶] The connection, however, must be made between the defendant's asbestos products and the risk of developing mesothelioma suffered by the decedent." (*Paulus, supra*, 224 Cal.App.4th at p. 1364.)

- "We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability. Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1140 [210 Cal.Rptr.3d 283, 384 P.3d 283].)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, § 632

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, Theories of Recovery—Strict Liability For Defective Products, ¶ 2:1259 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-O, Theories of Recovery—Causation Issues, ¶ 2:2409 (The Rutter Group)

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.72 (Matthew Bender)

436–439. Reserved for Future Use

440. Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements

A law enforcement officer may use reasonable force to [arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance by] a person when the officer has reasonable cause to believe that that person has committed or is committing a crime. However, the officer may use only that degree of force necessary to [arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance by] the person. [Even if the officer is mistaken, a person being arrested or detained has a duty not to use force to resist the officer unless the officer is using unreasonable force.].

[*Name of plaintiff***] claims that [***name of defendant***] was negligent in using unreasonable force to [arrest/detain/ [,/or] prevent escape of/ overcome resistance by] [him/her/***nonbinary pronoun***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used force to [arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance by] [***name of plaintiff***];**
2. **That the amount of force used by [***name of defendant***] was unreasonable;**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s use of unreasonable force was a substantial factor in causing [***name of plaintiff***]'s harm.**

In deciding whether [*name of defendant***] used unreasonable force, you must consider the totality of the circumstances to determine what amount of force a reasonable [***insert type of officer***] in [***name of defendant***]'s position would have used under the same or similar circumstances. "Totality of the circumstances" means all facts known to the officer at the time, including the conduct of [***name of defendant***] and [***name of plaintiff***] leading up to the use of force. Among the factors to be considered are the following:**

(a) Whether [*name of plaintiff***] reasonably appeared to pose an immediate threat to the safety of [***name of defendant***] or others;**

(b) The seriousness of the crime at issue; [and]

(c) Whether [*name of plaintiff***] was actively resisting [arrest/detention] or attempting to avoid [arrest/detention] by flight[; and/.]**

[(d) [*Name of defendant***]'s tactical conduct and decisions before using force on [***name of plaintiff***].]**

[An officer who makes or attempts to make an arrest does not have to

retreat or stop because the person being arrested is resisting or threatening to resist. Tactical repositioning or other deescalation tactics are not retreat. An officer does not lose the right to self-defense by using objectively reasonable force to [arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance by] the person.]

New June 2016; Revised May 2020, November 2020, May 2021

Directions for Use

Use this instruction if the plaintiff makes a negligence claim under state law arising from the force used in effecting an arrest or detention. Such a claim is often combined with a claimed civil rights violation under 42 United States Code section 1983. See CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements.* It might also be combined with a claim for battery. See CACI No. 1305, *Battery by Peace Officer—Essential Factual Elements*. For additional authorities on excessive force by a law enforcement officer, see the Sources and Authority to these two CACI instructions.

By its terms, Penal Code section 835a's deadly force provisions apply to "peace officers." It would appear that a negligence claim involving nondeadly force does not depend on whether the individual qualifies as a peace officer under the Penal Code. (See Pen. Code, § 835a; see also Pen. Code, § 830 et seq. [defining "peace officer"].) For cases involving the use of deadly force by a peace officer, use CACI No. 441, *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*. (Pen. Code, § 835a.) This instruction and CACI No. 441 may require modification if the jury must decide whether the force used by the defendant was deadly or nondeadly.

Include the last bracketed sentence in the first paragraph only if there is evidence the person being arrested or detained used force to resist the officer.

Factors (a), (b), and (c) are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are to be applied under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal.Rptr.3d 1, 207 P.3d 506].) They are not exclusive (see *Glenn v. Wash. County* (9th Cir. 2011) 673 F.3d 864, 872); additional factors may be added if appropriate to the facts of the case. If negligence, civil rights, and battery claims are all involved, the instructions can be combined so as to give the *Graham* factors only once. A sentence may be added to advise the jury that the factors apply to multiple claims.

Factor (d) is bracketed because no reported California state court decision has held that an officer's tactical decisions before using nondeadly force can be actionable negligence. It has been held that liability can arise if the officer's earlier tactical conduct and decisions show, as part of the totality of circumstances, that the ultimate use of deadly force was unreasonable. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].) In this respect,

California negligence law differs from the federal standard under the Fourth Amendment. (*Hayes, supra,* 57 Cal.4th at p. 639 ["[T]he state and federal standards are not the same, which we now confirm"]; cf. *Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1037 ["To determine police liability [under state law negligence], a court applies tort law's 'reasonable care' standard, which is distinct from the Fourth Amendment's 'reasonableness' standard. The Fourth Amendment is narrower and 'plac[es] less emphasis on preshooting conduct.'"]

Include the final bracketed paragraph only if the defendant claims that the person being arrested resisted arrest or threatened resistance.

Sources and Authority

- Legislative Findings re Use of Force by Law Enforcement. Penal Code section 835a(a).
- Use of Objectively Reasonable Force to Arrest. Penal Code section 835a(b).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).
- "There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent. It has often been pointed out that there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence." (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 586 [86 Cal.Rptr. 465, 468 P.2d 825].)
- "The evidence relevant to negligence and intentional tort overlaps here and presents a case similar to *Grudt*. . . . [¶] This court held it was reversible error to exclude the negligence issue from the jury even though plaintiff also had pled intentional tort. The court pointed to the rule that a party may proceed on inconsistent causes of action unless a nonsuit is appropriate." (*Munoz v. Olin* (1979) 24 Cal.3d 629, 635 [156 Cal.Rptr. 727, 596 P.2d 1143].)
- "Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of 'the totality of the circumstances at the time,' including 'the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.' The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the

federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests." (*Hernandez, supra*, 46 Cal.4th at p. 514, internal citation omitted.)

- "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of ' "the nature and quality of the intrusion on the individual's Fourth Amendment interests" ' against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra*, 490 U.S. at p. 396, internal citations omitted.)
- "The most important of these [*Graham* factors, above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553].)
- "Plaintiff must prove unreasonable force as an element of the tort." (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)
- " ' "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . ." ' In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)
- " '[A]s long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the "most reasonable" action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence.'" (*Hayes*, *supra*, 57 Cal.4th at p. 632.)
- "The California Supreme Court did not address whether decisions before non-deadly force can be actionable negligence, but addressed this issue only in the context of 'deadly force.'" (*Mulligan v. Nichols* (9th Cir. 2016) 835 F.3d 983, 991, fn. 7.)
- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful

detention . . . ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)

- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 496

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

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

441. Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements

A peace officer may use deadly force only when necessary in defense of human life. [*Name of plaintiff***] claims that [***name of defendant***] was negligent in using deadly force to [arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance to] [him/her/***nonbinary pronoun/name of decedent***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was a peace officer;**
2. That [***name of defendant***] **used deadly force on [***name of plaintiff/decedent***];**
3. **That [***name of defendant***]'s use of deadly force was not necessary to defend human life;**
4. **That [***name of plaintiff/decedent***] was [harmed/killed]; and**
5. **That [***name of defendant***]'s use of deadly force was a substantial factor in causing [***name of plaintiff/decedent***]'s [harm/death].**

[*Name of defendant***]'s use of deadly force was necessary to defend human life only if a reasonable officer in the same situation would have believed, based on the totality of the circumstances known to or perceived by [***name of defendant***] at the time, that deadly force was necessary [either]:**

[to defend against an imminent threat of death or serious bodily injury to [*name of defendant***] [and/or] [another person]][; or/.]]**

[to apprehend a fleeing person for a felony, when all of the following conditions are present:

i. **The felony threatened or resulted in death or serious bodily injury to another;**

ii. **[***Name of defendant***] reasonably believed that the person fleeing would cause death or serious bodily injury to another unless immediately apprehended; and**

iii. **[***Name of defendant***] made reasonable efforts to identify [himself/herself/***nonbinary pronoun***] as a peace officer and to warn that deadly force may be used, unless the officer had objectively reasonable grounds to believe the person is aware of those facts.]**

[A peace officer must not use deadly force against persons based only on the danger those persons pose to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.]

[A person being [arrested/detained] has a duty not to use force to resist a peace officer unless the peace officer is using unreasonable force.]

["Deadly force" is force that creates a substantial risk of causing death or serious bodily injury. It is not limited to the discharge of a firearm.]

A threat of death or serious bodily injury is "imminent" if, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or to another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

"Totality of the circumstances" means all facts known to or perceived by the peace officer at the time, including the conduct of [*name of defendant***] and [***name of plaintiff/decedent***] leading up to the use of deadly force. In determining whether [***name of defendant***]'s use of deadly force was necessary in defense of human life, you must consider [***name of defendant***]'s tactical conduct and decisions before using deadly force on [***name of plaintiff/decedent***] and whether [***name of defendant***] used other available resources and techniques as [an] alternative[s] to deadly force, if it was reasonably safe and feasible to an objectively reasonable officer.**

[A peace officer who makes or attempts to make an arrest does not have to retreat or stop because the person being arrested is resisting or threatening to resist. Tactical repositioning or other deescalation tactics are not retreat. A peace officer does not lose the right to self-defense by using objectively reasonable force to [arrest/detain/ [,/or] prevent escape/ [,/or] overcome resistance].]

New November 2020

Directions for Use

Use this instruction for a negligence claim arising from a peace officer's use of deadly force. Penal Code section 835a preserves the "reasonable force" standard for nondeadly force, but creates a separate, higher standard that authorizes a peace officer to use deadly force only when "necessary in defense of human life." If the plaintiff claims that the defendant used both deadly and nondeadly force, or if the jury must decide whether the force used was deadly or nondeadly, this instruction may be used along with the corresponding essential elements for negligence involving nondeadly force. See CACI No. 440, *Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*.

Element 1 may be stipulated to or decided by the judge as a matter of law. In such a case, the judge must instruct the jury that the defendant was a peace officer. If

there are contested issues of fact regarding element 1, include the specific factual findings necessary for the jury to determine whether the defendant was a peace officer.

Select either or both bracketed options concerning the justifications for using deadly force under Penal Code section § 835a(c) depending on the facts of the case. If only one justification is supported by the facts, omit the either/or language. Include the bracketed sentence following the justifications if the plaintiff claims that the only threat the plaintiff posed was self-harm. A peace officer may not use deadly force against a person based on a danger that person poses to themselves if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person. (Pen. Code, § 835a(c)(2).)

"Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm. (Pen. Code, § 835a(e)(1).) The definition may be omitted from the instruction if a firearm was used. Note that this definition does not require that the encounter result in the death of the person against whom the force was used. If there is no dispute about the use of deadly force, the court should instruct the jury that deadly force was used.

Include the final bracketed paragraph only if the defendant claims that the person being arrested resisted arrest or threatened resistance.

In a wrongful death or survival action, use the name of the decedent victim where applicable and further modify the instruction as appropriate.

Sources and Authority

- Legislative Findings Regarding Use of Force by Law Enforcement. Penal Code section 835a(a).
- When Use of Deadly Force Is Justified. Penal Code section 835a(c).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).
- "Peace Officer" Defined. Penal Code section 830 et seq.
- "There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent. It has often been pointed out that there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence." (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 586 [86 Cal.Rptr. 465, 468 P.2d 825].)
- "The evidence relevant to negligence and intentional tort overlaps here and presents a case similar to *Grudt v. City of Los Angeles, supra,* 2 Cal.3d 575. . . . [¶] This court held it was reversible error to exclude the negligence issue from the jury even though plaintiff also had pled intentional tort. The court pointed to

the rule that a party may proceed on inconsistent causes of action unless a nonsuit is appropriate." (*Munoz v. Olin* (1979) 24 Cal.3d 629, 635 [156 Cal.Rptr. 727, 596 P.2d 1143].)

- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention . . . ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)
- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)
- "[T]he reasonableness of a peace officer's conduct must be determined in light of the totality of circumstances. [Citations.] . . . [P]reshooting conduct is included in the totality of circumstances surrounding an officer's use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct." (*Villalobos v. City of Santa Maria* (2022) 85 Cal.App.5th 383, 389 [301 Cal.Rptr.3d 308], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 427, 993

3 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.10 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.102 (Matthew Bender)

California Civil Practice: Torts § 12:22 (Thomson Reuters)

442–449. Reserved for Future Use

450A. Good Samaritan—Nonemergency

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*] is not responsible for [*name of plaintiff*]'s harm because [he/she/*nonbinary pronoun*] was voluntarily trying to protect [*name of plaintiff*] from harm in a nonemergency situation. If you decide that [*name of defendant*] was negligent, [he/she/*nonbinary pronoun*] is not responsible unless [*name of plaintiff*] proves both of the following:

1. **[(a) That [*name of defendant*]'s failure to use reasonable care added to the risk of harm;]**

   [or]

   [(b) That [*name of defendant*]'s conduct caused [*name of plaintiff*] to reasonably rely on [his/her/*nonbinary pronoun*] protection;]

AND

2. **That the [additional risk/ [or] reliance] was a substantial factor in causing harm to [*name of plaintiff*].**

Derived from former CACI No. 450 December 2010

Directions for Use

Use this instruction for situations other than at the scene of an emergency. Different standards apply in an emergency situation. (See Health & Saf. Code, § 1799.102; CACI No. 450B, *Good Samaritan—Scene of Emergency*.) Give both instructions if the jury will be asked to decide whether an emergency existed as the preliminary issue. Because under Health and Safety Code section 1799.102 a defendant receives greater protection in an emergency situation, the advisory committee believes that the defendant bears the burden of proving an emergency. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted].)

Select either or both options for element 1 depending on the facts.

Sources and Authority

- Good Samaritan Immunity for Medical Licensees. Business and Professions Code sections 2395–2398.
- Good Samaritan Immunity for Nurses. Business and Professions Code sections 2727.5, 2861.5.
- Good Samaritan Immunity for Dentists. Business and Professions Code section 1627.5.
- Good Samaritan Immunity for Rescue Teams. Health and Safety Code section 1317(f).

- Good Samaritan Immunity for Persons Rendering Emergency Medical Services Health and Safety Code section 1799.102.
- Good Samaritan Immunity for Paramedics. Health and Safety Code section 1799.104.
- Good Samaritan Immunity for First-Aid Volunteers. Government Code section 50086.
- "Under well-established common law principles, a person has no duty to come to the aid of another. If, however, a person elects to come to someone's aid, he or she has a duty to exercise due care. Thus, a 'good Samaritan' who attempts to help someone might be liable if he or she does not exercise due care and ends up causing harm." (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 324 [86 Cal.Rptr.3d 350, 197 P.3d 164], internal citations omitted.)
- "A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act. Also pertinent to our discussion is the role of the volunteer who, having no initial duty to do so, undertakes to come to the aid of another—the 'good Samaritan.' . . . He is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." (*Williams v. State of California* (1983) 34 Cal.3d 18, 23 [192 Cal.Rptr. 233, 664 P.2d 137], internal citations omitted.)
- "A defendant does not increase the risk of harm by merely failing to eliminate a preexisting risk." (*University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 450 [241 Cal.Rptr.3d 616].)
- "A police officer, paramedic or other public safety worker is as much entitled to the benefit of this general rule as anyone else." (*Camp v. State of California* (2010) 184 Cal.App.4th 967, 975 [109 Cal.Rptr.3d 676].)
- "The police owe duties of care only to the public at large and, except where they enter into a 'special relationship,' have no duty to offer affirmative assistance to anyone in particular." (*Arista v. County of Riverside* (2018) 29 Cal.App.5th 1051, 1060–1061 [241 Cal.Rptr.3d 437].)
- "Under the good Samaritan doctrine, CHP may have a duty to members of the public to exercise due care when CHP voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member thereby inducing reliance, when an express promise to warn of a danger has induced reliance, or when the actions of CHP place a person in peril or increase the risk of harm. In other words, to create a special relationship and a duty of care, there must be evidence that CHP ' "made misrepresentations that induced a citizen's detrimental reliance [citation], placed a citizen in harm's way [citations], or lulled a citizen into a false sense of security and then withdrew essential safety precautions." ' Nonfeasance that leaves the citizen in exactly the

same position that he or she already occupied cannot support a finding of duty of care. Affirmative conduct or misfeasance on the part of CHP that induces reliance or changes the risk of harm is required." (*Greyhound Lines, Inc. v. Department of the California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1136 [152 Cal.Rptr.3d 492], internal citations omitted.)

- "A special relationship can be found 'when the state, through its agents, voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member, thereby inducing reliance, it is held to the same standard of care as a private person or organization.' " (*Arista, supra*, 29 Cal.App.5th at p. 1061.)

Secondary Sources

4 Witkin, California Procedure (6th ed. 2021) Pleadings, § 599

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1205–1210

Flahavan et al., California Practice Guide: Personal Injury (The Rutter Group) ¶¶ 2:583.10–2:583.11, 2:876

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.11[4] (Matthew Bender)

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.32[2], [5] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.150 (Matthew Bender)

450B. Good Samaritan—Scene of Emergency

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] is not responsible for [***name of plaintiff***]'s harm because [he/she/***nonbinary pronoun***] was trying to protect [***name of plaintiff***] from harm at the scene of an emergency.**

To succeed on this defense, [*name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] rendered medical or nonmedical care or assistance to [***name of plaintiff***] at the scene of an emergency;**
2. **That [***name of defendant***] was acting in good faith; and**
3. **That [***name of defendant***] was not acting for compensation.**

If you decide that [*name of defendant***] has proved all of the above, but you decide that [***name of defendant***] was negligent, [he/she/***nonbinary pronoun***] is not responsible unless [***name of plaintiff***] proves that [***name of defendant***]'s conduct constituted gross negligence or willful or wanton misconduct.**

"Gross negligence" is the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation.

"Willful or wanton misconduct" means conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that the person knows or should know it is highly probable that harm will result.

If you find that [*name of defendant***] was grossly negligent or acted willfully or wantonly, [***name of plaintiff***] must then also prove:**

1. **[(a) That [***name of defendant***]'s conduct added to the risk of harm;]**

   [or]

   [(b) That [*name of defendant***]'s conduct caused [***name of plaintiff***] to reasonably rely on [his/her/***nonbinary pronoun***] protection;]**

AND

2. **That the [additional risk/ [or] reliance] was a substantial factor in causing harm to [***name of plaintiff***].**

Derived from former CACI No. 450 December 2010; Revised December 2011, May 2020

Directions for Use

Use this instruction for situations at the scene of an emergency not involving medical, law enforcement, or emergency personnel. (See Health & Saf. Code, § 1799.102.) In a nonemergency situation, give CACI No. 450A, *Good Samaritan—Nonemergency*.

Under Health and Safety Code section 1799.102(b), the defendant must have acted at the scene of an emergency, in good faith, and not for compensation. These terms are not defined, and neither the statute nor case law indicates who has the burden of proof. However, the advisory committee believes that it is more likely that the defendant has the burden of proving those things necessary to invoke the protections of the statute. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted].)

If the jury finds that the statutory standards have been met, then presumably it must also find that the common-law standards for Good-Samaritan liability have also been met. (See Health & Saf. Code, § 1799.102(c) ["Nothing in this section shall be construed to change any existing legal duties or obligations"].) In the common-law part of the instruction, select either or both options for element 1 depending on the facts.

See also CACI No. 425, *"Gross Negligence" Explained*.

Sources and Authority

- Immunity for Persons Rendering Care at Scene of Emergency. Health and Safety Code section 1799.102.
- " 'Gross negligence' long has been defined in California and other jurisdictions as either a ' " 'want of even scant care' " ' or ' " 'an extreme departure from the ordinary standard of conduct.' " ' " (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754 [62 Cal.Rptr.3d 527, 161 P.3d 1095], internal citations omitted.)
- "By contrast, 'wanton' or 'reckless' misconduct (or ' "willful and wanton negligence" ') describes conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result." (*City of Santa Barbara*, *supra*, 41 Cal.4th at p. 754, fn. 4, internal citations omitted.)
- "Under well-established common law principles, a person has no duty to come to the aid of another. If, however, a person elects to come to someone's aid, he or she has a duty to exercise due care. Thus, a 'good Samaritan' who attempts to help someone might be liable if he or she does not exercise due care and ends up causing harm." (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 324 [86 Cal.Rptr.3d 350, 197 P.3d 164], internal citations omitted.)
- "A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some

relationship between them which gives rise to a duty to act. Also pertinent to our discussion is the role of the volunteer who, having no initial duty to do so, undertakes to come to the aid of another—the 'good Samaritan.' . . . He is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." (*Williams v. State of California* (1983) 34 Cal.3d 18, 23 [192 Cal.Rptr. 233, 664 P.2d 137], internal citations omitted.)

- "A police officer, paramedic or other public safety worker is as much entitled to the benefit of this general rule as anyone else." (*Camp v. State of California* (2010) 184 Cal.App.4th 967, 975 [109 Cal.Rptr.3d 676].)
- "Under the good Samaritan doctrine, CHP may have a duty to members of the public to exercise due care when CHP voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member thereby inducing reliance, when an express promise to warn of a danger has induced reliance, or when the actions of CHP place a person in peril or increase the risk of harm. In other words, to create a special relationship and a duty of care, there must be evidence that CHP ' "made misrepresentations that induced a citizen's detrimental reliance [citation], placed a citizen in harm's way [citations], or lulled a citizen into a false sense of security and then withdrew essential safety precautions." ' Nonfeasance that leaves the citizen in exactly the same position that he or she already occupied cannot support a finding of duty of care. Affirmative conduct or misfeasance on the part of CHP that induces reliance or changes the risk of harm is required." (*Greyhound Lines, Inc. v. Department of the California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1136 [152 Cal.Rptr.3d 492], internal citations omitted.)
- Statutory exceptions to Good Samaritan liability include immunities under certain circumstances for medical licensees (Bus. & Prof. Code, §§ 2395–2398), nurses (Bus. & Prof. Code, §§ 2727.5, 2861.5), dentists (Bus. & Prof. Code, § 1627.5), rescue teams (Health & Saf. Code, § 1317(f)), persons rendering emergency medical services (Health & Saf. Code, § 1799.102), paramedics (Health & Saf. Code, § 1799.104), and first-aid volunteers (Gov. Code, § 50086).

Secondary Sources

4 Witkin, California Procedure (6th ed. 2021) Pleadings, § 599

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1205–1210

Haning et al., California Practice Guide: Personal Injury, Ch. 2(IV)-H, *Emergency Medical Services Immunity*, ¶¶ 2:3495–2:3516 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.11[4] (Matthew Bender)

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.32[2], [5] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.150 (Matthew Bender)

450C. Negligent Undertaking

[*Name of plaintiff***] claims that [***name of defendant***] is responsible for [***name of plaintiff***]'s harm because [***name of defendant***] failed to exercise reasonable care in rendering services to [***name of third person***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***], voluntarily or for a charge, rendered services to [***name of third person***];**
2. **That these services were of a kind that [***name of defendant***] should have recognized as needed for the protection of [***name of plaintiff***];**
3. **That [***name of defendant***] failed to exercise reasonable care in rendering these services;**
4. **That [***name of defendant***]'s failure to exercise reasonable care was a substantial factor in causing harm to [***name of plaintiff***]; and**
5. **[(a) That [***name of defendant***]'s failure to use reasonable care added to the risk of harm;]**

   [or]

   [(b) That [*name of defendant***]'s services were rendered to perform a duty that [***name of third person***] owed to third persons including [***name of plaintiff***];]**

   [or]

   [(c) That [*name of plaintiff***] suffered harm because [[***name of third person***]/ [or] [***name of plaintiff***]] relied on [***name of defendant***]'s services.]**

New June 2016; Revised November 2018

Directions for Use

This instruction presents the theory of liability known as the "negligent undertaking" rule. (See Restatement Second of Torts, section 324A.) The elements are stated in *Paz v. State of California* (2000) 22 Cal.4th 550, 553 [93 Cal.Rptr.2d 703, 994 P.2d 975].

In *Paz,* the court said that negligent undertaking is "sometimes referred to as the 'Good Samaritan' rule," by which a person generally has no duty to come to the aid of another and cannot be liable for doing so unless the person aiding's acts increased the risk to the person aided or the person aided relied on the person aiding's acts. (*Paz, supra,* 22 Cal.4th at p. 553; see CACI No. 450A, *Good Samaritan—Nonemergency.*) It is perhaps more accurate to say that negligent undertaking is another application of the Good Samaritan rule. CACI No. 450A is

for use in a case in which the person aided is the injured plaintiff. (See Restatement 2d of Torts, § 323.) This instruction is for use in a case in which the defendant's failure to exercise reasonable care in performing services to one person has resulted in harm to another person.

Select one or more of the three options for element 5 depending on the facts.

Sources and Authority

- Negligent Undertaking. Restatement Second of Torts section 324A.
- "[T]he [Restatement Second of Torts] section 324A theory of liability—sometimes referred to as the "Good Samaritan" rule—is a settled principle firmly rooted in the common law of negligence. Section 324A prescribes the conditions under which a person who undertakes to render services for another may be liable to third persons for physical harm resulting from a failure to act with reasonable care. Liability may exist *if* (a) the failure to exercise reasonable care increased the risk of harm, (b) the undertaking was to perform a duty the other person owed to the third persons, or (c) the harm was suffered because the other person or the third persons relied on the undertaking." (*Paz, supra,* 22 Cal.4th at p. 553, original italics.)
- "Thus, as the traditional theory is articulated in the Restatement, and as we have applied it in other contexts, a negligent undertaking claim of liability to third parties requires evidence that: (1) the actor undertook, gratuitously or for consideration, to render services to another; (2) the services rendered were of a kind the actor should have recognized as necessary for the protection of third persons; (3) the actor failed to exercise reasonable care in the performance of the undertaking; (4) the actor's failure to exercise reasonable care resulted in physical harm to the third persons; and (5) *either* (a) the actor's carelessness increased the risk of such harm, or (b) the actor undertook to perform a duty that the other owed to the third persons, or (c) the harm was suffered because either the other or the third persons relied on the actor's undertaking. [¶] Section 324A's negligent undertaking theory of liability subsumes the well-known elements of any negligence action, viz., duty, breach of duty, proximate cause, and damages." (*Paz, supra,* 22 Cal.4th at p. 559, original italics, internal citation omitted; see also *Scott v. C. R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 775 [180 Cal.Rptr.3d 479] [jury properly instructed on elements as set forth above in *Paz*].)
- "Under this formulation, a duty of care exists when the first, second and fifth elements are established. The third element addresses the breach of that duty of care and the fourth element covers both causation and damages." (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 691 [236 Cal.Rptr.3d 157].)
- "Section 324A is applied to determine the 'duty element' in a negligence action where the defendant has ' "specifically . . . undertaken to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative duty to perform that undertaking carefully." ' The negligent undertaking theory of liability applies to

personal injury and property damage claims, but not to claims seeking only economic loss." (*Lichtman v. Siemens Industry Inc.* (2017) 16 Cal.App.5th 914, 922 [224 Cal.Rptr.3d 725], internal citations omitted.)

- "The foundation for considering whether an actor . . . should be exposed to liability on this theory is whether the actor made a specific undertaking ' "to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative duty to perform that undertaking carefully." ' " (*Jabo v. YMCA of San Diego County* (2018) 27 Cal.App.5th 853, 878 [238 Cal.Rptr.3d 588].)
- "[U]nder a negligent undertaking theory of liability, the scope of a defendant's duty presents a jury issue when there is a factual dispute as to the nature of the undertaking. The issue of 'whether [a defendant's] alleged actions, if proven, would constitute an "undertaking" sufficient . . . to give rise to an actionable duty of care is a legal question for the court.' However, 'there may be fact questions "about precisely what it was that the defendant undertook to do." That is, while "[t]he 'precise nature and extent' of [an alleged negligent undertaking] duty 'is a question of law . . . "it depends on the nature and extent of the act undertaken, a question of fact." ' " [Citation.] Thus, if the record can support competing inferences [citation], or if the facts are not yet sufficiently developed [citation], " 'an ultimate finding on the existence of a duty cannot be made prior to a hearing on the merits' " [citation], and summary judgment is precluded. [Citations.]' (see CACI No. 450C [each element of the negligent undertaking theory of liability is resolved by the trier of fact].)" (*O'Malley v. Hospitality Staffing Solutions* (2018) 20 Cal.App.5th 21, 27–28 [228 Cal.Rptr.3d 731], internal citations omitted.)
- "To establish as a matter of law that defendant does not owe plaintiffs a duty under a negligent undertaking theory, defendant must negate all three alternative predicates of the fifth factor: '(a) the actor's carelessness increased the risk of such harm, or (b) the undertaking was to perform a duty owed by the other to the third persons, or (c) the harm was suffered because of the reliance of the other or the third persons upon the undertaking.' " (*Lichtman*, *supra*, 16 Cal.App.5th at p. 926.)
- "The undisputed facts here present a classic scenario for consideration of the negligent undertaking theory. This theory of liability is typically applied where the defendant has contractually agreed to provide services for the protection of others, but has negligently done so." (*Lichtman*, *supra*, 16 Cal.App.5th at p. 927.)
- "The general rule is that a person who has not created a peril is not liable in tort for failing to take affirmative action to protect another unless they have some relationship that gives rise to a duty to act. However, one who undertakes to aid another is under a duty to exercise due care in acting and is liable if the failure to do so increases the risk of harm or if the harm is suffered because the other relied on the undertaking. Section 324A integrates these two basic principles in its rule." (*Paz. supra,* 22 Cal.4th at pp. 558–559.)

- "[T]he 'negligent undertaking' doctrine, like the special relationship doctrine, is an exception to the 'no duty to aid' rule." (*Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1231 [186 Cal.Rptr.3d 26].)
- "Under the good Samaritan doctrine, CHP may have a duty to members of the public to exercise due care when CHP voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member thereby inducing reliance, when an express promise to warn of a danger has induced reliance, or when the actions of CHP place a person in peril or increase the risk of harm. In other words, to create a special relationship and a duty of care, there must be evidence that CHP ' "made misrepresentations that induced a citizen's detrimental reliance [citation], placed a citizen in harm's way [citations], or lulled a citizen into a false sense of security and then withdrew essential safety precautions." ' Nonfeasance that leaves the citizen in exactly the same position that he or she already occupied cannot support a finding of duty of care. Affirmative conduct or misfeasance on the part of CHP that induces reliance or changes the risk of harm is required." (*Greyhound Lines, Inc. v. Department of the California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1136 [152 Cal.Rptr.3d 492], internal citations omitted.)
- "A defendant does not increase the risk of harm by merely failing to eliminate a preexisting risk." (*University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 450 [241 Cal.Rptr.3d 616].)
- "A operates a grocery store. An electric light hanging over one of the aisles of the store becomes defective, and A calls B Electric Company to repair it. B Company sends a workman, who repairs the light, but leaves the fixture so insecurely attached that it falls upon and injures C, a customer in the store who is walking down the aisle. B Company is subject to liability to C." (Restat. 2d of Torts, § 324A, Illustration 1.)

Secondary Sources

5 Witkin, California Procedure (6th ed. 2021) Pleadings, § 599

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1205–1210

Flahavan et al., California Practice Guide: Personal Injury, Ch. 2(II)-I, *Negligence Liability Based on Omission to Act—Legal Duty Arising from "Special Relationship"*, ¶¶ 2:2005–2:2009 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.11 (Matthew Bender)

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.32[2], [5] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.150, 165.241 (Matthew Bender)

451. Affirmative Defense—Contractual Assumption of Risk

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

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

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

New September 2003; Revised December 2011

Directions for Use

This instruction sets forth the affirmative defense of express or contractual assumption of risk. (See *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 856 [120 Cal.Rptr.3d 90].) It will be given in very limited circumstances. Both the interpretation of a waiver agreement and application of its legal effect are generally resolved by the judge before trial. The existence of a duty is a question of law for the court (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 719 [183 Cal.Rptr.3d 234]), as is the interpretation of a written instrument if the interpretation does not turn on the credibility of extrinsic evidence. (*Allabach v. Santa Clara County Fair Assn., Inc.* (1996) 46 Cal.App.4th 1007, 1011 [54 Cal.Rptr.2d 330].)

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

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

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

Sources and Authority

- Contract Releasing Party From Liability for Fraud or Willful Injury is Against Public Policy. Civil Code section 1668.
- "[P]arties may contract for the release of liability for future ordinary negligence so long as such contracts do not violate public policy. 'A valid release precludes liability for risks of injury within the scope of the release.' " (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 877 [208 Cal.Rptr.3d 792], internal citations omitted.)
- "With respect to the question of express waiver, the legal issue is *not* whether the particular risk of injury appellant suffered is inherent in the recreational activity to which the Release applies [citations], but simply *the scope of the Release*." (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 27 [236 Cal.Rptr.3d 682], original italics.)
- "Express assumption occurs when the plaintiff, in advance, expressly consents . . . to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. . . . The result is that . . . being under no duty, [the defendant] cannot be charged with negligence." (*Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 764 [276 Cal.Rptr. 672], internal citations omitted.)
- "While often referred to as a defense, a release of future liability is more appropriately characterized as an express assumption of the risk that negates the defendant's duty of care, an element of the plaintiff's case." (*Eriksson, supra*, 233 Cal.App.4th at p. 719.)
- "[C]ases involving express assumption of risk are concerned with instances in which, as the result of an express agreement, the defendant owes no duty to protect the plaintiff from an injury-causing risk. Thus in this respect express assumption of risk properly can be viewed as analogous to primary assumption of risk." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308–309, fn. 4 [11 Cal.Rptr.2d 2, 834 P.2d 696].)
- " ' "It is only necessary that the act of negligence, which results in injury to the releaser, be reasonably related to the object or purpose for which the release is given." ' . . . 'An act of negligence is reasonably related to the object or purpose for which the release was given if it is included within the express scope of the release.' " (*Eriksson, supra*, 233 Cal.App.4th at p. 722.)
- "Although [decedent] could not release or waive her parents' subsequent wrongful death claims, it is well settled that a release of future liability or express assumption of the risk by the decedent may be asserted as a defense to such claims." (*Eriksson, supra*, 233 Cal.App.4th at p. 725.)
- "[E]xculpatory clause which affects the public interest cannot stand." (*Tunkl v. Regents of Univ. of California* (1963) 60 Cal.2d 92, 98 [32 Cal.Rptr. 33, 383 P.2d 441].)
- "In *Tunkl*, our high court identified six characteristics typical of contracts

affecting the public interest: ' "[1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." ' Not all of these factors need to be present for an exculpatory contract to be voided as affecting the public interest." (*Hass, supra,* 26 Cal.App.5th at p. 29, internal citations omitted.)

- "The issue [of whether something is in the public interest] is tested *objectively*, by the activity's importance to the *general public*, not by its subjective importance to the particular plaintiff." (*Booth v. Santa Barbara Biplane Tours, LLC* (2008) 158 Cal.App.4th 1173, 1179–1180 [70 Cal.Rptr.3d 660], original italics.)
- "[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable." (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777 [62 Cal.Rptr.3d 527, 161 P.3d 1095], original italics.)
- " ' "[A] purveyor of recreational activities owes a duty to a patron not to increase the risks inherent in the activity in which the patron has paid to engage." ' Thus, in cases involving a waiver of liability for future negligence, courts have held that conduct that substantially or unreasonably increased the inherent risk of an activity or actively concealed a known risk could amount to gross negligence, which would not be barred by a release agreement." (*Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 359 [235 Cal.Rptr.3d 716].)
- " ' "A written release may exculpate a tortfeasor from future negligence or misconduct. [Citation.] To be effective, such a release '*must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties*.' [Citation.] The release need not achieve perfection. [Citation.] Exculpatory agreements in the recreational sports context do not implicate the public interest

and therefore are not void as against public policy. [Citations.]" ' ' "An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. [Citations.]" ' " (*Huverserian v. Catalina Scuba Luv, Inc.* (2010) 184 Cal.App.4th 1462, 1467 [110 Cal.Rptr.3d 112], original italics, internal citations omitted.)

- "Unlike claims for ordinary negligence, products liability claims cannot be waived." (*Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 640 [184 Cal.Rptr.3d 155].)
- "Since there is no disputed issue of material fact concerning gross negligence, the release also bars [plaintiff]'s cause of action for breach of warranty." (*Grebing, supra*, 234 Cal.App.4th at p. 640.)
- "Generally, a person who signs an instrument may not avoid the impact of its terms on the ground that she failed to read it before signing. However, a release is invalid when it is procured by misrepresentation, overreaching, deception, or fraud. 'It has often been held that if the releaser was under a misapprehension, not due to his own neglect, as to the nature or scope of the release, and if this misapprehension was induced by the misconduct of the releasee, then the release, regardless of how comprehensively worded, is binding only to the extent actually intended by the releaser.' 'In cases providing the opportunity for overreaching, the releasee has a duty to act in good faith and the releaser must have a full understanding of his legal rights. [Citations.] Furthermore, it is the province of the jury to determine whether the circumstances afforded the opportunity for overreaching, whether the releasee engaged in overreaching and whether the releaser was misled. [Citation.]' A 'strong showing of misconduct' by the plaintiff is not necessary to demonstrate the existence of a triable issue of fact here; only a 'slight showing' is required." (*Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 563–564 [188 Cal.Rptr.3d 228], internal citations omitted.)
- "Plaintiffs assert that Jerid did not 'freely and knowingly' enter into the Release because (1) the [defendant's] employee represented the Release was a sign-in sheet; (2) the metal clip of the clipboard obscured the title of the document; (3) the Release was written in a small font; (4) [defendant] did not inform Jerid he was releasing his rights by signing the Release; (5) Jerid did not know he was signing a release; (6) Jerid did not receive a copy of the Release; and (7) Jerid was not given adequate time to read or understand the Release. [¶] We do not find plaintiffs' argument persuasive because . . . there was nothing preventing Jerid from reading the Release. There is nothing indicating that Jerid was prevented from (1) reading the Release while he sat at the booth, or (2) taking the Release, moving his truck out of the line, and reading the Release. In sum, plaintiffs' arguments do not persuade us that Jerid was denied a reasonable opportunity to discover the true terms of the contract." (*Rosencrans, supra*, 192 Cal.App.4th at pp. 1080–1081.)
- "Whether a contract provision is clear and unambiguous is a question of law, not

of fact." (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598 [250 Cal.Rptr. 299].)

- "By signing as [decedent]'s parent, [plaintiff] approved of the terms of the release and understood that her signature made the release 'irrevocable and binding.' Under these circumstances, the release could not be disaffirmed. [¶] Although [plaintiff]'s signature prevented the agreement from being disaffirmed, it does not make her a party to the release." (*Eriksson, supra*, 233 Cal.App.4th at p. 721.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1439, 1449–1451

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

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

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

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

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

452. Sudden Emergency

[*Name of plaintiff/defendant***] claims that [he/she/***nonbinary pronoun***] was not negligent because [he/she/***nonbinary pronoun***] acted with reasonable care in an emergency situation. [***Name of plaintiff/defendant***] was not negligent if [he/she/***nonbinary pronoun***] proves all of the following:**

1. **That there was a sudden and unexpected emergency situation in which someone was in actual or apparent danger of immediate injury;**
2. **That [***name of plaintiff/defendant***] did not cause the emergency; and**
3. **That [***name of plaintiff/defendant***] acted as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer.**

New September 2003

Directions for Use

The instruction should not be given unless at least two courses of action are available to the party after the danger is perceived. (*Anderson v. Latimer* (1985) 166 Cal.App.3d 667, 675 [212 Cal.Rptr. 544].)

Additional instructions should be given if there are alternate theories of negligence.

Sources and Authority

- "Under the 'sudden emergency' or 'imminent peril' doctrine, 'a person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments.' 'A party will be denied the benefit of the doctrine . . . where that party's negligence causes or contributes to the creation of the perilous situation.'" (*Abdulkadhim v. Wu* (2020) 53 Cal.App.5th 298, 301–302 [266 Cal.Rptr.3d 636], internal citations omitted.)
- "The doctrine of imminent peril is available to either plaintiff or defendant, or, in a proper case, to both." (*Smith v. Johe* (1957) 154 Cal.App.2d 508, 511 [316 P.2d 688].)
- "Whether the conditions for application of the imminent peril doctrine exist is itself a question of fact to be submitted to the jury." (*Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 37 [267 Cal.Rptr. 197].)
- "The doctrine of imminent peril is properly applied only in cases where an

unexpected physical danger is presented so suddenly as to deprive the driver of his power of using reasonable judgment. [Citations.] A party will be denied the benefit of the doctrine of imminent peril where that party's negligence causes or contributes to the creation of the perilous situation. [Citations.]" (*Shiver v. Laramee* (2018) 24 Cal.App.5th 395, 399 [234 Cal.Rptr.3d 256].)

- " 'The test is whether the actor took one of the courses of action which a standard man in that emergency might have taken, and such a course is not negligent even though it led to an injury which might have been prevented by adopting an alternative course of action.' [Citation.]" (*Schultz v. Mathias* (1970) 3 Cal.App.3d 904, 912–913 [83 Cal.Rptr. 888].)
- "An emergency or peril under the sudden emergency or imminent peril doctrine is a set of facts presented to the person alleged to have been negligent. It is *that* actor's behavior that the doctrine excuses. It is irrelevant for purposes of the sudden emergency doctrine whether [defendant's] lane change created a dangerous situation for [plaintiff] or anyone else; the only relevant emergency is the one [*defendant*] faced." (*Abdulkadhim, supra,* 53 Cal.App.5th at p. 302, internal citations omitted, original italics.)
- "The doctrine of imminent peril applies not only when a person perceives danger to himself, but also when he perceives an imminent danger to others." (*Damele, supra,* 219 Cal.App.3d at p. 36.)
- "[T]he mere appearance of an imminent peril to others—not an actual imminent peril—is all that is required." (*Damele, supra,* 219 Cal.App.3d at p. 37.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1439, 1449–1451

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.7

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.03, 1.11, 1.30 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.250 (Matthew Bender)

453. Injury Incurred in Course of Rescue

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

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

1. **That there was, or a reasonable person would have perceived that there was, an emergency situation in which someone was in actual or apparent danger of immediate injury;**
2. **That [the emergency/a danger to [*name of plaintiff*]] was created by [*name of defendant*]'s negligence; and**
3. **That [*name of plaintiff*] was harmed while attempting to rescue the person in danger.**

New September 2003; Revised December 2011

Directions for Use

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

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

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

[*name of plaintiff*]" in element 2. Also omit the bracketed material in the opening sentence.

Sources and Authority

- "The cases have developed the rule that persons injured in the course of undertaking a necessary rescue may, absent rash or reckless conduct on their part, recover from the person whose negligence created the peril which necessitated the rescue. [¶] Although its precise limits are not yet fully developed, the rescue doctrine varies the ordinary rules of negligence in two important respects: (1) it permits the rescuer to sue on the basis of defendant's initial negligence toward the party rescued, without the necessity of proving negligence toward the rescuer, and (2) it substantially restricts the availability of the defense of contributory negligence by requiring defendant to prove that the rescuer acted rashly or recklessly under the circumstances." (*Solgaard, supra*, 6 Cal.3d at p. 368, footnote omitted.)
- "The rescue doctrine contemplates a voluntary act by one who, in an emergency and prompted by spontaneous human motive to save human life, attempts a rescue that he had no duty to attempt by virtue of a legal obligation or duty fastened on him by his employment." (*Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 784 [38 Cal.Rptr.2d 291].)
- "[T]he rescue doctrine arose in an era of contributory negligence, where any negligence on the part of a plaintiff barred the action. 'The purpose of the rescue doctrine when it was first created was to avoid having a plaintiff be found contributorily negligent as a matter of law when he voluntarily placed himself in a perilous position to prevent another person from suffering serious injury or death, the courts often stating that the plaintiff's recovery should not be barred unless his rescue attempt was recklessly or rashly made.' Most defendants could point to some negligence by the rescuer and simply approaching the danger could be construed as negligent, or as an assumption of the risk. This advanced no tenable public policy: It deterred rescues and ran counter to the human impulse to help others in need. Accordingly, the courts ruled the act of approaching danger did not interrupt the normal causal reach of tort liability and did not, of itself, establish contributory negligence." (*Sears v. Morrison* (1999) 76 Cal.App.4th 577, 581 [90 Cal.Rptr.2d 528], internal citations omitted.)
- "In order to assert the rescue doctrine, the rescuer must show that there was someone in peril and that he acted to rescue such person from the peril." (*Tucker v. CBS Radio Stations, Inc.* (2011) 194 Cal.App.4th 1246, 1252 [124 Cal.Rptr.3d 245].)
- "The evidence in the instant case was uncontradicted that defendant's employees . . . were in peril of their lives, that immediate action was required to save or assist them, that plaintiff undertook to rescue them, and that he was injured while in the course of doing so. It is apparent, therefore, that plaintiff was, as a matter of law, a rescuer and entitled to the benefits of the rescuer doctrine, including an instruction to the jury that as a rescuer, plaintiff could recover on

the basis of defendant's negligence to [its employees], if plaintiff's injury was a proximate result thereof, and if plaintiff acted neither rashly nor recklessly under the circumstances." (*Solgaard, supra*, 6 Cal.3d at p. 369.)

- "One also generally owes a duty of care to bystanders who attempt a rescue that becomes necessary due to one's own negligence. Thus, although it is contributory negligence unreasonably to expose oneself to a risk created by the defendant's negligence, a person is not contributorily negligent who, with due care, encounters the risk created by the defendant's negligence in order to perform a rescue necessitated by that negligence." (*Neighbarger, supra*, 8 Cal.4th at pp. 536–537, internal citation omitted.)
- "We do not accept this narrow view of the rescue rule, which would focus attention on the person creating the original danger and not on the person of the rescuer. We think the force of the rule should properly be centered on the rescuer, for it is the quality of his conduct which is being weighed. Whether he was induced to enter a position of danger as a result of the act of a particular defendant or as a result of some outside force is inconsequential to the process of evaluating the quality of his behavior." (*Scott, supra*, 239 Cal.App.2d at pp. 435–436.)
- "[Plaintiff] asserts that he should not have been required to show that respondents' negligence threatened real and imminent harm to himself or others, but only that he reasonably perceived the appearance of such danger . . . . We agree." (*Harris v. Oaks Shopping Ctr.* (1999) 70 Cal.App.4th 206, 210 [82 Cal.Rptr.2d 523].)
- "Under the rescue doctrine, an actor is usually liable for injuries sustained by a rescuer attempting to help another person placed in danger by the actor's negligent conduct. The question here is whether an actor is liable for injuries sustained by a person who is trying to rescue *the actor* from his own negligence. The answer is yes." (*Sears, supra*, 76 Cal.App.4th at p. 579, original italics.)
- "In general, the rescue doctrine permits a rescuer to recover for injuries sustained while attempting to rescue a party placed in danger by the defendant's conduct. In this case we conclude that the rescuer cannot maintain negligence claims against defendant because he failed to establish that a duty of care was owed to the rescued party." (*Tucker, supra*, 194 Cal.App.4th at p. 1248.)
- "There is some disagreement among the authorities where the danger is only to property. In *Henshaw v. Belyea* (1934) 220 C. 458, 31 P.2d 348, plaintiff ran from a safe place on the sidewalk in an attempt to save his employer's truck from slipping downhill by placing a block under a wheel, and his foot was crushed. The court approved the extension of the rescue doctrine to such a case. (220 C. 463.) (See 23 Cal. L. Rev. 110; 8 So. Cal. L. Rev. 159.)" (6 Witkin Summary of California Law (10th ed. 2005) Torts, § 1308.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1463–1465

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

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

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

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

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

454. Affirmative Defense—Statute of Limitations

[*Name of defendant*] contends that [*name of plaintiff*]'s lawsuit was not filed within the time set by law. To succeed on this defense, [*name of defendant*] must prove that [*name of plaintiff*]'s claimed harm occurred before [*insert date from applicable statute of limitation*].

New April 2007; Revised December 2007

Directions for Use

This instruction states the common-law rule that an action accrues on the date of injury. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].) The date to be inserted is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2007, the date is August 31, 2005.

For an instruction on the delayed-discovery rule, see CACI No. 455, *Statute of Limitations—Delayed Discovery*. See also verdict form CACI No. VF-410, *Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts*.

Do not use this instruction for attorney malpractice. (See CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit,* and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*.)

"Claimed harm" refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661].) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

Sources and Authority

- Two-Year Statute of Limitations. Code of Civil Procedure section 335.1.
- Three-Year Statute of Limitations. Code of Civil Procedure section 338(c).
- One-Year Statute of Limitations. Code of Civil Procedure section 340.2(c).
- "A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable." (*Glue-Fold, Inc., supra*, 82 Cal.App.4th at p. 1029, internal citations omitted.)
- " ' " ' "Ordinarily this is when the wrongful act is done and the obligation or the liability arises, but it does not 'accrue until the party owning it is entitled to begin and prosecute an action thereon.' " . . . In other words, "[a] cause of action accrues 'upon the occurrence of the *last element essential to the cause of action*.' " ' " ' " (*Choi v. Sagemark Consulting* (2017) 18 Cal.App.5th 308, 323 [226 Cal.Rptr.3d 267], original italics.)

- "It is undisputed that plaintiffs discovered shortly after the accident in 2010 that [defendant] had failed to secure the insurance coverage plaintiffs requested. Thus, this case does not involve the delayed discovery doctrine, which makes 'accrual of a cause of action contingent on when a party discovered or should have discovered that his or her injury had a wrongful cause.' In delayed discovery cases, 'plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation.' Here, the question is when plaintiffs incurred 'actual injury'—not when they discovered [defendant]'s negligence. The trial court erred to the extent that it relied on the delayed discovery doctrine to determine when plaintiffs incurred actual injury." *(Lederer v. Gursey Schneider LLP* (2018) 22 Cal.App.5th 508, 521 [231 Cal.Rptr.3d 518], internal citations omitted.)
- "Where, as here, 'damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained. . . . "Mere threat of future harm, not yet realized, is not enough." . . . "Basic public policy is best served by recognizing that damage is necessary to mature such a cause of action." . . . Therefore, when the wrongful act does not result in immediate damage, "the cause of action does not accrue prior to the maturation of perceptible harm." ' " (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604 [129 Cal.Rptr.3d 525].)
- "[W]hen a defendant asserts a statute of limitations defense against a FEHA failure to promote claim, the burden is on the defendant to prove when the plaintiff knew or should have known of the adverse promotion decision. (*Pollock v. Tri-Modal Distribution Services, Inc.* (2021) 11 Cal.5th 918, 947 [281 Cal.Rptr.3d 498, 491 P.3d 290].)
- " '[O]nce plaintiff has suffered actual and appreciable harm, neither the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation.' Cases contrast actual and appreciable harm with nominal damages, speculative harm or the threat of future harm. The mere breach of duty—causing only nominal damages, speculative harm or the threat of future harm not yet realized—normally does not suffice to create a cause of action." (*San Francisco Unified School Dist. v. W. R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1326 [44 Cal.Rptr.2d 305], internal citations omitted.)
- "Violations of a continuing or recurring obligation may give rise to 'continuous accrual' of causes of action, meaning that ' "a cause of action accrues each time a wrongful act occurs, triggering a new limitations period." [Citation.]' " (*Esparza v. Safeway, Inc.* (2019) 36 Cal.App.5th 42, 59 [247 Cal.Rptr.3d 875].)
- "Generally, the bar of the statute of limitations is raised as an affirmative defense, subject to proof by the defendant." (*Czajkowski v. Haskell & White* (2012) 208 Cal.App.4th 166, 174 [144 Cal.Rptr.3d 522].)
- " '[R]esolution of the statute of limitations issue is normally a question of fact . . . .' " (*Romano v. Rockwell Int'l, Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

- "Commencement of the statute of limitations is usually a factual question, but can be resolved as a matter of law when, as here, the material facts are not disputed." *Moss v. Duncan* (2019) 36 Cal.App.5th 569, 574 [248 Cal.Rptr.3d 689].)
- "Because the relevant facts are not in dispute, the application of the statute of limitations may be decided as a question of law." (*Lederer, supra*, 22 Cal.App.5th at p. 521.)
- "Based upon our review of legal precedent and our understanding of the principles and policies of the continuous accrual theory, we conclude that the theory is not limited in its application to cases in which a payor has acted 'wrongfully' in the sense of failing or refusing to make a periodic payment to a payee." (*Blaser v. State Teachers' Retirement System* (2019) 37 Cal.App.5th 349, 372 [249 Cal.Rptr.3d 701].)
- "So long as the time allowed for filing an action is not inherently unreasonable, California courts afford 'contracting parties considerable freedom to modify the length of a statute of limitations.' " (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 74 [215 Cal.Rptr.3d 835].)

Secondary Sources

4 Witkin, California Procedure (6th ed. 2021) Actions, § 473 et seq.

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions*, §§ 71.01–71.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.10 et seq., 345.20 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, § 143.20 et seq. (Matthew Bender)

1 California Pretrial Civil Procedure Practice Guide: The Wagstaffe Group, Ch. 17, *Preparing the Answer*, § 17-IV[I]

455. Statute of Limitations—Delayed Discovery

If [*name of defendant***] proves that [***name of plaintiff***]'s claimed harm occurred before [***insert date from applicable statute of limitations***], [***name of plaintiff***]'s lawsuit was still filed on time if [***name of plaintiff***] proves that before that date,**

[[*name of plaintiff***] did not discover, and did not know of facts that would have caused a reasonable person to suspect, that [he/she/***nonbinary pronoun***/it] had suffered harm that was caused by someone's wrongful conduct.]**

[*or***]**

[[*name of plaintiff***] did not discover, and a reasonable and diligent investigation would not have disclosed, that [***specify factual basis for cause of action***] contributed to [***name of plaintiff***]'s harm.]**

New April 2007; Revised December 2007, April 2009, December 2009, May 2020

Directions for Use

Read this instruction with the first option after CACI No. 454, *Affirmative Defense—Statute of Limitations*, if the plaintiff seeks to overcome the statute-of-limitations defense by asserting the "delayed-discovery rule" or "discovery rule." The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of the plaintiff's injury and its negligent cause. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].) The date to be inserted is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2009, the date is August 31, 2007.

Read this instruction with the second option if the facts suggest that even if the plaintiff had conducted a timely and reasonable investigation, it would not have disclosed the limitation-triggering information. (See *Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797 [27 Cal.Rptr.3d 661, 110 P.3d 914] [fact that plaintiff suspected her injury was caused by surgeon's negligence and timely filed action for medical negligence against health care provider did not preclude "discovery rule" from delaying accrual of limitations period on products liability cause of action against medical staple manufacturer whose role in causing injury was not known and could not have been reasonably discovered within the applicable limitations period commencing from date of injury].)

See also verdict form CACI No. VF-410, *Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts.*

Do not use this instruction for medical malpractice (see CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit,* and CACI

No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*) or attorney malpractice (see CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit,* and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*). Also, do not use this instruction if the case was timely but a fictitiously named defendant was identified and substituted in after the limitation period expired. (See *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 942 [63 Cal.Rptr.3d 615] [if lawsuit is initiated within the applicable period of limitations against one party and the plaintiff has complied with Code of Civil Procedure section 474 by alleging the existence of unknown additional defendants, the relevant inquiry when the plaintiff seeks to substitute a real defendant for one sued fictitiously is what facts the plaintiff actually knew at the time the original complaint was filed].)

"Claimed harm" refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661].) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

Sources and Authority

- "An exception to the general rule for defining the accrual of a cause of action—indeed, the 'most important' one—is the discovery rule. . . . It postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [¶] . . . [T]he plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof—when, simply put, he at least 'suspects . . . that someone has done something wrong' to him, 'wrong' being used, not in any technical sense, but rather in accordance with its 'lay understanding.' He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements. He has reason to suspect when he has 'notice or information of circumstances to put a reasonable person on *inquiry*'; he need not know the 'specific "facts" necessary to establish' the cause of action; rather, he may seek to learn such facts through the 'process contemplated by pretrial discovery'; but, within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place—he 'cannot wait for' them to 'find him' and 'sit on' his 'rights'; he 'must go find' them himself if he can and 'file suit' if he does." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397–398 [87 Cal.Rptr.2d 453, 981 P.2d 79], original italics, internal citations and footnote omitted.)
- "[I]t is the discovery of facts, not their legal significance, that starts the statute." (*Jolly, supra,* 44 Cal.3d at p. 1113.)
- "*Jolly* 'sets forth two alternate tests for triggering the limitations period: (1) a subjective test requiring actual suspicion by the plaintiff that the injury was caused by wrongdoing; and (2) an objective test requiring a showing that a reasonable person would have suspected the injury was caused by wrongdoing.

[Citation.] The first to occur under these two tests begins the limitations period.' " (*Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1552 [178 Cal.Rptr.3d 897].)

- "While ignorance of the existence of an injury or cause of action may delay the running of the statute of limitations until the date of discovery, the general rule in California has been that ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statute." (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 932 [30 Cal.Rptr.2d 440, 873 P.2d 613].)
- "[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis." (*Fox, supra,* 35 Cal.4th at p. 803.)
- "The California rule on delayed discovery of a cause of action is the statute of limitation begins to run 'when the plaintiff has reason to suspect an injury and some wrongful cause . . . .' 'A plaintiff need not be aware of the specific "facts" necessary to establish the claim; that is a process contemplated by pretrial discovery. . . . So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.' " (*MGA Entertainment, Inc. v. Mattel, Inc.* (2019) 41 Cal.App.5th 554, 561 [254 Cal.Rptr.3d 314].)
- "[A]s *Fox* teaches, claims based on two independent legal theories against two separate defendants can accrue at different times." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1323 [64 Cal.Rptr.3d 9].)
- "A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable. Developed to mitigate the harsh results produced by strict definitions of accrual, the common law discovery rule postpones accrual until a plaintiff discovers or has reason to discover the cause of action." (*Glue-Fold, Inc., supra,* 82 Cal.App.4th at p. 1029, internal citations omitted.)
- "A plaintiff's inability to discover a cause of action may occur 'when it is particularly difficult for the plaintiff to observe or understand the breach of duty, or when the injury itself (or its cause) is hidden or beyond what the ordinary person could be expected to understand.' " (*NBCUniversal Media, LLC v. Superior Court* (2014) 225 Cal.App.4th 1222, 1232 [171 Cal.Rptr.3d 1].)
- "[T]he plaintiff may discover, or have reason to discover, the cause of action even if he does not suspect, or have reason to suspect, the identity of the defendant. That is because the identity of the defendant is not an element of any cause of action. It follows that failure to discover, or have reason to discover, the identity of the defendant does not postpone the accrual of a cause of action, whereas a like failure concerning the cause of action itself does. 'Although never

fully articulated, the rationale for distinguishing between ignorance' of the defendant and 'ignorance' of the cause of action itself 'appears to be premised on the commonsense assumption that once the plaintiff is aware of' the latter, he 'normally' has 'sufficient opportunity,' within the 'applicable limitations period,' 'to discover the identity' of the former. He may 'often effectively extend[]' the limitations period in question 'by the filing' and amendment 'of a Doe complaint' and invocation of the relation-back doctrine. 'Where' he knows the 'identity of at least one defendant . . . , [he] must' proceed thus." (*Norgart, supra,* 21 Cal.4th at p. 399, internal citations and footnote omitted.)

- "The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have ' " 'information of circumstances to put [them] on inquiry' " ' or if they have ' " 'the opportunity to obtain knowledge from sources open to [their] investigation.' " ' In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox, supra,* 35 Cal.4th at pp. 807–808, internal citations omitted.)
- "Thus, a two-part analysis is used to assess when a claim has accrued under the discovery rule. The initial step focuses on whether the plaintiff possessed information that would cause a reasonable person to inquire into the cause of his injuries. Under California law, this inquiry duty arises when the plaintiff becomes aware of facts that would cause a reasonably prudent person to suspect his injuries were the result of wrongdoing. If the plaintiff was in possession of such facts, thereby triggering his duty to investigate, it must next be determined whether 'such an investigation would have disclosed a factual basis for a cause of action[.] [T]he statute of limitations begins to run on that cause of action when the investigation would have brought such information to light.' " (*Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1251 [162 Cal.Rptr.3d 617], internal citation omitted.)
- "[I]f continuing injury from a completed act generally extended the limitations periods, those periods would lack meaning. Parties could file suit at any time, as long as their injuries persisted. This is not the law. The time bar starts running when the plaintiff first learns of actionable injury, even if the injury will linger or compound. ' " '[W]here an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. *It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date . . . .*' " ' " (*Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 745 [129 Cal.Rptr.3d 354], original italics, internal citation omitted.)
- "[T]he discovery rule 'may be applied to breaches [of contract] which can be,

and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time.' " (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 73 [215 Cal.Rptr.3d 835].)

- "[T]he trial court erred in concluding that the discovery rule did not pertain to the limitations period of section 335.1 for medical battery claims." (*Daley v. Regents of University of California* (2019) 39 Cal.App.5th 595, 606 [252 Cal.Rptr.3d 273].)
- There is no doctrine of constructive or imputed suspicion arising from media coverage. "[Defendant]'s argument amounts to a contention that, having taken a prescription drug, [plaintiff] had an obligation to read newspapers and watch television news and otherwise seek out news of dangerous side effects not disclosed by the prescribing doctor, or indeed by the drug manufacturer, and that if she failed in this obligation, she could lose her right to sue. We see no such obligation." (*Nelson v. Indevus Pharmaceuticals, Inc.* (2006) 142 Cal.App.4th 1202, 1206 [48 Cal.Rptr.3d 668].)
- "The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only '[o]nce the plaintiff *has* a suspicion of wrongdoing.' " (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364 [76 Cal.Rptr.3d 146], original italics.)
- "Generally, the bar of the statute of limitations is raised as an affirmative defense, subject to proof by the defendant. [¶] However, when a plaintiff relies on the discovery rule or allegations of fraudulent concealment as excuses for an apparently belated filing of a complaint, 'the burden of pleading and proving belated discovery of a cause of action falls on the plaintiff.' " (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174 [144 Cal.Rptr.3d 522].)
- " '[R]esolution of the statute of limitations issue is normally a question of fact . . . .' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)
- "More specifically, as to accrual, 'once properly pleaded, belated discovery is a question of fact.' " (*Nguyen, supra*, 229 Cal.App.4th at p. 1552.)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, §§ 540-554, 714–718

Haning et al., California Practice Guide: Personal Injury, Ch. 5-B, *When To Sue—Statute Of Limitations*, ¶¶ 5:108–5:111.6 (The Rutter Group)

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions*, § 71.03[3], [4] (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.19[3] (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, §§ 143.47, 143.52 et seq. (Matthew Bender)

McDonald, California Medical Malpractice: Law and Practice §§ 7:1–7:7 (Thomson Reuters)

456. Defendant Estopped From Asserting Statute of Limitations Defense

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

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

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

New October 2008; Revised December 2014, June 2015, May 2020

Directions for Use

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

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

1236, 1246 [150 Cal.Rptr.3d 446] [equitable estoppel to deny family leave under California Family Rights Act].)

Most cases do not frame the issue as one of equitable estoppel and its four elements. All that is required is that the defendant's conduct actually have misled the plaintiff, and that plaintiff reasonably have relied on that conduct. Bad faith or an intent to mislead is not required. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384 [2 Cal.Rptr.3d 655, 73 P.3d 517]; *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43 [21 Cal.Rptr.2d 110].) Nor does it appear that there is a requirement that the defendant specifically intended to induce the plaintiff to defer filing suit. Therefore, no specific intent element has been included. However, the California Supreme Court has stated that element 4 is to be given in a construction defect case in which the defendant has assured the plaintiff that all defects will be repaired. (See *Lantzy, supra*, 31 Cal.4th at p. 384.)

Sources and Authority

- "As the name suggests, equitable estoppel is an equitable issue for court resolution." (*Hopkins*, *supra*, 225 Cal.App.4th at p. 745.)
- "While the judge determines equitable causes of action, the judge may (in rare instances) empanel an advisory jury to make preliminary factual findings. The factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder. '[W]hile a jury may be used for advisory verdicts as to questions of fact [in equitable actions], it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper.' " (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337], internal citations omitted.)
- "[CACI No. 456 is] appropriate for use when a trial court 'empanel[s] an advisory jury to make preliminary factual findings,' with respect to equitable estoppel . . . ." (*Hopkins*, *supra*, 225 Cal.App.4th at p. 745.)
- "Equitable tolling and equitable estoppel are distinct doctrines. ' "Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. . . . Equitable estoppel, however, . . . comes into play only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life . . . from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' Thus, equitable estoppel is available even where the limitations statute at issue expressly precludes equitable tolling." (*Lantzy, supra,* 31 Cal.4th at pp. 383–384, internal citations omitted.)
- "Accordingly, (1) if one potentially liable for a construction defect represents, while the limitations period is still running, that all actionable damage has been or will be repaired, thus making it unnecessary to sue, (2) the plaintiff

reasonably relies on this representation to refrain from bringing a timely action, (3) the representation proves false after the limitations period has expired, and (4) the plaintiff proceeds diligently once the truth is discovered, the defendant may be equitably estopped to assert the statute of limitations as a defense to the action." (*Lantzy, supra,* 31 Cal.4th at p. 384, internal citations omitted.)

- "Equitable estoppel does not require factually misleading statements in all cases." (*J. P. v. Carlsbad Unified Sch. Dist.* (2014) 232 Cal.App.4th 323, 335 [181 Cal.Rptr.3d 286].)
- " 'An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. . . . To create an equitable estoppel, "it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss. . . . Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense." ' " (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152–1153 [113 Cal.Rptr.2d 70, 33 P.3d 487].)
- [T]he parties may, by their words or conduct, be estopped from enforcing a written contract provision. Under the doctrine of estoppel, '[a] defendant may be equitably estopped from asserting a statutory or contractual limitations period as a defense if the defendant's act or omission caused the plaintiff to refrain from filing a timely suit and the plaintiff's reliance on the defendant's conduct was reasonable.' ' "It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. [Citation.]" ' (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 78–79 [215 Cal.Rptr.3d 835].)
- " ' "[W]hether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law." [Citations.]' " (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 925–926 [73 Cal.Rptr.3d 216], internal citations omitted.)
- "It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act. Estoppel most commonly results from misleading statements about the need for or advisability of a claim; actual fraud or the intent to mislead is not essential. A fortiori, estoppel may certainly be invoked when there are acts of violence or intimidation that are intended to prevent the filing of a claim." (*John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 445 [256 Cal.Rptr. 766, 769 P.2d 948], internal citations omitted.)
- " 'Estoppel as a bar to a public entity's assertion of the defense of noncompliance arises when the plaintiff establishes by a preponderance of the

evidence: (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) plaintiff was ignorant of the true state of facts, and (4) relied upon the conduct to his detriment.' " (*J.P. supra*, 232 Cal.App.4th at p. 333.)

- "It is well settled that the doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations." (*Estate of Pieper* (1964) 224 Cal.App.2d 670, 690–691 [37 Cal.Rptr. 46], internal citations omitted.)
- "Although 'ignorance of the identity of the defendant . . . will not *toll* the statute', 'a defendant may be *equitably estopped* from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity.' " (*Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 745 [129 Cal.Rptr.3d 354], original italics, internal citation omitted.)
- "Settlement negotiations are relevant and admissible to prove an estoppel to assert the statute of limitations." (*Holdgrafer, supra,* 160 Cal.App.4th at p. 927.)
- "The estoppel issue in this case arises in a unique context. Defendants' wrongful conduct has given rise to separate causes of action for property damage and personal injury with separate statutes of limitation. Where the plaintiffs reasonably rely on defendants' promise to repair the property damage without a lawsuit, is a jury permitted to find that plaintiffs' decision to delay filing a personal injury lawsuit was also reasonable? We conclude such a finding is permissible on the facts of this case." (*Shaffer, supra,* 17 Cal.App.4th at p. 43, internal citation omitted.)
- "At the very least, [plaintiff] cannot establish the second element necessary for equitable estoppel. [Plaintiff] argues that [defendant] was estopped to rely on the time bar of section 340.9 by its continued reconsideration of her claim after December 31, 2001, had passed. But she cannot prove [defendant] intended its reconsideration of the claim to be relied upon, or acted in such a way that [plaintiff] had a right to believe it so intended." (*Ashou, supra,* 138 Cal.App.4th at p. 767.)
- " 'It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act.' Estoppel as a bar to a public entity's assertion of the defense of noncompliance arises when a plaintiff establishes by a preponderance of the evidence (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) the plaintiff was ignorant of the true state of facts, and (4) relied upon the conduct to his detriment." (*K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1239–1240 [92 Cal.Rptr.3d 1], internal citation omitted.)
- "A nondisclosure is a cause of injury if the plaintiff would have acted so as to avoid injury had the plaintiff known the concealed fact. The plaintiff's reliance on a nondisclosure was reasonable if the plaintiff's failure to discover the

concealed fact was reasonable in light of the plaintiff's knowledge and experience. Whether the plaintiff's reliance was reasonable is a question of fact for the trier of fact unless reasonable minds could reach only one conclusion based on the evidence. The fact that a plaintiff was represented by counsel and the scope and timing of the representation are relevant to the question of the reasonableness of the plaintiff's reliance." (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 187–188 [104 Cal.Rptr.3d 508], internal citations omitted.)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, §§ 823–840

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

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

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions,* § 345.22 (Matthew Bender)

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

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

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

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

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

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

New December 2009; Revised December 2014

Directions for Use

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

Equitable tolling is not available for legal malpractice (see *Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [statutory tolling provisions of Code Civ Proc., § 340.6 are exclusive for both one-year and four-year limitation periods]; see also CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative*

Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit) nor for medical malpractice with regard to the three-year limitation period of Code of Civil Procedure section 340.5. (See *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [statutory tolling provisions of Code Civ. Proc., § 340.5 are exclusive only for three-year period; one-year period may be tolled on other grounds]; see also CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit*, and CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*.)

Sources and Authority

- Tolling for Equal Employment Opportunity Commission Investigation. Government Code section 12965(e)(1), (f)(1).
- "The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.' " (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 [84 Cal.Rptr.3d 734, 194 P.3d 1026], internal citations omitted.)
- "The purpose of equitable tolling is to 'ease[] the pressure on parties "concurrently to seek redress in two separate forums with the attendant danger of conflicting decisions on the same issue." ' It is intended to benefit the court system 'by reducing the costs associated with a duplicative filing requirement, in many instances rendering later court proceedings either easier and cheaper to resolve or wholly unnecessary.' " (*Long v. Forty Niners Football Co*. (2019) 33 Cal.App.5th 550, 555 [244 Cal.Rptr.3d 887], internal citation omitted.)
- "While the case law is not entirely clear, it appears that the weight of authority supports our conclusion that whether a plaintiff has demonstrated the elements of equitable tolling presents a question of fact." (*Hopkins, supra*, 225 Cal.App.4th at p. 755.)
- "[E]quitable tolling, '[a]s the name suggests . . . is an equitable issue for court resolution.' " (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)
- "While the judge determines equitable causes of action, the judge may (in rare instances) empanel an advisory jury to make preliminary factual findings. The factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder. '[W]hile a jury may be used for advisory verdicts as to questions of fact [in equitable actions], it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper.' " (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337], internal citations omitted.)
- "[CACI No. 457 is] appropriate for use when a trial court 'empanel[s] an advisory jury to make preliminary factual findings,' with respect to equitable

. . . tolling." (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)

- "The equitable tolling doctrine rests on the concept that a plaintiff should not be barred by a statute of limitations unless the defendant would be unfairly prejudiced if the plaintiff were allowed to proceed. '[T]he primary purpose of the statute of limitations is normally satisfied when the defendant receives timely notification of the first of two proceedings.' " (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 598 [95 Cal.Rptr.3d 18], internal citations omitted.)
- "Broadly speaking, the doctrine applies ' "[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one." ' [Citation.] Thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason." (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 853 [234 Cal.Rptr.3d 712].)
- "[T]he effect of equitable tolling is that the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370–371 [2 Cal.Rptr.3d 655, 73 P.3d 517].)
- "A major reason for applying the doctrine is to avoid 'the hardship of compelling plaintiffs to pursue several duplicative actions simultaneously on the same set of facts.' '[D]isposition of a case filed in one forum may render proceedings in the second unnecessary or easier and less expensive to resolve.' " (*Guevara v. Ventura County Community College Dist.* (2008) 169 Cal.App.4th 167, 174 [87 Cal.Rptr.3d 50], internal citations omitted.)
- "[A]pplication of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff. These elements seemingly are present here. As noted, the federal court, without prejudice, declined to assert jurisdiction over a timely filed state law cause of action and plaintiffs thereafter promptly asserted that cause in the proper state court. Unquestionably, the same set of facts may be the basis for claims under both federal and state law. We discern no reason of policy which would require plaintiffs to file simultaneously two separate actions based upon the same facts in both state and federal courts since 'duplicative proceedings are surely inefficient, awkward and laborious.' " (*Addison v. State* (1978) 21 Cal.3d 313, 319 [146 Cal.Rptr. 224, 578 P.2d 941], internal citations omitted.)
- " ' "The timely notice requirement essentially means that the first claim must have been filed within the statutory period. Furthermore[,] the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally this

means that the defendant in the first claim is the same one being sued in the second." "The second prerequisite essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant's investigation of the first claim will put him in a position to fairly defend the second." "The third prerequisite of good faith and reasonable conduct on the part of the plaintiff is less clearly defined in the cases. But in *Addison v. State of California, supra*, 21 Cal.3d 313[,] the Supreme Court did stress that the plaintiff filed his second claim a short time after tolling ended." ' " (*McDonald, supra*, 45 Cal.4th at p. 102, fn. 2, internal citations omitted.)

- "The third requirement of good faith and reasonable conduct may turn on whether 'a plaintiff delayed filing the second claim until the statute on that claim had nearly run . . .' or 'whether the plaintiff [took] affirmative actions which . . . misle[d] the defendant into believing the plaintiff was foregoing his second claim.' " (*Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494, 1505 [92 Cal.Rptr.3d 131].)
- "Where exhaustion of an administrative remedy is mandatory prior to filing suit, equitable tolling is automatic: 'It has long been settled in this and other jurisdictions that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding.' This rule prevents administrative exhaustion requirements from rendering illusory nonadministrative remedies contingent on exhaustion." (*McDonald, supra*, 45 Cal.4th at p. 101, internal citation omitted.)
- "The trial court rejected equitable tolling on the apparent ground that tolling was unavailable where, as here, the plaintiff was advised the alternate administrative procedure he or she was pursuing was voluntary and need not be exhausted. In reversing summary judgment, the Court of Appeal implicitly concluded equitable tolling is in fact available in such circumstances and explicitly concluded equitable tolling is not foreclosed as a matter of law under the FEHA. The Court of Appeal was correct on each count." (*McDonald, supra*, 45 Cal.4th at p. 114.)
- "Equitable tolling and equitable estoppel [see CACI No. 456] are distinct doctrines. ' "Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. . . . Equitable estoppel, however, . . . comes into play only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life . . . from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' " (*Lantzy, supra*, 31 Cal.4th at pp. 383–384.)
- "[V]oluntary abandonment [of the first proceeding] does not categorically bar application of equitable tolling, but it may be relevant to whether a plaintiff can

satisfy the three criteria for equitable tolling." (*McDonald, supra*, 45 Cal.4th at p. 111.)

- "The equitable tolling doctrine generally requires a showing that the plaintiff is seeking an alternate remedy in an established procedural context. Informal negotiations or discussions between an employer and employee do not toll a statute of limitations under the equitable tolling doctrine." (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1416 [159 Cal.Rptr.3d 749], internal citation omitted.)
- "Tolling the FEHA limitation period while the employee awaits the outcome of an EEOC investigation furthers several policy objectives: (1) the defendant receives timely notice of the claim; (2) the plaintiff is relieved of the obligation of pursuing simultaneous actions on the same set of facts; and (3) the costs of duplicate proceedings often are avoided or reduced." (*Mitchell v. State Dept. of Public Health* (2016) 1 Cal.App.5th 1000, 1008 [205 Cal.Rptr.3d 261].)
- " '[P]utative class members would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations.' A trial court may, nonetheless, apply tolling to save untimely claims. But in doing so, the court must address 'two major policy considerations.' The first is 'protection of the class action device,' which requires the court to determine whether the denial of class certification was 'unforeseeable by class members,' or whether potential members, in anticipation of a negative ruling, had already filed ' "protective motions to intervene or to join in the event that a class was later found unsuitable," depriving class actions "of the efficiency and economy of litigation which is a principal purpose of the procedure." ' The second consideration is 'effectuation of the purposes of the statute of limitations,' and requires the court to determine whether commencement of the class suit ' "notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." [Citation.] In these circumstances, . . . the purposes of the statute of limitations would not be violated by a decision to toll.' " (*Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 482–483 [216 Cal.Rptr.3d 390], internal citations omitted.)
- "Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (*Laird, supra*, 2 Cal.4th at p. 618 [applying rule to one-year limitation period].)
- "We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does not require us to expand that sentence beyond its language." (*Belton, supra*, 20 Cal.4th at p. 934 [rejecting application of rule to one-year limitation period].)
- "[E]quitable tolling has never been applied to allow a plaintiff to extend the time

for pursuing an administrative remedy by filing a lawsuit. Despite broad language used by courts in employing the doctrine, equitable tolling has been applied almost exclusively to extend statutory deadlines for judicial actions, rather than deadlines for commencing administrative proceedings." (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1109 [150 Cal.Rptr.3d 405].)

- "Plaintiffs cite no authority, and we are aware of none, that would allow a plaintiff in one case to equitably toll the limitation period based on the filing of a stranger's lawsuit." (*Reid v. City of San Diego* (2018) 23 Cal.App.5th 901, 916 [234 Cal.Rptr.3d 636].)
- "Equitable tolling applies to claims under FEHA during the period in which the plaintiff exhausts administrative remedies or when the plaintiff voluntarily pursues an administrative remedy or nonmandatory grievance procedure, even if exhaustion of that remedy is not mandatory." (*Wassmann, supra,* 24 Cal.App.5th at pp. 853–854.)

Secondary Sources

4 Witkin, California Procedure (6th ed. 2021) Actions, § 796 et seq.

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

3 California Torts, Ch. 32, *Liability of Attorneys*, § 32.60[1][g.2] (Matthew Bender)

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

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

458–459. Reserved for Future Use

460. Strict Liability for Ultrahazardous Activities—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] was engaged in an ultrahazardous activity that caused [him/her/*nonbinary pronoun*/it] to be harmed and that [*name of defendant*] is responsible for that harm.

People who engage in ultrahazardous activities are responsible for the harm these activities cause others, regardless of how carefully they carry out these activities. [*Insert ultrahazardous activity*] is an ultrahazardous activity.

To establish [his/her/*nonbinary pronoun*/its] claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was engaged in [*insert ultrahazardous activity*];**
2. **That [*name of plaintiff*] was harmed;**
3. **That [*name of plaintiff*]'s harm was the kind of harm that would be anticipated as a result of the risk created by [*insert ultrahazardous activity*]; and**
4. **That [*name of defendant*]'s [*insert ultrahazardous activity*] was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Sources and Authority

- "The doctrine of ultrahazardous activity provides that one who undertakes an ultrahazardous activity is liable to every person who is injured as a proximate result of that activity, regardless of the amount of care he uses." (*Pierce v. Pacific Gas & Electric Co.* (1985) 166 Cal.App.3d 68, 85 [212 Cal.Rptr. 283], internal citations omitted.)
- Whether an activity is ultrahazardous is a question of law to be determined by the court. (*Luthringer v. Moore* (1948) 31 Cal.2d 489, 496 [190 P.2d 1].)
- Restatement of Torts Second, section 519, provides:

  (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

  (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.
- Restatement of Torts Second, section 520, provides:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

- Section 519 formerly provided, in part, that "one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize is likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm." This section was followed by the court in *Luthringer, supra,* and by other courts in subsequent cases. (See *Garcia v. Estate of Norton* (1986) 183 Cal.App.3d 413, 418 [228 Cal.Rptr. 108].) This statement regarding forseeability is evidently still good law in California, even though the wording of section 519 does not presently contain the limitation.
- Strict liability in this context has been confined to "consequences which lie within the extraordinary risk posed by the abnormally dangerous activity and is limited to the 'class of persons who are threatened by the abnormal danger, and the kind of damage they may be expected to incur.' " (*Goodwin v. Reilley* (1985) 176 Cal.App.3d 86, 92 [221 Cal.Rptr. 374], citing Prosser & Keeton, The Law of Torts (5th ed. 1984) § 75, p. 562.)
- "The important factor is that certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy." (*Luthringer, supra,* 31 Cal.2d at p. 500.)
- "It is axiomatic that an essential element of a plaintiff's cause of action, whether based on negligence or strict liability, is the existence of a causal connection between defendant's act and the injury which plaintiff suffered." (*Smith v. Lockheed Propulsion Co.* (1967) 247 Cal.App.2d 774, 780 [56 Cal.Rptr. 128], internal citations omitted.)
- Defendant contended that the strict liability doctrine "cannot be applied unless the defendant is aware of the abnormally dangerous condition or activity." This is unsound: One who carried on such an "activity is liable for injuries to a person whom the actor reasonably should recognize as likely to be harmed . . . , even though 'the utmost care is exercised to prevent the harm.' " (*Garcia, supra*,

183 Cal.App.3d at p. 420, internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1575–1588 et seq.

1 Levy et al., California Torts, Ch. 7, *Strict Liability for Hazardous Activities*, §§ 7.01–7.06 (Matthew Bender)

1 California Environmental Law & Land Use Practice, Ch. 1, *Nuisance, Trespass, and Strict Liability for Ultrahazardous Activities* (Matthew Bender)

1A California Trial Guide, Unit 11, *Opening Statement*, § 11.55 (Matthew Bender)

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

23 California Points and Authorities, Ch. 234, *Ultrahazardous Activities* (Matthew Bender)

1 California Civil Practice: Torts §§ 2:4–2:10 (Thomson Reuters)

461. Strict Liability for Injury Caused by Wild Animal—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*]'s [*insert type of animal*] harmed [him/her/*nonbinary pronoun*] and that [*name of defendant*] is responsible for that harm.

People who own, keep, or control wild animals are responsible for the harm that these animals cause to others, no matter how carefully they guard or restrain their animals.

To establish [his/her/*nonbinary pronoun*] claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] owned, kept, or controlled [a/an] [*insert type of animal*];**
2. **That [*name of plaintiff*] was harmed; and**
3. **That [*name of defendant*]'s [*insert type of animal*] was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised December 2015, June 2016

Directions for Use

Give this instruction to impose strict liability on an animal owner for injuries caused by an animal of a type that is inherently dangerous without the need to show the owner's knowledge of dangerousness. (See *Baugh v. Beatty* (1949) 91 Cal.App.2d 786, 791–792 [205 P.2d 671].) For an instruction for use for a domestic animal if it is alleged that the owner knew or should have known that the animal had a dangerous propensity, see CACI No. 462, *Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensity*. (See *Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 665 [142 Cal.Rptr.3d 24].) For an instruction on statutory strict liability under the dog-bite statute, see CACI No. 463, *Dog Bite Statute—Essential Factual Elements.*

Whether the determination that the animal that caused injury is a "wild animal" triggering this instruction is a matter of law for the court or can be a question of fact for the jury has apparently not been addressed by the courts.

Sources and Authority

- "The keeper of an animal of a species dangerous by nature . . . is liable, without wrongful intent or negligence, for damage to others resulting from such a propensity. The liability of the keeper is absolute, for '[the] gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. [Citation.] In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and

the question of the owner's negligence is not in the case.' " (*Hillman v. Garcia-Ruby* (1955) 44 Cal.2d 625, 626 [283 P.2d 1033].)

- "[I]f the animal which inflicted the injury is vicious and dangerous, known to the defendant to be such, an allegation of negligence on the part of defendant is unnecessary and the averment, if made, may be treated as surplusage." (*Baugh, supra*, 91 Cal.App.2d at p. 791.)
- "[A] wild animal is presumed to be vicious and since the owner of such an animal . . . is an insurer against the acts of the animal to anyone who is injured, and unless such person voluntarily or consciously does something which brings the injury on himself, the question of the owner's negligence is not in the case." *Baugh, supra*, 91 Cal.App.2d at p. 791.)
- "The court instructed the jury with respect to the liability of the keeper of a vicious or dangerous animal, known to be such by its owner. Although plaintiff has not raised any objection to this instruction, it was not proper in the instant case since the animal was of the class of animals *ferae naturae*, of known savage and vicious nature, and hence an instruction on the owner's knowledge of its ferocity was unnecessary." (*Baugh, supra*, 91 Cal.App.2d at pp. 791–792.)
- "[Strict] liability has been imposed on 'keepers of lions and tigers, bears, elephants, wolves [and] monkeys.' " (*Rosenbloom v. Hanour Corp.* (1998) 66 Cal.App.4th 1477, 1479, fn. 1 [78 Cal.Rptr.2d 686].)
- "The owner of a naturally dangerous animal may be excused from the usual duty of care: 'In cases involving "primary assumption of risk"—where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury—the doctrine . . . operates as a complete bar to the plaintiff's recovery.' " (*Rosenbloom, supra,* 66 Cal.App.4th at p. 1479, internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1563

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 3.3–3.6

1 Levy et al., California Torts, Ch. 6, *Strict Liability for Injuries Caused by Animals*, §§ 6.01–6.10 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability*, § 23.23 (Matthew Bender)

1 California Civil Practice: Torts §§ 2:20–2:21 (Thomson Reuters)

462. Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***]'s [***insert type of animal***] harmed [him/her/***nonbinary pronoun***] and that [***name of defendant***] is responsible for that harm.**

People who own, keep, or control animals with unusually dangerous natures or tendencies can be held responsible for the harm that their animals cause to others, no matter how carefully they guard or restrain their animals.

To establish [his/her/*nonbinary pronoun***] claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] owned, kept, or controlled a [***insert type of animal***];**
2. **That the [***insert type of animal***] had an unusually dangerous nature or tendency;**
3. **That before [***name of plaintiff***] was injured, [***name of defendant***] knew or should have known that the [***insert type of animal***] had this nature or tendency;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That the [***insert type of animal***]'s unusually dangerous nature or tendency was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised April 2007, June 2013

Directions for Use

Give this instruction to impose strict liability on an animal owner if the owner knew or should have known that the animal had a dangerous propensity. (See *Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 665 [142 Cal.Rptr.3d 24].) There is also strict liability for injuries caused by animals of a type that are inherently dangerous without the need to show the owner's knowledge of dangerousness. (*Baugh v. Beatty* (1949) 91 Cal.App.2d 786, 791–792 [205 P.2d 671]; see CACI No. 461, *Strict Liability for Injury Caused by Wild Animal—Essential Factual Elements*.)

For an instruction on statutory strict liability under the dog-bite statute, see CACI No. 463, *Dog Bite Statute (Civ. Code, § 3342)—Essential Factual Elements.*

Sources and Authority

- "A common law strict liability cause of action may also be maintained if the owner of a domestic animal that bites or injures another person knew or had

reason to know of the animal's vicious propensities. If [defendant] knew or should have known of his dog's vicious propensities and failed to inform [plaintiff] of such facts, he could be found to have exposed [plaintiff] to an *unknown risk* and thereby be held strictly liable at common law for her injuries. Under such circumstances, the defense of primary assumption of risk would not bar [plaintiff]'s claim since she could not be found to have assumed a risk of which she was unaware." (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1115–1116 [47 Cal.Rptr.3d 553, 140 P.3d 848], original italics, internal citations omitted.)

- "The doctrine of strict liability for harm done by animals has developed along two separate and independent lines: (1) Strict liability for damages by trespassing livestock, and (2) strict liability apart from trespass (a) for damages by animals of a species regarded as inherently dangerous, and (b) for damages by animals of a species not so regarded but which, in the particular case, possess dangerous propensities which were or should have been known to the possessor." (*Thomas*, *supra*, 206 Cal.App.4th at p. 665.)
- "California has long followed the common law rule of strict liability for harm done by a domestic animal with known vicious or dangerous propensities abnormal to its class." (*Drake v. Dean* (1993) 15 Cal.App.4th 915, 921 [19 Cal.Rptr.2d 325].)
- Any propensity that is likely to cause injury under the circumstances is a dangerous or vicious propensity within the meaning of the law. (*Talizin v. Oak Creek Riding Club* (1959) 176 Cal.App.2d 429, 437 [1 Cal.Rptr. 514].)
- The question of whether a domestic animal is vicious or dangerous is ordinarily a factual one for the jury. (*Heath v. Fruzia* (1942) 50 Cal.App.2d 598, 601 [123 P.2d 560].)
- " 'The gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and the question of the owner's negligence is not in the case.' " (*Hillman v. Garcia-Ruby* (1955) 44 Cal.2d 625, 626 [283 P.2d 1033], internal citations omitted.)
- "The absolute duty to restrain the dog could not be invoked unless the jury found, not only that the dog had the alleged dangerous propensity, but that defendants knew or should have known that it had." (*Hillman, supra,* 44 Cal.2d at p. 628.)
- "[N]egligence may be predicated on the characteristics of the animal which, although not abnormal to its class, create a foreseeable risk of harm. As to those characteristics, the owner has a duty to anticipate the harm and to exercise ordinary care to prevent the harm." (*Drake, supra,* 15 Cal.App.4th at p. 929.)
- "It is well settled in cases such as this (the case involved a bull) that the owner of an animal, not naturally vicious, is not liable for an injury done by it, unless two propositions are established: 1. That the animal in fact was vicious, and 2.

That the owner knew it." (*Mann v. Stanley* (1956) 141 Cal.App.2d 438, 441 [296 P.2d 921].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1575–1588 et seq.

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 3.3–3.6

1 Levy et al., California Torts, Ch. 6, *Strict Liability for Injuries Caused by Animals*, §§ 6.01–6.10 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability*, § 23.33 (Matthew Bender)

1 California Civil Practice: Torts, §§ 2:20–2:21 (Thomson Reuters)

463. Dog Bite Statute (Civ. Code, § 3342)—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*]'s dog bit [him/her/*nonbinary pronoun*] and that [*name of defendant*] is responsible for that harm.

People who own dogs can be held responsible for the harm from a dog bite, no matter how carefully they guard or restrain their dogs.

To establish [his/her/*nonbinary pronoun*] claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] owned a dog;**
2. **That the dog bit [*name of plaintiff*] while [he/she/*nonbinary pronoun*] was in a public place or lawfully on private property;**
3. **That [*name of plaintiff*] was harmed; and**
4. **That [*name of defendant*]'s dog was a substantial factor in causing [*name of plaintiff*]'s harm.**

[[*Name of plaintiff*] was lawfully on private property of the owner if [he/she/*nonbinary pronoun*] was performing any duty required by law or was on the property at the invitation, express or implied, of the owner.]

New September 2003; Revised April 2007, May 2020

Directions for Use

Read the last optional paragraph if there is an issue regarding whether the plaintiff was lawfully on private property when the plaintiff was bitten.

For an instruction on common-law liability based on the defendant's knowledge of his or her pet's dangerous propensities, see CACI No. 462, *Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities—Essential Factual Elements*.

Sources and Authority

- Liability for Dog Bites. Civil Code section 3342(a).
- This statute creates an exception to the general rule that an owner is not strictly liable for harm caused by a domestic animal absent knowledge of the animal's vicious propensity. (*Hicks v. Sullivan* (1932) 122 Cal.App. 635, 639 [10 P.2d 516].)
- It is not necessary that the skin be broken in order for the statute to apply. (*Johnson v. McMahan* (1998) 68 Cal.App.4th 173, 176 [80 Cal.Rptr.2d 173].)
- "The defenses of assumption of the risk and contributory negligence may still be

asserted" in an action brought under section 3342. (*Johnson, supra,* 68 Cal.App.4th at p. 176.)

- "A veterinarian or a veterinary assistant who accepts employment for the medical treatment of a dog, aware of the risk that *any* dog, regardless of its previous nature, might bite while being treated, has assumed this risk as part of his or her occupation." (*Nelson v. Hall* (1985) 165 Cal.App.3d 709, 715 [211 Cal.Rptr. 668], original italics.)
- "[Plaintiff], by virtue of the nature of her occupation as a kennel worker, assumed the risk of being bitten or otherwise injured by the dogs under her care and control while in the custody of the commercial kennel where she worked pursuant to a contractual boarding agreement. The Court of Appeal correctly concluded a strict liability cause of action under the dog bite statute (§ 3342) was therefore unavailable to [plaintiff]." (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1132 [47 Cal.Rptr.3d 553, 140 P.3d 848].)
- The definition of "lawfully upon the private property of such owner" effectively prevents trespassers from obtaining recovery under the Dog Bite Statute. (*Fullerton v. Conan* (1948) 87 Cal.App.2d 354, 358 [197 P.2d 59].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1569–1573

California Tort Guide (Cont.Ed.Bar 3d ed.) § 3.2

1 Levy et al., California Torts, Ch. 6, *Strict Liability for Injuries Caused by Animals*, § 6.12 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability* (Matthew Bender)

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

1 California Civil Practice: Torts § 2:16 (Thomson Reuters)

464–469. Reserved for Future Use

470. Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity

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

1. **That [***name of defendant***] either intentionally injured [***name of plaintiff***] or acted so recklessly that [his/her/***nonbinary pronoun***] conduct was entirely outside the range of ordinary activity involved in [***e.g., touch football***];**
2. **That [***name of plaintiff***] was harmed; and**
3. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Conduct is entirely outside the range of ordinary activity involved in [*e.g., touch football***] if that conduct (1) increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., touch football***], and (2) it can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the [sport/activity].**

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

New September 2003; Revised April 2004, October 2008, April 2009, December 2011, December 2013; Revised and Renumbered from CACI No. 408 May 2017; Revised May 2018

Directions for Use

This instruction sets forth a plaintiff's response to the affirmative defense of primary assumption of risk asserted by a defendant who was a coparticipant in the sport or other recreational activity. For an instruction applicable to coaches, instructors, or trainers, see CACI No. 471, *Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches*. For an instruction applicable to facilities owners and operators and to event sponsors, see CACI No. 472, *Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation Involving Inherent Risk.*

Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3

Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) Element 1 sets forth the exceptions in which there is a duty.

While duty is generally a question of law, some courts have held that whether the defendant has increased the risk beyond those inherent in the sport or activity is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] and cases cited therein, including cases *contra*.) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

Sources and Authority

- "Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk . . . bar[s] recovery because no duty of care is owed as to such risks." (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 [45 Cal.Rptr.2d 855], internal citations omitted.)
- "Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks. The doctrine applies to activity 'done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury' . . . ." (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594, 601 [202 Cal.Rptr.3d 536], internal citations omitted; see also *Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208 [202 Cal.Rptr.3d 757] ["These factors certainly apply to skateboarding"]; *Swigart v. Bruno* (2017) 13 Cal.App.5th 529, 540 [220 Cal.Rptr.3d 556] [horseback riding is an inherently dangerous sport]; *Foltz v. Johnson* (2017) 16 Cal.App.5th 647, 656–657 [224 Cal.Rptr.3d 506] [off-road dirt bike riding].)
- "A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [11 Cal.Rptr.2d 30, 834 P.2d 724].)
- "[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Knight, supra*, 3 Cal.4th at p. 320.)
- "The *Knight* rule, however, 'does not grant unbridled legal immunity to all defendants participating in sporting activity. The Supreme Court has stated that "it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." Thus, even though "defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself," they may not

increase the likelihood of injury above that which is inherent.'" (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1261 [102 Cal.Rptr.2d 813], internal citations omitted.)

- "In *Freeman v. Hale*, the Court of Appeal advanced a test . . . for determining what risks are inherent in a sport: '[C]onduct is totally outside the range of ordinary activity involved in the sport (and thus any risks resulting from that conduct are not inherent to the sport) if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.'" (*Distefano, supra*, 85 Cal.App.4th at p. 1261.)
- "[G]olfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is 'so reckless as to be totally outside the range of the ordinary activity involved in the sport.'" (*Shin, supra*, 42 Cal.4th at p. 497.)
- "The [horseback] rider generally assumes the risk of injury inherent in the sport. Another person does not owe a duty to protect the rider from injury by discouraging the rider's vigorous participation in the sport or by requiring that an integral part of horseback riding be abandoned. And the person has no duty to protect the rider from the careless conduct of others participating in the sport. The person owes the horseback rider only two duties: (1) to not 'intentionally' injure the rider; and (2) to not 'increase the risk of harm beyond what is inherent in [horseback riding]' by 'engag[ing] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport'" (*Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1545–1546 [98 Cal.Rptr.3d 779].)
- "[T]he general test is 'that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.' Although a defendant has no duty of care to a plaintiff with regard to inherent risks, a defendant still has a duty not to increase those risks." (*Swigart*, *supra*, 13 Cal.App.5th at p. 538, internal citations omitted.)
- "The question of which risks are inherent in a recreational activity is fact intensive but, on a sufficient record, may be resolved on summary judgment. Judges deciding inherent risk questions under this doctrine 'may consider not only their own or common experience with the recreational activity involved but may also consult case law, other published materials, and documentary evidence introduced by the parties on a motion for summary judgment.'" (*Foltz*, *supra*, 16 Cal.App.5th at p. 656, internal citations omitted.)
- "[W]hether defendant breached the limited duty of care he owed other golfers by engaging in conduct that was 'so reckless as to be totally outside the range of the ordinary activity involved in [golf]' depends on resolution of disputed material facts. Thus, defendant's summary judgment motion was properly

denied." (*Shin, supra*, 42 Cal.4th at p. 486, internal citation omitted.)

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra*, 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra*, 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra*, 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide . . . whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra*, 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588].)
- "The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it." (*Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 501 [194 Cal.Rptr.3d 830].)
- "Primary assumption of risk has often been applied in the context of active sports, but the doctrine also applies to other recreational activities that ' "involv[e] an inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity." ' 'Where the doctrine applies to a recreational activity, operators, instructors and participants in the activity owe other participants only the duty not to act so as to increase the risk of injury over that inherent in the activity.' Coparticipants must not intentionally or recklessly injure other participants, but

the doctrine is a complete defense to a claim of negligence. However, recovery for injuries caused by risks *not* inherent in the activity is not barred by the doctrine." (*Wolf v. Weber* (2020) 52 Cal.App.5th 406, 410–411 [266 Cal.Rptr.3d 104], original italics, internal citations omitted.)

- "Admittedly, it is sometimes said that '[t]he existence and scope of a defendant's duty of care in the primary assumption of risk context "is a *legal* question which depends on the nature of the sport or activity . . . and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." ' This statement of the rule is correct where there is no dispute about the inherent risks, and such cases may be resolved on summary judgment. [¶] However this statement is overly broad. Although the risks inherent in *many* activities are not subject to reasonable dispute (e.g., being hit with a baseball during a game), the risks inherent in *some* activities are not commonly known. In such cases, expert testimony may be required ' "for purposes of weighing whether the inherent risks of the activity were increased by the defendant's conduct." ' Thus, it is not entirely accurate to say inherent risks of an activity always present purely legal questions, because sometimes the nature of an activity and its risks must be gleaned from the evidence." (*Jimenez, supra*, 247 Cal.App.4th at p. 608, original italics, internal citations omitted.)
- "[Plaintiff] has repeatedly argued that primary assumption of the risk does not apply because she did not impliedly consent to having a weight dropped on her head. However, a plaintiff's expectation does not define the limits of primary assumption of the risk. 'Primary assumption of risk focuses on the legal question of duty. It does not depend upon a plaintiff's implied consent to injury, nor is the plaintiff's subjective awareness or expectation relevant. . . . .' " (*Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 471 [158 Cal.Rptr.3d 474].)
- "Primary assumption of the risk does not depend on whether the plaintiff subjectively appreciated the risks involved in the activity; instead, the focus is an objective one that takes into consideration the risks that are ' "inherent" ' in the activity at issue." (*Swigart*, *supra*, 13 Cal.App.5th at p. 538.)
- "A jury could find that, by using a snowboard without the retention strap, in violation of the rules of the ski resort and a county ordinance, defendant unnecessarily increased the danger that his snowboard might escape his control and injure other participants such as plaintiff. The absence of a retention strap could therefore constitute conduct not inherent to the sport which increased the risk of injury." (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 829 [89 Cal.Rptr.2d 519].)
- "The existence and scope of a defendant's duty depends on the role that defendant played in the activity. Defendants were merely the hosts of a social gathering at their cattle ranch, where [plaintiff] asked to ride one of their horses; they were not instructors and did not assume any of the responsibilities of an instructor." (*Levinson, supra*, 176 Cal.App.4th at pp. 1550–1551, internal citation omitted.)
- "[T]he primary assumption of risk doctrine is not limited to activities classified

as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 [150 Cal.Rptr.3d 551, 290 P.3d 1158].)

- "Whether a duty exists 'does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on [(1)] the nature of the activity or sport in which the defendant is engaged and [(2)] the relationship of the defendant and the plaintiff to that activity or sport.' It is the 'nature of the activity' and the parties' relationship to it that determines whether the doctrine applies—not its characterization as a sporting event." (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 999–1000 [70 Cal.Rptr.3d 519], internal citations omitted.)
- "[T]o the extent that ' " 'a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence,' " ' he or she is subject to the defense of comparative negligence but not to an absolute defense. This type of comparative negligence has been referred to as ' "secondary assumption of risk." ' Assumption of risk that is based upon the absence of a defendant's duty of care is called ' "primary assumption of risk." ' 'First, in "primary assumption of risk" cases—where the defendant owes no duty to protect the plaintiff from a particular risk of harm—a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff's conduct in undertaking the activity was *reasonable* or unreasonable. Second, in "secondary assumption of risk" cases—involving instances in which the defendant has breached the duty of care owed to the plaintiff—the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such breach, simply because the plaintiff's conduct in encountering the risk of such an injury was reasonable rather than unreasonable.' " (*Kindrich v. Long Beach Yacht Club* (2008) 167 Cal.App.4th 1252, 1259 [84 Cal.Rptr.3d 824], original italics, internal citations omitted.)
- "Even were we to conclude that [plaintiff]'s decision to jump off the boat was a voluntary one, and that therefore he assumed a risk inherent in doing so, this is not enough to provide a complete defense. Because voluntary assumption of risk as a complete defense in a negligence action was abandoned in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226], only the absence of duty owed a plaintiff under the doctrine of primary assumption of risk would provide such a defense. But that doctrine does not come into play except when a plaintiff and a defendant are engaged in certain types of activities, such as an 'active sport.' That was not the case here; plaintiff was merely the passenger on a boat. Under *Li*, he may have been contributorily negligent but this would only go to reduce the amount of damages to which he is entitled." (*Kindrich, supra*, 167 Cal.App.4th at p. 1258.)
- "Though most cases in which the doctrine of primary assumption of risk exists involve recreational sports, the doctrine has been applied to dangerous activities in other contexts (see, e.g., *Saville v. Sierra College* (2005) 133 Cal.App.4th 857

[36 Cal.Rptr.3d 515] [training in peace officer takedown maneuvers]; *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012 [2 Cal.Rptr.3d 168] [training on physical restraint methods]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112 [75 Cal.Rptr.2d 801] [practice of cheerleader routines]; *Bushnell* [*v. Japanese-American Religious & Cultural Center*], 43 Cal.App.4th 525 [50 Cal.Rptr.2d 671] [practice of moves in judo class]; and *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761 [53 Cal.Rptr.2d 713] [injury to nurse's aide by nursing home patient])." (*McGarry, supra*, 158 Cal.App.4th at pp. 999–1000, internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1496–1511

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

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

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

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

471. Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches

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[*Name of plaintiff***] claims [he/she/***nonbinary pronoun***] was harmed by [***name of defendant***]'s [coaching/training/instruction]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [coach/trainer/instructor];**
2. **[That [***name of defendant***] intended to cause [***name of plaintiff***] injury or acted recklessly in that [his/her/***nonbinary pronoun***] conduct was entirely outside the range of ordinary activity involved in teaching or coaching [***sport or other recreational activity, e.g., horseback riding***] in which [***name of plaintiff***] was participating;]**

   [or]

   [That [*name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., horseback riding***];]**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised April 2004, June 2012, December 2013; Revised and Renumbered from CACI No. 409 May 2017; Revised May 2020

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].)

There are exceptions, however, in which there is a duty of care. Use the first option for element 2 if it is alleged that the coach or trainer intended to cause the student's injury or engaged in conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport or activity. Use the second option if it is alleged that the coach's or trainer's failure to use ordinary care increased the risk of injury to the plaintiff, for example, by encouraging or allowing the plaintiff to participate in the sport or activity when the plaintiff was physically unfit to participate or by allowing the plaintiff to use unsafe equipment or instruments. (See

Eriksson v. Nunnink (2011) 191 Cal.App.4th 826, 845 [120 Cal.Rptr.3d 90].) If the second option is selected, also give CACI No. 400, *Negligence—Essential Factual Elements.*

While duty is a question of law, courts have held that whether the defendant has unreasonably increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 470, *Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to facilities owners and operators and to event sponsors, see CACI No. 472, *Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors.* For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation with Inherent Risk.*

Sources and Authority

- "In order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' involved in teaching or coaching the sport." (*Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1011 [4 Cal.Rptr.3d 103, 75 P.3d 30], internal citation omitted.)
- "[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 [150 Cal.Rptr.3d 551, 290 P.3d 1158].)
- "Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks. The doctrine applies to activity 'done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury' . . . ." (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594, 601 [202 Cal.Rptr.3d 536], internal citations omitted; see also *Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208 [202 Cal.Rptr.3d 757] ["These factors certainly apply to skateboarding"].)
- "Here, we do not deal with the relationship between coparticipants in a sport, or

with the duty that an operator may or may not owe to a spectator. Instead, we deal with the duty of a coach or trainer to a student who has entrusted himself to the former's tutelage. There are precedents reaching back for most of this century that find an absence of duty to coparticipants and, often, to spectators, but the law is otherwise as applied to coaches and instructors. For them, the general rule is that coaches and instructors owe a duty of due care to persons in their charge. The coach or instructor is not, of course, an insurer, and a student may be held to notice that which is obvious and to ask appropriate questions. But all of the authorities that comment on the issue have recognized the existence of a duty of care." (*Tan v. Goddard* (1993) 13 Cal.App.4th 1528, 1535–1536 [17 Cal.Rptr.2d 89], internal citations omitted.)

- "[D]ecisions have clarified that the risks associated with learning a sport may themselves be inherent risks of the sport, and that an instructor or coach generally does not increase the risk of harm inherent in learning the sport simply by urging the student to strive to excel or to reach a new level of competence." (*Kahn, supra*, 31 Cal.4th at p. 1006.)
- "To the extent a duty is alleged against a coach for 'pushing' and/or 'challenging' a student to improve and advance, the plaintiff must show that the coach intended to cause the student's injury or engaged in reckless conduct—that is, conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport. Furthermore, a coach has a duty of ordinary care not to increase the risk of injury to a student by encouraging or allowing the student to participate in the sport when he or she is physically unfit to participate or by allowing the student to use unsafe equipment or instruments." (*Eriksson, supra*, 191 Cal.App.4th at p. 845, internal citation omitted.)
- "That an instructor might ask a student to do more than the student can manage is an inherent risk of the activity. Absent evidence of recklessness, or other risk-increasing conduct, liability should not be imposed simply because an instructor asked the student to take action beyond what, with hindsight, is found to have been the student's abilities. To hold otherwise would discourage instructors from requiring students to stretch, and thus to learn, and would have a generally deleterious effect on the sport as a whole." (*Honeycutt v. Meridian Sports Club, LLC* (2014) 231 Cal.App.4th 251, 258 [179 Cal.Rptr.3d 473].)
- Coaches and sports instructors "owe students a duty 'not to increase the risks inherent in the learning process undertaken by the student.' But this does not require them to 'fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether . . . .' Instead, '[b]y choosing to participate in a sport that poses the obvious possibility of injury, the student athlete must learn to accept an adverse result of the risks inherent in the sport.' " (*Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1436–1437 [89 Cal.Rptr.2d 920], internal citations omitted.)
- "The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties'

relationship to it." *(Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 501 [194 Cal.Rptr.3d 830].)

- "Admittedly, it is sometimes said that '[t]he existence and scope of a defendant's duty of care in the primary assumption of risk context "is a *legal* question which depends on the nature of the sport or activity . . . and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." ' This statement of the rule is correct where there is no dispute about the inherent risks, and such cases may be resolved on summary judgment. [¶] However this statement is overly broad. Although the risks inherent in *many* activities are not subject to reasonable dispute (e.g., being hit with a baseball during a game), the risks inherent in *some* activities are not commonly known. In such cases, expert testimony may be required ' "for purposes of weighing whether the inherent risks of the activity were increased by the defendant's conduct." ' . . . Thus, it is not entirely accurate to say inherent risks of an activity always present purely legal questions, because sometimes the nature of an activity and its risks must be gleaned from the evidence." (*Jimenez, supra,* 247 Cal.App.4th at p. 608, original italics, internal citations omitted.)
- "[Plaintiff] has repeatedly argued that primary assumption of the risk does not apply because she did not impliedly consent to having a weight dropped on her head. However, a plaintiff's expectation does not define the limits of primary assumption of the risk. 'Primary assumption of risk focuses on the legal question of duty. It does not depend upon a plaintiff's implied consent to injury, nor is the plaintiff's subjective awareness or expectation relevant. . . . .' " (*Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 471 [158 Cal.Rptr.3d 474].)
- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra*, 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra*, 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra*, 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide . . . whether the defendant has increased the risks of the activity beyond the risks

inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra*, 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna, supra*, 169 Cal.App.4th at pp. 112–113.)

- "The existence of a duty of care is a separate issue from the question whether (on the basis of forseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)
- "[A duty not to increase the risk] arises only if there is an ' "organized relationship" ' between the defendants and the participant in relation to the sporting activity, such as exists between . . . a coach or instructor and his or her students. [I]mposing such a duty in the context of these types of relationships is justified because the defendants are 'responsible for, or in control of, the conditions under which the [participant] engaged in the sport.' " (*Bertsch, supra,* 247 Cal.App.4th at pp. 1208–1209, internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1496, 1497, 1501–1510

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶¶ 3:1067–3:1078 (The Rutter Group)

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

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics*, § 273.31 (Matthew Bender)

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

472. Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors

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[*Name of plaintiff***] claims [he/she/***nonbinary pronoun***] was harmed while [participating in/watching] [***sport or other recreational activity, e.g., snowboarding***] at [***name of defendant***]'s [***specify facility or event where plaintiff was injured, e.g., ski resort***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [owner/operator/sponsor/***other***] of [***e.g., a ski resort***];**
2. **[That [***name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., snowboarding***];]**

   [or]

   [That [*name of defendant***] unreasonably failed to minimize a risk that is not inherent in [***e.g., snowboarding***] and unreasonably exposed [***name of plaintiff***] to an increased risk of harm;]**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2013; Revised and Renumbered from CACI No. 410 May 2017; Revised May 2019

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) There is, however, a duty applicable to facilities owners and operators and to event sponsors not to unreasonably increase the risks of injury to participants and spectators beyond those inherent in the activity. (See *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1162 [150 Cal.Rptr.3d 551, 290 P.3d 1158] [participants]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [spectators].)

There is also a duty to minimize risks that are extrinsic to the nature of the sport; that is, those that can be addressed without altering the essential nature of the activity. (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 38 [236

Cal.Rptr.3d 682].) Choose either or both options for element 2 depending on which duty is alleged to have been breached.

While duty is a question of law, courts have held that whether the defendant has increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein]; cf. *Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 354 [235 Cal.Rptr.3d 716] [court to decide whether an activity is an active sport, the inherent risks of that sport, and whether the defendant has increased the risks of the activity beyond the risks inherent in the sport].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 470, *Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to instructors, trainers, and coaches, see CACI No. 471, *Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation With Inherent Risk.*

Sources and Authority

- "[U]nder the primary assumption of risk doctrine, operators, sponsors and instructors in recreational activities posing inherent risks of injury have no duty to eliminate those risks, but do owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity." (*Nalwa, supra*, 55 Cal.4th at p. 1162.)
- "The doctrine applies to recreational activities ' "involving an inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity." ' " *(Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 500 [194 Cal.Rptr.3d 830].)
- "Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks. The doctrine applies to activity 'done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury' . . . ." (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594, 601 [202 Cal.Rptr.3d 536], internal citations omitted; see also *Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208 [202 Cal.Rptr.3d 757] ["These factors certainly apply to skateboarding"], internal citations omitted.)
- "What the primary assumption of risk doctrine does not do, however, is absolve operators of *any obligation* to protect the safety of their customers. As a general rule, where an operator can take a measure that would increase safety and minimize the risks of the activity *without also altering the nature of the activity*, the operator is required to do so. As the court explained in *Knight,* 'in the sports

setting, as elsewhere, the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue in a given case.' When the defendant is the operator of an inherently risky sport or activity (as opposed to a coparticipant), there are 'steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport [or activity].' " (*Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1300 [222 Cal.Rptr.3d 633], original italics, internal citations omitted.)

- "Thus, *Nalwa* actually reaffirms *Knight's* conclusions regarding the duties owed to participants by operators/organizers of recreational activities. In short, such operators and organizers have two distinct duties: the limited duty not to increase the *inherent* risks of an activity under the primary assumption of the risk doctrine and the ordinary duty of due care with respect to the *extrinsic* risks of the activity, which should reasonably be minimized to the extent possible without altering the nature of the activity." (*Hass, supra*, 26 Cal.App.5th at p. 38, original italics.)
- "The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it." (*Griffin, supra,* 242 Cal.App.4th at p. 501.)
- "Admittedly, it is sometimes said that '[t]he existence and scope of a defendant's duty of care in the primary assumption of risk context "is a *legal* question which depends on the nature of the sport or activity . . . and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." ' This statement of the rule is correct where there is no dispute about the inherent risks, and such cases may be resolved on summary judgment. [¶] However this statement is overly broad. Although the risks inherent in *many* activities are not subject to reasonable dispute (e.g., being hit with a baseball during a game), the risks inherent in *some* activities are not commonly known. In such cases, expert testimony may be required ' "for purposes of weighing whether the inherent risks of the activity were increased by the defendant's conduct." ' . . . Thus, it is not entirely accurate to say inherent risks of an activity always present purely legal questions, because sometimes the nature of an activity and its risks must be gleaned from the evidence." (*Jimenez, supra,* 247 Cal.App.4th at p. 608, original italics, internal citations omitted.)
- "In any case in which the primary assumption of risk doctrine applies, operators, instructors, and participants in the activity owe other participants a duty 'not to act so as to *increase* the risk of injury over that inherent in the activity.' But owners and operators of sports venues and other recreational activities have an *additional duty* to undertake reasonable steps or measures to protect their customers' or spectators' safety—if they can do so without altering the nature of the sport or the activity." (*Mayes v. La Sierra University* (2022) 73 Cal.App.5th 686, 698 [288 Cal.Rptr.3d 693], original italics, internal citations omitted.)
- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further

defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn*, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna, supra*, 169 Cal.App.4th at pp. 112–113, internal citations omitted.)

- "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant." (*Knight, supra*, 3 Cal.4th at pp. 315–316.)
- "Under *Knight*, defendants had a duty *not to increase* the inherent risks to which spectators at professional baseball games are regularly exposed and which they assume. As a result, a triable issue of fact remained, namely whether the [defendants]' mascot cavorting in the stands and distracting plaintiff's attention, *while the game was in progress*, constituted a breach of that duty, i.e., constituted negligence in the form of increasing the inherent risk to plaintiff of being struck by a foul ball." (*Lowe, supra*, 56 Cal.App.4th at p. 114, original italics.)
- "[T]hose responsible for maintaining athletic facilities have a . . . duty not to increase the inherent risks, albeit in the context of businesses selling recreational opportunities." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 162 [41 Cal.Rptr.3d 299, 131 P.3d 383], internal citation omitted.)
- "*Knight*, consistently with established case law, simply requires courts in each instance to examine the question of duty in light of the nature of the defendant's activities and the relationship of the parties to that activity." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482 [63 Cal.Rptr.2d 291, 936 P.2d 70].)
- "Because primary assumption of risk focuses on the question of duty, it is not dependent on either the plaintiff's implied consent to, or subjective appreciation of, the potential risk." (*Griffin, supra,* 242 Cal.App.4th at p. 502, original italics.)
- "Defendants' obligation not to increase the risks inherent in the activity included a duty to provide safe equipment for the trip, such as a safe and sound craft." (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 255 [38 Cal.Rptr.2d 65].)

- "[A duty not to increase the risk] arises only if there is an ' "organized relationship" ' between the defendants and the participant in relation to the sporting activity, such as exists between a recreational business operator and its patrons . . . . [I]mposing such a duty in the context of these types of relationships is justified because the defendants are 'responsible for, or in control of, the conditions under which the [participant] engaged in the sport.' " However, '[t]his policy justification does not extend to a defendant wholly uninvolved with and unconnected to the sport,' . . . who neither 'held out their driveway as an appropriate place to skateboard or in any other way represented that the driveway was a safe place for skateboarding.' " (*Bertsch, supra,* 247 Cal.App.4th at pp. 1208–1209, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1496–1497, 1501–1511

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶ 3:1120 (The Rutter Group)

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

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics*, § 273.31 (Matthew Bender)

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

473. Primary Assumption of Risk—Exception to Nonliability—Occupation Involving Inherent Risk

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by [***name of defendant***] while [***name of plaintiff***] was performing [his/her/***nonbinary pronoun***] job duties as [***specify, e.g., a firefighter***]. [***Name of defendant***] is not liable if [***name of plaintiff***]'s injury arose from a risk inherent in the occupation of [***e.g., firefighter***]. However, [***name of plaintiff***] may recover if [he/she/***nonbinary pronoun***] proves all of the following:**

[1. That [*name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., firefighting***];]**

[*or*]

[1. That [*name of defendant***] [misrepresented to/failed to warn] [***name of plaintiff***] [of] a dangerous condition that [***name of plaintiff***] could not have known about as part of [his/her/***nonbinary pronoun***] job duties;]**

[*or*]

[1. That the cause of [*name of plaintiff***]'s injury was not related to the inherent risk;]**

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

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

New May 2017; Revised May 2020

Directions for Use

Give this instruction if the plaintiff asserts an exception to assumption of risk of the injury that the plaintiff suffered because the risk is an inherent part of the plaintiff's duties. This has traditionally been referred to as the "firefighter's rule." (See *Gregory v. Cott* (2014) 59 Cal. 4th 996, 1001 [176 Cal. Rptr. 3d 1, 331 P.3d 179].)

There are, however, exceptions to nonliability under the firefighter's rule. The plaintiff may recover if (1) the defendant's actions have unreasonably increased the risks of injury beyond those inherent in the occupation; (2) the defendant misrepresented or failed to disclose a hazardous condition that the plaintiff had no reason to know about; or (3) the cause of the injury was not related to the inherent risk. This instruction asks the jury to determine whether an exception applies. (*Gregory, supra*, 59 Cal.4th at p. 1010.) These exceptions are presented in the options to element 1.

While duty is a question of law, courts have held that whether the defendant has increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 470, *Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity.* For an instruction applicable to coaches, instructors, or trainers, see CACI No. 471, *Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches*. For an instruction applicable to facilities owners and operators and to event sponsors, see CACI No. 472, *Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors*.

Sources and Authority

- "Primary assumption of risk cases often involve recreational activity, but the doctrine also governs claims arising from inherent occupational hazards. The bar against recovery in that context first developed as the 'firefighter's rule,' which precludes firefighters and police officers from suing members of the public for the conduct that makes their employment necessary. After *Knight*, we have viewed the firefighter's rule 'not . . . as a separate concept,' but as a variant of primary assumption of risk, 'an illustration of when it is appropriate to find that the defendant owes no duty of care.' Whether a duty of care is owed in a particular context depends on considerations of public policy, viewed in light of the nature of the activity and the relationship of the parties to the activity." (*Gregory, supra*, 59 Cal. 4th at pp. 1001–1002, internal citations omitted.)
- "The firefighter's rule, upon which the [defendant] relies, and the analogous veterinarian's rule, are examples of the primary assumption of risk doctrine applied in the employment context." (*Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 435 [197 Cal.Rptr.3d 51].)
- "Our holding does not preclude liability in situations where caregivers are not warned of a known risk, where defendants otherwise increase the level of risk beyond that inherent in providing care, or where the cause of injury is unrelated to the symptoms of [Alzheimers] disease." (*Gregory, supra*, 59 Cal.4th at p. 1000.)
- "[T]he principle of assumption of risk, which forms the theoretical basis for the fireman's rule, is not applicable where a fireman's injuries are proximately caused by his being misled as to the nature of the danger to be confronted." (*Lipson v. Superior Court* (1982) 31 Cal.3d 362, 371 [182 Cal. Rptr. 629, 644 P.2d 822].)
- "The firefighter's rule, however, is hedged about with exceptions. The firefighter does not assume every risk of his or her occupation. The rule does not apply to conduct other than that which necessitated the summoning of the firefighter or police officer, and it does not apply to independent acts of misconduct that are committed after the firefighter or police officer has arrived on the scene." (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 538 [34 Cal. Rptr.

2d 630, 882 P.2d 347], internal citation omitted.)

- "We have noted that the duty to avoid injuring others 'normally extends to those engaged in hazardous work.' 'We have never held that the doctrine of assumption of risk relieves all persons of a duty of care to workers engaged in a hazardous occupation.' However, the doctrine does apply in favor of those who hire workers to handle a dangerous situation, in both the public and the private sectors. Such a worker, 'as a matter of fairness, should not be heard to complain of the negligence that is the cause of his or her employment. [Citations.] In effect, we have said it is unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant has contracted with the plaintiff to remedy or confront.' This rule encourages the remediation of dangerous conditions, an important public policy. Those who hire workers to manage a hazardous situation are sheltered from liability for injuries that result from the risks that necessitated the employment." (*Gregory, supra*, 59 Cal.4th at p. 1002, internal citations omitted.)
- "[A] person whose conduct precipitates the intervention of a police officer owes no duty of care to the officer 'with respect to the original negligence that caused the officer's intervention.' " (*Harry v. Ring the Alarm, LLC* (2019) 34 Cal.App.5th 749, 759 [246 Cal.Rptr.3d 471].)
- "Because of the nature of the activity, caring for the mentally infirm, and the relationship between the parties, patient and caregiver, mentally incompetent patients should not owe a legal duty to protect caregivers from injuries suffered in attending to them. Here, the very basis of the relationship between plaintiff and [defendant] was to protect [defendant] from harming either herself or others." (*Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, 1770 [53 Cal.Rptr.2d 713].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1515

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.23 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.173 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.412 (Matthew Bender)

474–499. Reserved for Future Use

VF-400. Negligence—Single Defendant

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] negligent?**

   _____ Yes _____ No

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

2. **Was [*name of defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

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

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

   Total Future Economic Damages: $_____]

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

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

   TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

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

This verdict form is based on CACI No. 400, *Negligence—Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 3. The breakdown is optional depending on the circumstances.

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

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

VF-401. Negligence—Single Defendant—Plaintiff's Negligence at Issue—Fault of Others Not at Issue

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We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] negligent?**

   _____ **Yes** _____ **No**

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

2. **Was [*name of defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

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

3. **What are [*name of plaintiff*]'s total damages? Do not reduce the damages based on the fault, if any, of [*name of plaintiff*].**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

   Total Future Economic Damages: $_____]

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

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

   TOTAL $_____

If [*name of plaintiff*] has proved any damages, then answer question 4. If [*name of plaintiff*] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of plaintiff*] negligent?**

   _____ **Yes** _____ **No**

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

5. **Was [*name of plaintiff*]'s negligence a substantial factor in causing [his/her/*nonbinary pronoun*] harm?**

   _____ **Yes** _____ **No**

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

6. **What percentage of responsibility for [*name of plaintiff*]'s harm do you assign to:**

[*Name of defendant*]:	_____**%**
[*Name of plaintiff*]:	_____**%**
TOTAL	**100 %**

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 400, *Negligence—Essential Factual Elements*, and CACI No. 405, *Comparative Fault of Plaintiff*.

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

If specificity is not required, users do not have to itemize all the damages listed in question 3. The breakdown is optional depending on the circumstances.

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

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

VF-402. Negligence—Fault of Plaintiff and Others at Issue

We answer the questions submitted to us as follows:

1. **Was [*name of first defendant*] negligent?**

   _____ **Yes** _____ **No**

   Was [*name of second defendant*] negligent?

   _____ **Yes** _____ **No**

   [*Repeat as necessary for other defendants.*]

   If you answered yes for any defendant in question 1, then answer question 2 for that defendant. If you answered no for any defendant in question 1, insert the number zero next to that defendant's name in question 8. If you answered no for all defendants in question 1, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **For each defendant that received a "yes" answer in question 1, answer the following:**

   Was [*name of first defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?

   _____ **Yes** _____ **No**

   Was [*name of second defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?

   _____ **Yes** _____ **No**

   [*Repeat as necessary for other defendants.*]

   If you answered yes for any defendant in question 2, then answer question 3. If you answered no for any defendant in question 2, insert the number zero next to that defendant's name in question 8. If you did not answer yes for any defendant in question 2, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **What are [*name of plaintiff*]'s total damages? Do not reduce the damages based on the fault, if any, of [*name of plaintiff*] or others.**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

If [*name of plaintiff*] has proved any damages, then answer question 4. If [*name of plaintiff*] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of plaintiff*] negligent?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, insert the number zero next to [*name of plaintiff*]'s name in question 8, skip question 5, and answer question 6.

5. Was [*name of plaintiff*]'s negligence a substantial factor in causing [his/her/*nonbinary pronoun*] harm?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, insert the number zero next to [*name of plaintiff*]'s name in question 8 and answer question 6.

6. Was [*name/description of first nonparty*] negligent?

_____ Yes _____ No

Was [*name/description of second nonparty*] negligent?

_____ Yes _____ No

[*Repeat as necessary for other nonparties*.]

If you answered yes for any person in question 6, then answer

question 7 for that person. If you answered no for any person in question 6, insert the number zero next to that person's name in question 8. If you answered no for all persons in question 6, skip question 7 and answer question 8.

7. For each person who received a "yes" answer in question 6, answer the following:

Was [*name/description of first nonparty***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**

_____ Yes _____ No

Was [*name/description of second nonparty***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**

_____ Yes _____ No

[*Repeat as necessary for other nonparties***.]**

If you answered yes for any person in question 7, then answer question 8. If you answered no for any person in question 7, then insert the number zero next to that person's name in question 8 and answer question 8.

8. What percentage of responsibility for [*name of plaintiff***]'s harm do you assign to the following? Insert a percentage for only those who received "yes" answers in questions 2, 5, or 7:**

[*Name of first defendant***]:**	**_____%**
[*Name of second defendant***]:**	**_____%**
[*Name of plaintiff***]:**	**_____%**
[*Name/description of first nonparty***]:**	**_____%**
[*Name/description of second nonparty***]:**	**_____%**
TOTAL	**100 %**

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2009, December 2010, June 2014, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 400, *Negligence—Essential Factual Elements*, CACI No. 405, *Comparative Fault of Plaintiff*, and CACI No. 406, *Apportionment of Responsibility*.

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

If specificity is not required, users do not have to itemize all the damages listed in question 3. The breakdown is optional depending on the circumstances.

This verdict form is designed for a single plaintiff, multiple defendants, and multiple nonparties who are alleged to have been negligent. If there are multiple plaintiffs, consider preparing a separate verdict form for each. If a coplaintiff is alleged to have been negligent and that coplaintiff's negligence is alleged to have harmed the plaintiff, treat the allegedly negligent coplaintiff as a nonparty in questions 6 and 7 and add the coplaintiff's name to the list of contributing persons in question 8 of the plaintiff's verdict form.

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

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

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

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] either intentionally injure [*name of plaintiff*] or act so recklessly that [his/her/*nonbinary pronoun*] conduct was entirely outside the range of ordinary activity involved in [*specify sport or activity, e.g., touch football*]?**

   _____ Yes _____ No

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

2. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

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

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

   Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2004, April 2007, April 2009, December 2010, December 2011, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 470, *Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity*.

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

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

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

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

VF-404. Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches

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We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] [*name of plaintiff*]'s [coach/trainer/instructor]?**

   _____ Yes _____ No

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

2. **[Did [*name of defendant*] intend to cause [*name of plaintiff*] injury or act recklessly in that [his/her/*nonbinary pronoun*] conduct was entirely outside the range of ordinary activity involved in teaching or coaching [*sport or other activity*] in which [*name of plaintiff*] was participating?**

   _____ Yes _____ No]

   [or]

   [Did [*name of defendant*]'s failure to use reasonable care increase the risks to [*name of plaintiff*] over and above those inherent in [*sport or other activity*]?

   _____ Yes _____ No]

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

3. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

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

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2004, April 2007, December 2010, June 2012, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 471, *Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches*.

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

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

If the jury is given the discretion under Civil Code section 3288 to award

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

VF-405. Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors

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We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] the [owner/operator/sponsor/***other***] of [***e.g., a ski resort***]?**

   _____ Yes _____ No

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

2. **Did [***name of defendant***] do something or fail to do something that unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***sport or other recreational activity, e.g., snowboarding***]?**

   _____ Yes _____ No

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

3. **Was [name of defendant]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

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

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

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New December 2015; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 472, *Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors*.

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

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

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

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We answer the questions submitted to us as follows:

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

   [*or*]

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

   _____ Yes _____ No]

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

2. **[Did [*name of defendant*] [sell/ give] alcoholic beverages to [*name of alleged minor*]?**

   _____ Yes _____ No]

   [or]

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

   _____ Yes _____ No]

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

3. **Was [*name of alleged minor*] less than 21 years old at the time?**

   _____ Yes _____ No

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

4. **When [*name of defendant*] provided the alcoholic beverages, did [*name of alleged minor*] display symptoms that would lead a reasonable person to conclude that [*name of alleged minor*] was obviously intoxicated?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you

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

5. Did [*name of alleged minor*] later harm [*name of plaintiff*]?

_____ Yes _____ No

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

6. Was [*name of defendant*]'s [selling/giving] alcoholic beverages to [*name of alleged minor*] a substantial factor in causing [*name of plaintiff*]'s harm?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2009, December 2010, December 2014, December 2016, May 2024

Directions for Use

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

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

Omit question 1 if the defendant is a person such as a social host who, though not required to be licensed, sells alcohol to an obviously intoxicated minor. (See *Ennabe v. Manosa* (2014) 58 Cal.4th 697, 711 [168 Cal.Rptr.3d 440, 319 P.3d 201].)

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

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

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

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

VF-407. Strict Liability—Ultrahazardous Activities

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] engaged in [*insert ultrahazardous activity*]?**

   _____ **Yes** _____ **No**

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

2. **Was [*name of plaintiff*] harmed?**

   _____ **Yes** _____ **No**

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

3. **Was [*name of plaintiff*]'s harm the kind of harm that would be anticipated as a result of the risk created by [*insert ultrahazardous activity*]?**

   _____ **Yes** _____ **No**

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

4. **Was [*name of defendant*]'s [*insert ultrahazardous activity*] a substantial factor in causing [*name of plaintiff*]'s harm?**

   _____ **Yes** _____ **No**

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

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

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 460, *Strict Liability for Ultrahazardous Activities—Essential Factual Elements*.

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

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

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

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

VF-408. Strict Liability for Domestic Animal With Dangerous Propensities

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] own, keep, or control a [***insert type of animal***]?**

   _____ **Yes** _____ **No**

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

2. **Did the [***insert type of animal***] have an unusually dangerous nature or tendency?**

   _____ **Yes** _____ **No**

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

3. **Did [***name of defendant***] know, or should [he/she/***nonbinary pronoun***] have known, that the [***insert type of animal***] had this nature or tendency?**

   _____ **Yes** _____ **No**

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

4. **Was the [***insert type of animal***]'s unusually dangerous nature or tendency a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

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

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

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 462, *Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities—Essential Factual Elements.*

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

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

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

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

findings that are required in order to calculate the amount of prejudgment interest.

VF-409. Dog Bite Statute (Civ. Code, § 3342)

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*]'s dog bite [*name of plaintiff*]?**

   _____ Yes _____ No

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

2. **Was [*name of plaintiff*] in a public place or lawfully on private property when [he/she/*nonbinary pronoun*] was bitten?**

   _____ Yes _____ No

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

3. **Was the dog a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

4. **What are the damages, if any, that [*name of plaintiff*] suffered as a result of the dog bite?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

   Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 463, *Dog Bite Statute (Civ. Code, § 3342)—Essential Factual Elements.*

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

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

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

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

VF-410. Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***]'s claimed harm occur before [***insert date from applicable statute of limitations***]?**

   _____ **Yes** _____ **No**

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

2. **Before [***insert date from applicable statute of limitations***], did [***name of plaintiff***] discover, or know of facts that would have caused a reasonable person to suspect, that [he/she/***nonbinary pronoun***/it] had suffered harm that was caused by someone's wrongful conduct?**

   _____ **Yes** _____ **No**

   [*or*]

2. **Would a reasonable and diligent investigation have disclosed before [***insert date from applicable statute of limitations***] that [***specify factual basis for cause of action***] contributed to [***name of plaintiff***]'s harm?**

   _____ **Yes** _____ **No**

Signed: _____
Presiding Juror

Dated: _____

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

New December 2007; Revised December 2010, May 2022, May 2024

Directions for Use

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

This verdict form is based on CACI No. 454, *Affirmative Defense—Statute of Limitations,* and CACI No. 455, *Statute of Limitations—Delayed Discovery*. If the only issue is whether the plaintiff's harm occurred before or after the limitation date, omit question 2. If the plaintiff claims that the delayed-discovery rule applies to

save the action, use the first option for question 2. If the plaintiff claims that a reasonable investigation would not have disclosed the pertinent information before the limitation date, use the second option for question 2. If both delayed discovery and nondiscovery despite reasonable investigation are at issue, use both options and renumber them as question 2 and question 3.

The date to be inserted throughout is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2007, the date is August 31, 2005.

In question 1, "claimed harm" refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661].) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

The first option for question 2 may be modified to refer to specific facts that the plaintiff may have known.

VF-411. Parental Liability (Nonstatutory)

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] aware of habits or tendencies of [*name of minor*] that created an unreasonable risk of harm to other persons and led to [*name of plaintiff*]'s harm?**

   _____ Yes _____ No

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

2. **Did [*name of defendant*] have the opportunity and ability to control the conduct of [*name of minor*]?**

   _____ Yes _____ No

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

3. **Was [*name of defendant*] negligent because [he/she/*nonbinary pronoun*] failed to exercise reasonable care to prevent [*name of minor*]'s conduct?**

   _____ Yes _____ No

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

4. **Was [*name of defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

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

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-405 December 2015; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 428, *Parental Liability (Nonstatutory)*. Questions 1 and 3 can be altered to correspond to one or both of the alternative bracketed option in elements 1 and 3 of CACI No. 428.

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

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

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

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801,

814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-412–VF-499. Reserved for Future Use

MEDICAL NEGLIGENCE

500. Medical Negligence—Essential Factual Elements

Please see CACI No. 400, *Negligence—Essential Factual Elements*

New September 2003; Revised December 2011, December 2015

Directions for Use

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph of CACI No. 400. From a theoretical standpoint, medical negligence is still considered negligence. (See *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997–998 [35 Cal.Rptr.2d 685, 884 P.2d 142].)

Also give the appropriate standard-of-care instruction for the defendant's category of medical professional. (See CACI No. 501, *Standard of Care for Health Care Professionals*, CACI No. 502, *Standard of Care for Medical Specialists*, CACI No. 504, *Standard of Care for Nurses*, CACI No. 514, *Duty of Hospital.*)

It is not necessary to instruct that causation must be proven within a reasonable medical probability based upon competent expert testimony. The reference to "medical probability" in medical malpractice cases is no more than a recognition that the case involves the use of medical evidence. (*Uriell v. Regents of University of California* (2015) 234 Cal.App.4th 735, 746 [184 Cal.Rptr.3d 79].)

Sources and Authority

- "Professional Negligence" of Health Care Provider Defined. Code of Civil Procedure section 340.5, Civil Code sections 3333.1 and 3333.2.
- "The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [191 Cal.Rptr.3d 766].)
- "The court's use of standard jury instructions for the essential elements of negligence, including causation, was appropriate because medical negligence is fundamentally negligence." (*Uriell, supra*, 234 Cal.App.4th at p. 744 [citing Directions for Use to this instruction].)
- "Section 340.5 defines 'professional negligence' as 'a negligent act or omission by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are *within the scope of services for which the provider is licensed* and which are not within any restriction imposed by the licensing agency or licensed hospital.' The term 'professional negligence' encompasses actions in which 'the injury for which damages are sought is directly related to

the professional services provided by the health care provider' or directly related to 'a matter that is an ordinary and usual part of medical professional services.' '[C]ourts have broadly construed "professional negligence" to mean negligence occurring during the rendering of services for which the health care provider is licensed.' " (*Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 297 [170 Cal.Rptr.3d 125], original italics, internal citations omitted.)

- "With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional 'circumstances' relevant to an overall assessment of what constitutes 'ordinary prudence' in a particular situation." (*Flowers*, *supra*, 8 Cal.4th at pp. 997–998.)
- "Since the standard of care remains constant in terms of 'ordinary prudence,' it is clear that denominating a cause of action as one for 'professional negligence' does not transmute its underlying character. For substantive purposes, it merely serves to establish the basis by which 'ordinary prudence' will be calculated and the defendant's conduct evaluated." (*Flowers, supra*, 8 Cal.4th at p. 998.)
- "The Medical Injury Compensation Reform Act (MICRA) contains numerous provisions effecting substantial changes in negligence actions against health care providers, including a limitation on noneconomic damages, elimination of the collateral source rule as well as preclusion of subrogation in most instances, and authorization for periodic payments of future damages in excess of $ 50,000. While in each instance the statutory scheme has altered a significant aspect of claims for medical malpractice, such as the measure of the defendant's liability for damages or the admissibility of evidence, the fundamental substance of such actions on the issues of duty, standard of care, breach, and causation remains unaffected." (*Flowers*, *supra*, 8 Cal.4th at p. 999.)
- "On causation, the plaintiff must establish 'it is more probable than not the negligent act was a cause-in-fact of the plaintiff's injury.' ' "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." ' '[C]ausation in actions arising from medical negligence must be proven within a reasonable medical probability based on competent expert testimony, i.e., something more than a "50-50 possibility." ' '[T]he evidence must be sufficient to allow the jury to infer that in the absence of the defendant's negligence, there was a reasonable medical probability the plaintiff would have obtained a better result.' " (*Belfiore-Braman v. Rotenberg* (2018) 25 Cal.App.5th 234, 247 [235 Cal.Rptr.3d 629], internal citations omitted.)
- "That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion. There can be many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, *it becomes more likely than not that the injury was a result of its action*. This is the outer limit of inference upon which an issue may be submitted to the jury." (*Jennings v. Palomar Pomerado Health*

Systems, Inc. (2003) 114 Cal.App.4th 1108, 1118 [8 Cal.Rptr.3d 363], original italics, internal citations omitted.)

- "The rationale advanced by the hospital is that . . . if the need for restraint is 'obvious to all,' the failure to restrain is ordinary negligence. . . . [T]his standard is incompatible with the subsequently enacted statutory definition of professional negligence, which focuses on whether the negligence occurs in the rendering of professional services, rather than whether a high or low level of skill is required. [Citation.]" (*Bellamy v. Appellate Dep't of the Superior Court* (1996) 50 Cal.App.4th 797, 806–807 [57 Cal.Rptr.2d 894].)
- "[E]ven in the absence of a physician-patient relationship, a physician has liability to an examinee for negligence or professional malpractice for injuries incurred during the examination itself." (*Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1478 [37 Cal.Rptr.2d 769].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1066–1068, 1071, 1072

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.65

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, § 30.11, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.01 (Matthew Bender)

17 California Forms of Pleading and Practice, Ch. 209, *Dentists*, § 209.15 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, §§ 295.13, 295.43 (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.20 et seq. (Matthew Bender)

501. Standard of Care for Health Care Professionals

[A/An] [*insert type of medical practitioner***] is negligent if [he/she/***nonbinary pronoun***] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [***insert type of medical practitioners***] would use in the same or similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."**

[You must determine the level of skill, knowledge, and care that other reasonably careful [*insert type of medical practitioners***] would use in the same or similar circumstances, based only on the testimony of the expert witnesses [including [***name of defendant***]] who have testified in this case.]**

New September 2003; Revised October 2004, December 2005, December 2010

Directions for Use

This instruction is intended to apply to nonspecialist physicians, surgeons, and dentists. The standards of care for nurses, specialists, and hospitals are addressed in separate instructions. (See CACI No. 502, *Standard of Care for Medical Specialists*, CACI No. 504, *Standard of Care for Nurses*, and CACI No. 514, *Duty of Hospital*.)

The second paragraph should be used if the court determines that expert testimony is necessary to establish the standard of care, which is usually the case. (See *Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1542–1543 [111 Cal.Rptr.3d 36].)

If the standard of care is set by statute or regulation, refer to instructions on negligence per se (CACI Nos. 418–421). (See *Galvez v. Frields* (2001) 88 Cal.App.4th 1410 [107 Cal.Rptr.2d 50].)

See CACI Nos. 219–221 on evaluating the credibility of expert witnesses.

Sources and Authority

- "With unimportant variations in phrasing, we have consistently held that a physician is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances." (*Landeros v. Flood* (1976) 17 Cal.3d 399, 408 [131 Cal.Rptr. 69, 551 P.2d 389].)
- "The courts require only that physicians and surgeons exercise in diagnosis and treatment that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36 [210 Cal.Rptr. 762, 694 P.2d 1134].)
- "[T]he law imposes on individuals a duty to have medical education, training and skill before practicing medicine and that practicing medicine without this education, training and skill is negligent. . . . [A] breach of that portion of the

standard of care does not, in and of itself, establish actionable malpractice (i.e., one cannot recover from a person merely for lacking medical knowledge unless that lack of medical knowledge caused injury to the plaintiff).” (*Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110, 1119 [267 Cal.Rptr. 503], disapproved on other grounds in *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1228 [23 Cal.Rptr.2d 397, 859 P.2d 96].)

- “[T]he standard of care for physicians is the reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession *under similar circumstances*. The test for determining familiarity with the standard of care is knowledge of similar conditions. Geographical location may be a factor considered in making that determination, but, by itself, does not provide a practical basis for measuring similar circumstances. Over 30 years ago, our Supreme Court observed that ‘[t]he unmistakable general trend . . . has been toward liberalizing the rules relating to the testimonial qualifications of medical experts.’ ” (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470–471 [71 Cal.Rptr.3d 707], original italics, internal citations omitted.)
- “Today, ‘neither the Evidence Code nor Supreme Court precedent *requires* an expert witness to have practiced in a particular locality before he or she can render an opinion in an ordinary medical malpractice case.’ ” (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310–311 [205 Cal.Rptr.3d 825], original italics.)
- “As a general rule, the testimony of an expert witness is required in every professional negligence case to establish the applicable standard of care, whether that standard was met or breached by the defendant, and whether any negligence by the defendant caused the plaintiff’s damages. A narrow exception to this rule exists where’ ” ‘. . . the conduct required by the particular circumstances is within the common knowledge of the layman.’ . . . [Citations.]” ’ This exception is, however, a limited one. It arises when a foreign object such as a sponge or surgical instrument, is left in a patient following surgery and applies only when the plaintiff can invoke the doctrine of res ipsa loquitur. ‘The “common knowledge” exception is generally limited to situations in which . . . a layperson “. . . [can] say as a matter of common knowledge . . . that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.” . . .’ ” (*Scott, supra*, 185 Cal.App.4th at pp. 1542–1543, footnote and internal citations omitted.)
- “We have already held upon authority that the failure to remove a sponge from the abdomen of a patient is negligence of the ordinary type and that it does not involve knowledge of *materia medica* or surgery but that it belongs to that class of mental lapses which frequently occur in the usual routine of business and commerce, and in the multitude of commonplace affairs which come within the group of ordinary actionable negligence. The layman needs no scientific enlightenment to see at once that the omission can be accounted for on no other theory than that someone has committed actionable negligence.” (*Ales v. Ryan* (1936) 8 Cal.2d 82, 93 [64 P.2d 409].)

- The medical malpractice standard of care applies to veterinarians. (*Williamson v. Prida* (1999) 75 Cal.App.4th 1417, 1425 [89 Cal.Rptr.2d 868].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1066, 1067, 1104, 1108

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.1

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, § 30.12, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.11 (Matthew Bender)

17 California Forms of Pleading and Practice, Ch. 209, *Dentists*, § 209.42 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, §§ 295.13, 295.43, 295.45 (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.20 et seq. (Matthew Bender)

502. Standard of Care for Medical Specialists

[A/An] [*insert type of medical specialist***] is negligent if [he/she/***nonbinary pronoun***] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [***insert type of medical specialists***] would use in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."**

[You must determine the level of skill, knowledge, and care that other reasonably careful [*insert type of medical specialists***] would use in similar circumstances based only on the testimony of the expert witnesses [including [***name of defendant***]] who have testified in this case.]**

New September 2003; Revised October 2004

Directions for Use

This instruction is intended to apply to physicians, surgeons, and dentists who are specialists in a particular practice area.

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary to establish the standard of care.

See CACI Nos. 219–221 on evaluating the credibility of expert witnesses.

Sources and Authority

- "In those cases where a medical specialist is alleged to have acted negligently, the 'specialist must possess and use the learning, care and skill normally possessed and exercised by practitioners of that specialty under the same or similar circumstances.' " (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [191 Cal.Rptr.3d 766].)
- "In the first place, the special obligation of the professional is exemplified by his duty not merely to perform his work with ordinary care but to use the skill, prudence, and diligence commonly exercised by practitioners of his profession. If he further specializes within the profession, he must meet the standards of knowledge and skill of such specialists." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188 [98 Cal.Rptr. 837, 491 P.2d 421].)
- "The difference between the duty owed by a specialist and that owed by a general practitioner lies not in the degree of care required but in the amount of skill required." (*Valentine v. Kaiser Foundation Hospitals* (1961) 194 Cal.App.2d 282, 294 [15 Cal.Rptr. 26] (disapproved on other grounds by *Siverson v. Weber* (1962) 57 Cal.2d 834, 839 [22 Cal.Rptr. 337, 372 P.2d 97]).)
- "The role of the psychiatrist, who is indeed a practitioner of medicine, and that of the psychologist who performs an allied function, are like that of the physician who must conform to the standards of the profession and who must

often make diagnoses and predictions based upon such evaluations. Thus the judgment of the therapist in diagnosing emotional disorders and in predicting whether a patient presents a serious danger of violence is comparable to the judgment which doctors and professionals must regularly render under accepted rules of responsibility." (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425, 438 [131 Cal.Rptr. 14, 551 P.2d 334].)

- "[A] psychotherapist or other mental health care provider has a duty to use a reasonable degree of skill, knowledge and care in treating a patient, commensurate with that possessed and exercised by others practicing within that specialty in the professional community." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 505 [71 Cal.Rptr.2d 552].)
- "[T]he standard of care for physicians is the reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession *under similar circumstances*. The test for determining familiarity with the standard of care is knowledge of similar conditions. Geographical location may be a factor considered in making that determination, but, by itself, does not provide a practical basis for measuring similar circumstances. Over 30 years ago, our Supreme Court observed that '[t]he unmistakable general trend . . . has been toward liberalizing the rules relating to the testimonial qualifications of medical experts.' " (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470–471 [71 Cal.Rptr.3d 707], original italics, internal citations omitted.)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.2

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, § 30.12, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.85 (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.20 et seq. (Matthew Bender)

503A. Psychotherapist's Duty to Protect Intended Victim From Patient's Threat

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[*Name of plaintiff***] claims that [***name of defendant***]'s failure to protect [***name of plaintiff/decedent***] was a substantial factor in causing [injury to [***name of plaintiff***]/the death of [***name of decedent***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was a psychotherapist;**
2. **That [***name of patient***] was [***name of defendant***]'s patient;**
3. **That [***name of patient***] communicated to [***name of defendant***] a serious threat of physical violence;**
4. **That [***name of plaintiff/decedent***] was a reasonably identifiable victim of [***name of patient***]'s threat;**
5. **That [***name of patient***] [injured [***name of plaintiff***]/killed [***name of decedent***]];**
6. **That [***name of defendant***] failed to make reasonable efforts to protect [***name of plaintiff/decedent***]; and**
7. **That [***name of defendant***]'s failure was a substantial factor in causing [[***name of plaintiff***]'s injury/the death of [***name of decedent***]].**

Derived from former CACI No. 503 April 2007; Revised June 2013, May 2020

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist for failure to protect a victim from a patient's act of violence after the patient communicated to the therapist a threat against the victim. (See *Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334].) The liability imposed by *Tarasoff* is modified by the provisions of Civil Code section 43.92(a). First read CACI No. 503B, *Affirmative Defense—Psychotherapist's Communication of Threat to Victim and Law Enforcement*, if the therapist asserts that the therapist is immune from liability under Civil Code section 43.92(b) because the therapist made reasonable efforts to communicate the threat to the victim and to a law enforcement agency.

In a wrongful death case, insert the name of the decedent victim where applicable.

Sources and Authority

- Limited Psychotherapist Immunity. Civil Code section 43.92(a).
- "[T]herapists cannot escape liability merely because [the victim] was not their patient. When a therapist determines, or pursuant to the standards of his

profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." (*Tarasoff, supra,* 17 Cal.3d at p. 431.)

- Civil Code section 43.92 was enacted to limit the liability of psychotherapists under *Tarasoff* regarding a therapist's duty to warn an intended victim. (*Barry v. Turek* (1990) 218 Cal.App.3d 1241, 1244–1245 [267 Cal.Rptr. 553].) Under this provision, "[p]sychotherapists thus have immunity from *Tarasoff* claims except where the plaintiff proves that the patient has communicated to his or her psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." (*Barry, supra,* 218 Cal.App.3d at p. 1245.)
- "When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864].)
- "Section 43.92 strikes a reasonable balance in that it does not compel the therapist to predict the dangerousness of a patient. Instead, it requires the therapist to attempt to protect a victim under limited circumstances, even though the therapist's disclosure of a patient confidence will potentially disrupt or destroy the patient's trust in the therapist. However, the requirement is imposed upon the therapist only after he or she determines that the patient has made a credible threat of serious physical violence against a person." (*Calderon v. Glick* (2005) 131 Cal.App.4th 224, 231 [31 Cal.Rptr.3d 707].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1189, 1190

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services and Civil Rights*, § 361A.93 (Matthew Bender)

11 California Points and Authorities, Ch. 154, *Mental Health and Mental Disabilities*, § 154.30 (Matthew Bender)

503B. Affirmative Defense—Psychotherapist's Communication of Threat to Victim and Law Enforcement

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[*Name of defendant***] is not responsible for [[***name of plaintiff***]'s injury/the death of [***name of decedent***]] if [***name of defendant***] proves that [he/she/** *nonbinary pronoun***] made reasonable efforts to communicate the threat to [***name of plaintiff/decedent***] and to a law enforcement agency.**

Derived from former CACI No. 503 April 2007; Revised June 2013, May 2020

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334]) if there is a dispute of fact regarding whether the defendant made reasonable efforts to communicate to the victim and to a law enforcement agency a threat made by the defendant's patient. The therapist is immune from liability under *Tarasoff* if the therapist makes reasonable efforts to communicate the threat to the victim and to a law enforcement agency. (Civ. Code, § 43.92(b).) CACI No. 503A, *Psychotherapist's Duty to Protect Intended Victim From Patient's Threat*, sets forth the elements of a *Tarasoff* cause of action if the defendant is not immune.

In a wrongful death case, insert the name of the decedent victim where applicable.

Sources and Authority

- Limited Psychotherapist Immunity. Civil Code section 43.92(b).
- Failure to inform a law enforcement agency concerning a homicidal threat made by a patient against his work supervisor did not abrogate the "firefighter's rule" and, therefore, did not render the psychiatrist liable to a police officer who was subsequently shot by the patient. (*Tilley v. Schulte* (1999) 70 Cal.App.4th 79, 85–86 [82 Cal.Rptr.2d 497].)
- "When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1189, 1190

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services and Civil Rights*, § 361A.93 (Matthew Bender)

11 California Points and Authorities, Ch. 154, *Mental Health and Mental Disabilities*, § 154.30 (Matthew Bender)

504. Standard of Care for Nurses

[A/An] [*insert type of nurse*] is negligent if [he/she/*nonbinary pronoun*] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [*insert type of nurses*] would use in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."

[You must determine the level of skill, knowledge, and care that other reasonably careful [*insert type of nurses*] would use in similar circumstances based only on the testimony of the expert witnesses [including [*name of defendant*]] who have testified in this case.]

New September 2003; Revised October 2004, June 2010

Directions for Use

The appropriate level of nurse should be inserted where indicated—i.e., registered nurse, licensed vocational nurse, nurse practitioner.

The second paragraph should be included unless the court determines that expert testimony is not necessary to establish the standard of care.

Sources and Authority

- "[A] nurse is negligent if he or she fails to meet the standard of care—that is, fails to use the level of skill, knowledge, and care that a reasonably careful nurse would use in similar circumstances." (*Massey v. Mercy Med. Ctr. Redding* (2009) 180 Cal.App.4th 690, 694 [103 Cal.Rptr.3d 209] [citing this instruction].)
- " '[T]oday's nurses are held to strict professional standards of knowledge and performance.' But '[s]ome difficulties are presented [in the nursing malpractice context] by the fact that a nurse's traditional role has involved "both routine, nontechnical tasks as well as specialized nursing tasks. If, in considering the case law in this area, the dispute is analyzed in terms of what action by the nurse is being complained about, it is possible to make some sense out of the relevant decisions." ' " (*Massey, supra*, 180 Cal.App.4th at p. 697, internal citation omitted.)
- "[A] nurse's conduct must not be measured by the standard of care required of a physician or surgeon, but by that of other nurses in the same or similar locality and under similar circumstances." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 969 [191 Cal.Rptr.3d 766].)
- The jury should not be instructed that the standard of care for a nurse practitioner must be measured by the standard of care for a physician or surgeon when the nurse is examining a patient or making a diagnosis. (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 150 [211 Cal.Rptr. 368, 695 P.2d 665].) Courts have observed that nurses are trained, "but to a lesser degree

than a physician, in the recognition of the symptoms of diseases and injuries." (*Cooper v. National Motor Bearing Co.* (1955) 136 Cal.App.2d 229, 238 [288 P.2d 581].)

- "[E]xpert opinion testimony is required to prove that a defendant nurse did not meet the standard of care and therefore was negligent, 'except in cases where the negligence is obvious to laymen.' " (*Massey, supra*, 180 Cal.App.4th at pp. 694–695.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1129–1130

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.52

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.84 (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.20 et seq. (Matthew Bender)

505. Success Not Required

[A/An] [*insert type of medical practitioner***] is not necessarily negligent just because [his/her/***nonbinary pronoun***] efforts are unsuccessful or [he/she/***nonbinary pronoun***] makes an error that was reasonable under the circumstances. [A/An] [***insert type of medical practitioner***] is negligent only if [he/she/***nonbinary pronoun***] was not as skillful, knowledgeable, or careful as other reasonable [***insert type of medical practitioners***] would have been in similar circumstances.**

New September 2003

Directions for Use

Plaintiffs have argued that this type of instruction "provides too easy an 'out' for malpractice defendants." (*Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 343 [160 Cal.Rptr. 246].) Nevertheless, in California, instructions on this point have been sustained when challenged. (*Rainer v. Community Memorial Hospital* (1971) 18 Cal.App.3d 240, 260 [95 Cal.Rptr. 901].)

Sources and Authority

- "While a physician cannot be held liable for mere errors of judgment or for erroneous conclusions on matters of opinion, he must use the judgment and form the opinions of one possessed of knowledge and skill common to medical men practicing, in the same or like community and that he may have done his best is no answer to an action of this sort." (*Sim v. Weeks* (1935) 7 Cal.App.2d 28, 36 [45 P.2d 350].)
- "The 'law has never held a physician or surgeon liable for every untoward result which may occur in medical practice' but it 'demands only that a physician or surgeon have the degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same locality and that he exercise ordinary care in applying such learning and skill to the treatment of his patient.' " (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 473 [234 P.2d 34], internal citations omitted.)
- It is appropriate to instruct a jury that "they do not necessarily adjudge whether there was negligence in terms of the result achieved . . . ." (*Dincau v. Tamayose* (1982) 131 Cal.App.3d 780, 800 [182 Cal.Rptr. 855].)
- "[A] physician and surgeon is not required to make a perfect diagnosis but is only required to have that degree of skill and learning ordinarily possessed by physicians of good standing practicing in the same locality and to use ordinary care and diligence in applying that learning to the treatment of his patient." (*Ries v. Reinard* (1941) 47 Cal.App.2d 116, 119 [117 P.2d 386].)
- "A doctor is not a warrantor of cures nor is he required to guarantee results and

in the absence of a want of reasonable care and skill will not be held responsible for untoward results." (*Sanchez v. Rodriguez* (1964) 226 Cal.App.2d 439, 449 [38 Cal.Rptr. 110].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1066, 1067

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.5

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, § 30.01 (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.38 (Matthew Bender)

506. Alternative Methods of Care

[A/An] [*insert type of medical practitioner*] is not necessarily negligent just because [he/she/*nonbinary pronoun*] chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice.

New September 2003

Sources and Authority

- "A difference of medical opinion concerning the desirability of one particular medical procedure over another does not . . . establish that the determination to use one of the procedures was negligent." (*Clemens v. Regents of Univ. of California* (1970) 8 Cal.App.3d 1, 13 [87 Cal.Rptr. 108].)
- "Medicine is not a field of absolutes. There is not ordinarily only one correct route to be followed at any given time. There is always the need for professional judgment as to what course of conduct would be most appropriate with regard to the patient's condition." (*Barton v. Owen* (1977) 71 Cal.App.3d 484, 501–502 [139 Cal.Rptr. 494].)
- This type of instruction may be important in arriving at a fair decision: "[I]n determining whether defendants breached a standard of care owed decedent, the jury may not engage in 'but for' reasoning." (*Meier v. Ross General Hospital* (1968) 69 Cal.2d 420, 435 [71 Cal.Rptr. 903, 445 P.2d 519].)
- "[I]n order for CACI No. 506 to be given, there must have been expert testimony presented to the jury to the effect that a medical practitioner chose a medically accepted method of diagnosis (or treatment) from among alternative medically accepted methods of diagnosis (or treatment)." (*Ayala v. Arroyo Vista Family Health Center* (2008) 160 Cal.App.4th 1350, 1353 [73 Cal.Rptr.3d 486].)

Secondary Sources

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.11 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.34 (Matthew Bender)

507. Duty to Warn Patient

[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she/***nonbinary pronoun***] did not warn [***name of patient***] that [his/her/***nonbinary pronoun***] condition presented a danger to others.**

[*Name of defendant***] was negligent if [***name of plaintiff***] proves that [he/she/***nonbinary prounoun***] did not take reasonable steps to warn [***name of patient***] that [his/her/***nonbinary prounoun***] condition presented a danger to others.**

New September 2003

Directions for Use

This instruction is intended to cover situations where a patient's condition foreseeably causes harm to a third party.

Sources and Authority

- "To avoid liability in this case, [defendants] should have taken whatever steps were reasonable under the circumstances to protect [plaintiff] and other foreseeable victims of [patient]'s dangerous conduct. What is a reasonable step to take will vary from case to case." (*Myers v. Quesenberry* (1983) 144 Cal.App.3d 888, 894 [193 Cal.Rptr. 733], internal citations omitted.) "Our holding does not require the physician to do anything other than what he was already obligated to do for the protection of the patient. Thus, even though it may appear that the scope of liability has been expanded to include injuries to foreseeable victims other than the patient, the standard of medical care to the patient remains the same." (*Ibid.*)
- "When the avoidance of foreseeable harm to a third person requires a defendant to control the conduct of a person with whom the defendant has a special relationship (such as physician and patient) or to warn the person of the risks involved in certain conduct, the defendant's duty extends to a third person with whom the defendant does not have a special relationship." (*Reisner v. Regents of Univ. of California* (1995) 31 Cal.App.4th 1195, 1198–1199 [37 Cal.Rptr.2d 518] [infected sex partner could maintain action against his partner's physicians for failing to tell the young woman that she had received HIV-tainted blood].)
- Proof of causation is still required: "[Defendants] will be liable only if [plaintiff] is able to prove their failure to warn [patient] not to drive in an irrational and uncontrolled diabetic condition was a substantial factor in causing his injuries." (*Myers, supra,* 144 Cal.App.3d at p. 895.)
- This obligation to third parties appears to be limited to healthcare professionals and does not apply to ordinary citizens. (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1456–1457 [23 Cal.Rptr.2d 34].)

Secondary Sources

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.16 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, §§ 175.22, 175.23 (Matthew Bender)

508. Duty to Refer to a Specialist

If a reasonably careful [*insert type of medical practitioner***] in the same situation would have referred [***name of patient***] to a [***insert type of medical specialist***], then [***name of defendant***] was negligent if [he/she/***nonbinary pronoun***] did not do so.**

However, if [*name of defendant***] treated [***name of patient***] with as much skill and care as a reasonable [***insert type of medical specialist***] would have, then [***name of defendant***] was not negligent.**

New September 2003

Sources and Authority

- Physicians who elect to treat a patient even though the patient should have been referred to a specialist will be held to the standard of care of that specialist. If the physician meets the higher standard of care, he or she is not negligent. (*Simone v. Sabo* (1951) 37 Cal.2d 253, 257 [231 P.2d 19].)
- If the evidence establishes that the failure of a nurse to consult the attending physician under the circumstances presented in the case is not in accord with the standard of care of the nursing profession, this instruction may be applicable. (*Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 344 [160 Cal.Rptr. 246].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1066, 1067

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.6

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, § 30.12, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.13 (Matthew Bender)

17 California Forms of Pleading and Practice, Ch. 209, *Dentists*, § 209.11 (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, §§ 175.20 (Matthew Bender)

509. Abandonment of Patient

[*Name of plaintiff*] claims [*name of defendant*] was negligent because [he/she/*nonbinary pronoun*] did not give [*name of patient*] enough notice before withdrawing from the case. To succeed, [*name of plaintiff*] must prove both of the following:

1. **That [*name of defendant*] withdrew from [*name of patient*]'s care and treatment; and**
2. **That [*name of defendant*] did not provide sufficient notice for [*name of patient*] to obtain another medical practitioner.**

However, [*name of defendant*] was not negligent if [he/she/*nonbinary pronoun*] proves that [*name of patient*] consented to the withdrawal or declined further medical care.

New September 2003

Sources and Authority

- "[A] physician who abandons a patient may do so 'only . . . after due notice, and an ample opportunity afforded to secure the presence of other medical attendance.' " (*Payton v. Weaver* (1982) 131 Cal.App.3d 38, 45 [182 Cal.Rptr. 225], internal citations omitted.)
- "A physician cannot just walk away from a patient after accepting the patient for treatment. . . . In the absence of the patient's consent, the physician must notify the patient he is withdrawing and allow ample opportunity to secure the presence of another physician." (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1138 [73 Cal.Rptr.2d 695].)
- "Abandonment as a theory warrants CACI No. 509 only where there is evidence that the physician has accepted responsibility for the patient and then has withdrawn without giving enough notice to ensure timely continuity of treatment." (*Zannini v. Liker* (2022) 74 Cal.App.5th 610, 627 [289 Cal.Rptr.3d 712].)
- "When a competent, informed adult directs the withholding or withdrawal of medical treatment, even at the risk of hastening or causing death, medical professionals who respect that determination will not incur criminal or civil liability: the patient's decision discharges the physician's duty." (*Thor v. Superior Court* (1993) 5 Cal.4th 725, 743 [21 Cal.Rptr.2d 357, 855 P.2d 375].)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.8

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.42 (Matthew Bender)

510. Derivative Liability of Surgeon

A surgeon is responsible for the negligence of other medical practitioners or nurses who are under the surgeon's supervision and control and actively participating during an operation.

New September 2003; Revised April 2007, May 2020

Directions for Use

Give this instruction in a case in which the plaintiff seeks to hold a surgeon vicariously responsible under the "captain-of-the-ship" doctrine for the negligence of nurses or other hospital employees that occurs during the course of an operation. There is some disagreement in the courts regarding whether the captain-of-the-ship doctrine remains a viable rule of law. (Compare *Truhitte v. French Hospital* (1982) 128 Cal.App.3d 332, 348 [180 Cal.Rptr. 152] (doctrine has been eroded) with *Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1397–1398 [51 Cal.Rptr.3d 277] (doctrine remains viable).)

Sources and Authority

- The "captain of the ship" doctrine imposes liability on a surgeon under the doctrine of respondeat superior for the acts of those under the surgeon's special supervision and control during the operation. (*Thomas v. Intermedics Orthopedics, Inc.* (1996) 47 Cal.App.4th 957, 967 [55 Cal.Rptr.2d 197].)
- "The doctrine has been explained as follows: 'A physician generally is not liable for the negligence of hospital or other nurses, attendants, or internes, who are not his employees, particularly where he has no knowledge thereof or no connection therewith. On the other hand, a physician is liable for the negligence of hospital or other nurses, attendants, or internes, who are not his employees, where such negligence is discoverable by him in the exercise of ordinary care, he is negligent in permitting them to attend the patient, or the negligent acts were performed under conditions where, in the exercise of ordinary care, he could have or should have been able to prevent their injurious effects and did not. [¶] The mere fact that a physician or surgeon gives instructions to a hospital employee does not render the physician or surgeon liable for negligence of the hospital employee in carrying out the instructions. Similarly, the mere right of a physician to supervise a hospital employee is not sufficient to render the physician liable for the negligence of such employee. On the other hand, if the physician has the right to exercise control over the work to be done by the hospital employee and the manner of its performance, or an employee of a hospital is temporarily detached in whole or in part from the hospital's general control so as to become the temporary servant of the physician he assists, the physician will be subject to liability for the employee's negligence. [¶] Thus, where a hospital employee, although not in the regular employ of an operating

surgeon, *is under his special supervision and control during the operation*, the relationship of master and servant exists, and the surgeon is liable, under the doctrine of respondeat superior, for the employee's negligence.' " (*Thomas, supra,* 47 Cal.App.4th at pp. 966–967, original italics.)

- This doctrine applies only to medical personnel who are actively participating in the surgical procedure. (*Thomas, supra,* 47 Cal.App.4th at pp. 966–967.)
- While the "captain of the ship" doctrine has never been expressly rejected, it has been eroded by modern courts. "A theory that the surgeon directly controls *all* activities of whatever nature in the operating room certainly is not realistic in present day medical care." (*Truhitte, supra,* 128 Cal.App.3d at p. 348, original italics.)
- "[T]he *Truhitte* court ignores what we have already recognized as the special relationship between a vulnerable hospital patient and the surgeon operating on the patient. A helpless patient on the operating table who cannot understand or control what is happening reasonably expects a surgeon to oversee her care and to look out for her interests. We find this special relationship sufficient justification for the continued application of captain of the ship doctrine. Moreover, in light of the Supreme Court's expressions of approval of the doctrine . . . , we feel compelled to adhere to the doctrine." (*Baumgardner, supra,* 144 Cal.App.4th at pp. 1397–1398, internal citations omitted.)
- Absent evidence of right to control, an operating surgeon is generally not responsible for the conduct of anesthesiologists or others who independently carry out their duties. (*Seneris v. Haas* (1955) 45 Cal.2d 811, 828 [291 P.2d 915]; *Marvulli v. Elshire* (1972) 27 Cal.App.3d 180, 187 [103 Cal.Rptr. 461].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1109

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.4

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.45 (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.25 (Matthew Bender)

511. Wrongful Birth—Sterilization/Abortion—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*] negligently failed to prevent the birth of her child. To establish this claim, [*name of plaintiff*] must prove both of the following:

1. **That [*name of defendant*] performed a negligent [sterilization/abortion] procedure; and**
2. **That [*name of plaintiff*] gave birth to an unplanned child after this procedure was performed.**

New September 2003

Directions for Use

The general medical negligence instructions—instructions on the standard of care and causation—could be used in conjunction with this one.

Sources and Authority

- No Defense for Parent's Failure or Refusal to Prevent Live Birth. Civil Code section 43.6(b).
- "California law now permits a mother to hold medical personnel liable for their negligent failure to prevent or to terminate a pregnancy." (*Foy v. Greenblott* (1983) 141 Cal.App.3d 1, 8 [190 Cal.Rptr. 84].)
- Negligent sterilization procedure that leads to the birth of a child, either normal or disabled, can form the basis of a wrongful birth action. (*Custodio v. Bauer* (1967) 251 Cal.App.2d 303, 323–325 [59 Cal.Rptr. 463]; *Morris v. Frudenfeld* (1982) 135 Cal.App.3d 23, 37 [185 Cal.Rptr. 76].) The same is true of an unsuccessful abortion procedure. (*Stills v. Gratton* (1976) 55 Cal.App.3d 698, 707–709 [127 Cal.Rptr. 652].)
- A wrongful birth claim based on a negligently performed sterilization or abortion procedure does not support an action for wrongful life: "California courts do recognize a wrongful life claim by an 'impaired' child for special damages (but not for general damages), when the physician's negligence is the proximate cause of the child's need for extraordinary medical care and training. No court, however, has expanded tort liability to include wrongful life claims by children born without any mental or physical impairment." (*Alexandria S. v. Pac. Fertility Medical Ctr.* (1997) 55 Cal.App.4th 110, 122 [64 Cal.Rptr.2d 23].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1110

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.22

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.17 (Matthew Bender)

512. Wrongful Birth—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] was negligent because [*name of defendant*] failed to inform [him/her/*nonbinary pronoun*] of the risk that [he/she/*nonbinary pronoun*] would have a child with a [genetic impairment/disability]. To establish this claim, [*name of plaintiff*] must prove all of the following:

[1. That [*name of defendant*] negligently failed to [diagnose/ [or] warn [*name of plaintiff*] of] the risk that [*name of child*] would be born with a [genetic impairment/disability];]

[*or*]

[1. That [*name of defendant*] negligently failed to [perform appropriate tests/advise [*name of plaintiff*] of tests] that would more likely than not have disclosed the risk that [*name of child*] would be born with a [genetic impairment/disability];]

2. That [*name of child*] was born with a [genetic impairment/disability];

3. That if [*name of plaintiff*] had known of the [genetic impairment/disability], [*insert name of mother*] would not have conceived [*name of child*] [or would not have carried the fetus to term]; and

4. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*] to have to pay extraordinary expenses to care for [*name of child*].

New September 2003; Revised April 2007, May 2023

Directions for Use

The general medical negligence instructions on the standard of care and causation (see CACI Nos. 500–502) may be used in conjunction with this instruction. Read also CACI No. 513, *Wrongful Life—Essential Factual Elements*, if the parents' cause of action for wrongful birth is joined with the child's cause of action for wrongful life.

In element 1, select the first option if the claim is that the defendant failed to diagnose or warn the plaintiff of a possible genetic impairment. Select the second option if the claim is that the defendant failed to order or advise of available genetic testing. In a testing case, there is no causation unless the chances that the test would disclose the impairment were at least 50 percent. (See *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702–703 [260 Cal.Rptr. 772].)

Sources and Authority

- "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22 Cal.Rptr.2d 819].)
- "[A]s in any medical malpractice action, the plaintiff must establish: '(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.' " (*Gami, supra,* 18 Cal.App.4th at p. 877.)
- "A mere 20 percent chance does not establish a 'reasonably probable causal connection' between defendants' negligent failure to provide [a genetic] test and plaintiffs' injuries. A less than 50-50 possibility that defendants' omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause." (*Simmons, supra,* 212 Cal.App.3d at pp. 702–703.)
- "[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child—like his or her parents—may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 239 [182 Cal.Rptr. 337, 643 P.2d 954].)
- "Although the parents and child cannot, of course, both recover for the same medical expenses, we believe it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care." (*Turpin, supra,* 31 Cal.3d at p. 238.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1110–1118

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.22a, 9.23b

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.17 (Matthew Bender)

513. Wrongful Life—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she/***nonbinary pronoun***] failed to inform [***name of plaintiff***]'s parents of the risk that [he/she/***nonbinary pronoun***] would be born with a [genetic impairment/disability]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

[1. That [*name of defendant***] negligently failed to [diagnose/ [or] warn [***name of plaintiff***]'s parents of] the risk that [***name of plaintiff***] would be born with a [genetic impairment/disability];]**

[*or*]

[1. That [*name of defendant***] negligently failed to [perform appropriate tests/advise [***name of plaintiff***]'s parents of tests] that would more likely than not have disclosed the risk that [***name of plaintiff***] would be born with a [genetic impairment/disability];]**

2. That [*name of plaintiff***] was born with a [genetic impairment/disability];**

3. That if [*name of plaintiff***]'s parents had known of the risk of [genetic impairment/disability], [his/her/***nonbinary pronoun***] mother would not have conceived [him/her/***nonbinary pronoun***] [or would not have carried the fetus to term]; and**

4. That [*name of defendant***]'s negligence was a substantial factor in causing [***name of plaintiff***]'s parents to have to pay extraordinary expenses for [***name of plaintiff***].**

New September 2003; Revised April 2007, April 2008, November 2019, May 2023

Directions for Use

The general medical negligence instructions on the standard of care and causation (see CACI Nos. 500–502) may be used in conjunction with this instruction. Read also CACI No. 512, *Wrongful Birth—Essential Factual Elements*, if the parents' cause of action for wrongful birth is joined with the child's cause of action for wrongful life.

In element 1, select the first option if the claim is that the defendant failed to diagnose or warn the plaintiff of a possible genetic impairment. Select the second option if the claim is that the defendant failed to order or advise of available genetic testing. In a testing case, there is no causation unless the chances that the test would disclose the impairment were at least 50 percent. (See *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702–703 [260 Cal.Rptr. 772].)

In order for this instruction to apply, the genetic impairment must result in a

physical or mental disability. This is implied by the fourth element in the instruction.

Sources and Authority

- No Wrongful Life Claim Against Parent. Civil Code section 43.6(a).
- "[I]t may be helpful to recognize that although the cause of action at issue has attracted a special name—'wrongful life'—plaintiff's basic contention is that her action is simply one form of the familiar medical or professional malpractice action. The gist of plaintiff's claim is that she has suffered harm or damage as a result of defendants' negligent performance of their professional tasks, and that, as a consequence, she is entitled to recover under generally applicable common law tort principles." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 229 [182 Cal.Rptr. 337, 643 P.2d 954].)
- "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22 Cal.Rptr.2d 819].)
- "[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child—like his or her parents—may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment." (*Turpin, supra,* 31 Cal.3d at p. 239.)
- "There is no loss of earning capacity caused by the doctor in negligently permitting the child to be born with a genetic defect that precludes earning a living." (*Andalon v. Superior Court* (1984) 162 Cal.App.3d 600, 614 [208 Cal.Rptr. 899].)
- "A mere 20 percent chance does not establish a 'reasonably probable causal connection' between defendants' negligent failure to provide [a] test and plaintiffs' injuries. A less than 50-50 possibility that defendants' omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause." (*Simmons, supra,* 212 Cal.App.3d at pp. 702–703, internal citations omitted.)
- "Wrongful life claims are actions brought on behalf of children, while wrongful birth claims refer to actions brought by parents. California courts do recognize a wrongful life claim by an 'impaired' child for special damages (but not for general damages), when the physician's negligence is the proximate cause of the child's need for extraordinary medical care and training. No court, however, has expanded tort liability to include wrongful life claims by children born without any mental or physical impairment." (*Alexandria S. v. Pac. Fertility Medical Ctr.* (1997) 55 Cal.App.4th 110, 122 [64 Cal.Rptr.2d 23], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1112–1118

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.22a, 9.23b

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.17 (Matthew Bender)

514. Duty of Hospital

A hospital is negligent if it does not use reasonable care toward its patients. A hospital must provide procedures, policies, facilities, supplies, and qualified personnel reasonably necessary for the treatment of its patients.

[When you are deciding whether [*name of defendant*] was negligent, you must base your decision only on the testimony of the expert witnesses who have testified in this case.]

New September 2003

Directions for Use

This instruction may be augmented by CACI No. 515, *Duty of Hospital to Provide Safe Environment*, and/or CACI No. 516, *Duty of Hospital to Screen Medical Staff*.

The second paragraph should be used unless the court determines that expert testimony is not necessary to establish the standard of care.

See CACI Nos. 219–221 on evaluating the credibility of expert witnesses.

This instruction is not intended if the hospital is being sued based on the negligence of an agent or employee. See instructions in the Vicarious Responsibility series and adapt accordingly.

Sources and Authority

- "[T]he duty imposed by law on the hospital is that it must exercise such reasonable care toward a patient as his mental and physical condition, if known, require . . . ." (*Vistica v. Presbyterian Hospital & Medical Center, Inc.* (1967) 67 Cal.2d 465, 469 [62 Cal.Rptr. 577, 432 P.2d 193].)
- "A private hospital owes its patients the duty of protection. It was the duty of the hospital to use reasonable care and diligence in safeguarding a patient committed to its charge [citations] and such care and diligence are measured by the capacity of the patient to care for himself. By reason of the tender age of appellant's baby respondent owed a higher degree of care in attending it than if she had been an adult." (*Thomas v. Seaside Memorial Hospital* (1947) 80 Cal.App.2d 841, 847 [183 P.2d 288].)
- "It is the duty of any hospital that undertakes the treatment of an ill or wounded person to use reasonable care and diligence not only in operating upon and treating but also in safeguarding him, and such care and diligence is measured by the capacity of the patient to care for himself." (*Valentin v. La Societe Francaise de Bienfaisance Mutuelle* (1946) 76 Cal.App.2d 1, 4 [172 P.2d 359].)
- "[T]he professional duty of a hospital . . . is primarily to provide a safe environment within which diagnosis, treatment, and recovery can be carried out.

Thus if an unsafe condition of the hospital's premises causes injury to a patient . . . there is a breach of the hospital's duty *qua* hospital." (*Murillo v. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50, 56–57 [160 Cal.Rptr. 33].)

- "Defendant . . . was under a duty to observe and know the condition of a patient. Its business is caring for ill persons, and its conduct must be in accordance with that of a person of ordinary prudence under the circumstances, a vital part of those circumstances being the illness of the patient and incidents thereof." (*Rice v. California Lutheran Hospital* (1945) 27 Cal.2d 296, 302 [163 P.2d 860].)
- "If a hospital is obliged to maintain its premises and its instrumentalities for the comfort of its patients with such care and diligence as will reasonably assure their safety, it should be equally bound to observe the progress of a patient in his recovery from a major operation with such care and diligence as his condition reasonably requires for his comfort and safety and promptly to employ such agencies as may reasonably appear necessary for the patient's safety." (*Valentin, supra,* 76 Cal.App.2d at p. 5.)
- "No expert opinion is required to prove the hospital's failure to provide an adequate number of trained, qualified personnel at the most critical time in postoperative care was negligent." (*Czubinsky v. Doctors Hospital* (1983) 139 Cal.App.3d 361, 367 [188 Cal.Rptr. 685].)
- "A California civil jury instruction succinctly characterizes a hospital's duty to its patients as follows: 'A hospital must provide procedures, policies, facilities, supplies, and qualified personnel reasonably necessary for the treatment of its patients.' (CACI No. 514.) The instruction would appear to be an accurate distillation of the case law applicable when patients are being treated at a hospital facility for an illness, injury or medical condition." (*Walker v. Sonora Regional Medical Center* (2012) 202 Cal.App.4th 948, 960 [135 Cal.Rptr.3d 876].)
- " 'Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and internes [sic], as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.' Although hospitals do not practice medicine in the same sense as physicians, they do provide facilities and services in connection with the practice of medicine, and if they are negligent in doing so they can be held liable. Here, defendant hospital implicitly recognized that point when it requested, and the trial court gave, this jury instruction: 'A hospital must provide procedures, policies, facilities, supplies, and qualified personnel reasonably necessary for the treatment of its patients.' " (*Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291, 310 [145 Cal.Rptr.3d 553, 282 P.3d 1250].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1120

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-I, *Negligence Liability Based On Omission To Act—Legal Duty Arising From "Special Relationship"*, ¶¶ 2:1898–2:1925 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 3-F, *MICRA Provisions Affecting Damages*, ¶¶ 3:282.11c, 3:282.11d (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.55–9.64

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.81 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.13 (Matthew Bender)

515. Duty of Hospital to Provide Safe Environment

If [*name of defendant hospital*] knew or reasonably should have known it was likely that [*name of patient*] would harm [himself/herself/*nonbinary pronoun*/another], then [*name of defendant hospital*] had to use reasonable care to prevent such harm.

New September 2003

Directions for Use

Always read CACI No. 514, *Duty of Hospital*, in conjunction with this instruction.

Sources and Authority

- "When a patient is admitted into the care of a hospital, the hospital must exercise reasonable care to protect that patient from harm." (*Walker v. Sonora Regional Medical Center* (2012) 202 Cal.App.4th 948, 959 [135 Cal.Rptr.3d 876].)
- "[T]he duty extends to safeguarding the patient from dangers due to mental incapacity; and where the hospital has notice or knowledge of facts from which it might reasonably be concluded that a patient would be likely to harm himself or others unless preclusive measures were taken, then the hospital must use reasonable care in the circumstances to prevent such harm." (*Vistica v. Presbyterian Hospital & Medical Center, Inc.* (1967) 67 Cal.2d 465, 469 [62 Cal.Rptr. 577, 432 P.2d 193].)
- "If those charged with the care and treatment of a mentally disturbed patient know of facts from which they could reasonably conclude that the patient would be likely to harm himself in the absence of preclusive measures, then they must use reasonable care under the circumstances to prevent such harm." (*Meier v. Ross General Hospital* (1968) 69 Cal.2d 420, 424 [71 Cal.Rptr. 903, 445 P.2d 519].)
- "A rule more fitting to the facts of this case is expressed in *Wood v. Samaritan Institution* (1945) 26 Cal.2d 847 [161 P.2d 556], where the California Supreme Court held hospitals have a duty to be especially protective of their alcoholic patients." (*Emerick v. Raleigh Hills Hospital* (1982) 133 Cal.App.3d 575, 581 [184 Cal.Rptr. 92].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1120–1123

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.55–9.62

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.81 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.13 (Matthew Bender)

516. Duty of Hospital to Screen Medical Staff

A hospital is negligent if it does not use reasonable care to select and periodically evaluate its medical staff so that its patients are provided adequate medical care.

New September 2003

Directions for Use

Always read CACI No. 514, *Duty of Hospital*, in conjunction with this instruction.

Sources and Authority

- "[W]e hold a hospital is accountable for negligently screening the competency of its medical staff to insure the adequacy of medical care rendered to patients at its facility." (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 346 [183 Cal.Rptr. 156].)
- "[A] hospital generally owes a duty to screen the competency of its medical staff and to evaluate the quality of medical treatment rendered on its premises. Thus, a hospital could be found liable for injury to a patient caused by the hospital's negligent failure 'to insure the competence of its medical staff through careful selection and review,' thereby creating an unreasonable risk of harm to the patient." *(Walker v. Sonora Regional Medical Center* (2012) 202 Cal.App.4th 948, 959–960 [135 Cal.Rptr.3d 876], internal citation omitted.)
- "The hospital has 'a direct and independent responsibility to its patients of insuring the competency of its medical staff and the quality of medical care provided . . . .' [Citation.] Hospitals must be able to establish high standards of professional work and to maintain those standards through careful selection and review of staff. And they are required to do so by both state and federal law. [Citations.]" (*Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 489 [247 Cal.Rptr. 244].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1120–1123

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.55–9.62

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.81 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.13 (Matthew Bender)

517. Affirmative Defense—Patient's Duty to Provide for the Patient's Own Well-Being

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A patient must use reasonable care to provide for the patient's own well-being. This includes a responsibility to [follow [a/an] [*insert type of medical practitioner*]'s instructions/seek medical assistance] when a reasonable person in the same situation would do so.

[*Name of defendant***] claims that [***name of plaintiff***]'s harm was caused, in whole or in part, by [***name of plaintiff***]'s negligence in failing to [follow [***name of defendant***]'s instructions/seek medical assistance]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of plaintiff***] did not use reasonable care in [following [***name of defendant***]'s instructions/seeking medical assistance]; and**
2. **That [***name of plaintiff***]'s failure to [follow [***name of defendant***]'s instructions/seek medical assistance] was a substantial factor in causing [his/her/***nonbinary pronoun***] harm.**

New September 2003; Revised December 2015, May 2020

Directions for Use

Read this instruction in conjunction with basic comparative fault and damages instructions (CACI Nos. 405, 406, 407).

The defendant has the burden of proving that the plaintiff was comparatively negligent and that this negligence was a cause of the harm. (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1285 [164 Cal.Rptr.3d 112].)

Sources and Authority

- "It is error for a trial court to charge the jury with regard to contributory negligence [for failure to follow doctor's advice] when there is no expert testimony the plaintiff was negligent." (*Bolen v. Woo* (1979) 96 Cal.App.3d 944, 952 [158 Cal.Rptr. 454].)
- "[I]t is error in medical malpractice cases to [instruct on contributory negligence] in the absence of some evidence that the injured patient's acts or omissions were a proximate cause of the harm sustained." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 875 [148 Cal.Rptr. 355, 582 P.2d 946].)
- "Unquestionably the jury must have considered whether the attitude of respondent was one of refusal to follow the advice of his physicians or was, because of his extended experience, one of justifiable fear of want of their skill. Whether such delays under the circumstances were those of a reasonably prudent person determines the right of respondent to recover all of the special damages, and the implied finding was that respondent was not arbitrary in not promptly

acceding to each suggestion of an operation." (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 422 [175 P.2d 607].)

- "Negligence, in fact, may often explain why the patient, to begin with, needed and sought out the physician's assistance. The health care professional, in this instance, takes the patient as he finds him. Other than in very rare cases, the only legitimate application of the doctrine of contributory fault is when it takes place concurrently with or after the delivery of the practitioner's care and treatment." (*Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606, 632 [183 Cal.Rptr.3d 59].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1798

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.66

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.61 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.14 (Matthew Bender)

518. Medical Malpractice: Res ipsa loquitur

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

1. **That [*name of plaintiff*]'s harm ordinarily would not have occurred unless someone was negligent; [In deciding this issue, you must consider [only] the testimony of the expert witnesses.]**
2. **That the harm occurred while [*name of plaintiff*] was under the care and control of [*name of defendant*]; and**
3. **That [*name of plaintiff*]'s voluntary actions did not cause or contribute to the event[s] that harmed [him/her/*nonbinary pronoun*].**

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

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

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

New September 2003; Revised December 2011

Directions for Use

The first paragraph of this instruction sets forth the three elements of res ipsa loquitur. The bracketed sentence in element 1 should be read only if expert testimony is introduced. The word "only" within that sentence is to be used if the court has determined that the issue of the defendant's negligence involves matters beyond common knowledge.

The second paragraph explains that if the plaintiff fails to establish res ipsa loquitur as a presumption, the jury may still find for the plaintiff if it finds based on its consideration of all of the evidence that the defendant was negligent. (See *Howe v.*

Seven Forty Two Co., Inc. (2010) 189 Cal.App.4th 1155, 1163–1164 [117 Cal.Rptr.3d 126].)

If the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find that the accident resulted from the defendant's negligence unless the defendant comes forward with evidence that would support a contrary finding. (See Cal. Law Revision Com. comment to Evid. Code, § 646.) The last two paragraphs of the instruction assume that the defendant has presented evidence that would support a finding that the defendant was not negligent or that any negligence on the defendant's part was not a proximate cause of the accident. In this case, the presumption drops out, and the plaintiff must then prove the elements of negligence without the benefit of the presumption of res ipsa loquitur. (See *Howe*, *supra*, 189 Cal.App.4th at pp. 1163–1164; see also Evid. Code, § 646(c).)

Sources and Authority

- Res ipsa loquitur. Evidence Code section 646(c).
- Presumption Affecting Burden of Producing Evidence. Evidence Code section 604.
- "In California, the doctrine of res ipsa loquitur is defined by statute as 'a presumption affecting the burden of producing evidence.' The presumption arises when the evidence satisfies three conditions: ' "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." ' A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. The presumed fact, in this context, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant. . . .' If the defendant introduces 'evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,' the trier of fact determines whether defendant was negligent without regard to the presumption, simply by weighing the evidence." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825–826 [15 Cal.Rptr.2d 679, 843 P.2d 624], internal citations omitted.)
- " 'The doctrine of res ipsa loquitur is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible.' " (*Howe*, *supra*, 189 Cal.App.4th at p. 1161.)
- "Res ipsa loquitur is an evidentiary rule for 'determining whether circumstantial evidence of negligence is sufficient.' " (*Howe*, *supra*, 189 Cal.App.4th at p. 1161, internal citation omitted.)
- The doctrine "is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, permitting a common sense inference of

negligence from the happening of the accident." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 [215 Cal.Rptr. 834].)

- "All of the cases hold, in effect, that it must appear, either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent." (*Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 Cal.2d 436, 442–443 [247 P.2d 344].)
- "In determining the applicability of res ipsa loquitur, courts have relied on both expert testimony and common knowledge. The standard of care in a professional negligence case can be proved only by expert testimony unless the conduct required by the particular circumstances is within the common knowledge of the layperson." (*Blackwell v. Hurst* (1996) 46 Cal.App.4th 939, 943 [54 Cal.Rptr.2d 209], internal citations omitted.)
- "Under the doctrine of res ipsa loquitur and this common knowledge exception, it is proper to instruct the jury that it can infer negligence from the happening of the accident itself, if it finds based on common knowledge, the testimony of physicians called as expert witnesses, and all the circumstances, that the injury was more likely than not the result of negligence." (*Gannon v. Elliot* (1993) 19 Cal.App.4th 1, 6 [23 Cal.Rptr.2d 86], internal citation omitted.)
- "The fact that a particular injury rarely occurs does not in itself justify an inference of negligence unless some other evidence indicates negligence. To justify res ipsa loquitur instructions, appellant must have produced sufficient evidence to permit the jury to make the necessary decision. He must have presented 'some substantial evidence which, if believed by the jury, would entitle it to draw an inference of negligence from the happening of the accident itself.' " (*Blackwell, supra,* 46 Cal.App.4th at p. 944, internal citations omitted.)
- The purpose of the second "control" requirement is to "link the defendant with the probability, already established, that the accident was negligently caused." (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 362 [124 Cal.Rptr. 193, 540 P.2d 33].) The control requirement is not absolute. (*Zentz, supra,* 39 Cal.2d at p. 443.)
- "The purpose of [the third] requirement, like that of control by the defendant is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he was entirely inactive at the time of the accident in order to satisfy this requirement, so long as the evidence is such as to eliminate his conduct as a factor contributing to the occurrence." (*Newing, supra,* 15 Cal.3d at p. 363, internal citations omitted.)
- The third condition "should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof. . . . [I]ts purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident." (*Zentz, supra,* 39 Cal.2d at p. 444.)
- "[Evidence Code section 646] . . . classified the doctrine as a presumption

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

- " 'If evidence is produced that would support a finding that the defendant was not negligent or that any negligence on his part was not a proximate cause of the accident, the presumptive effect of the doctrine vanishes.' '[T]he mere introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact causes the presumption, as a matter of law, to disappear.' When the presumptive effect vanishes, it is the plaintiff's burden to introduce actual evidence that would show that the defendant is negligent and that such negligence was the proximate cause of the accident." (*Howe*, *supra*, 189 Cal.App.4th at p. 1163, internal citations omitted.)
- "As the [Law Revision Commission] Comment [to Evidence Code section 646] explains, even though the presumptive effect of the doctrine vanishes, 'the jury may still be able to draw an inference that the accident was caused by the defendant's lack of due care from the facts that gave rise to the presumption. . . . [¶] . . . [¶] . . . An inference of negligence may well be warranted from all of the evidence in the case even though the plaintiff fails to establish all the elements of res ipsa loquitur. In appropriate cases, therefore, the jury may be instructed that, even though it does not find that the facts giving rise to the presumption have been proved by a preponderance of the evidence, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more probable than not that the defendant was negligent.' " (*Howe*, *supra*, 189 Cal.App.4th at p. 1163, internal citation omitted.)
- "It follows that where part of the facts basic to the application of the doctrine of res ipsa loquitur is established as a matter of law but that others are not, the court should instruct that application of the doctrine by the jury depends only upon the existence of the basic facts not conclusively established." (*Rimmele v. Northridge Hosp. Foundation* (1975) 46 Cal.App.3d 123, 130 [120 Cal.Rptr. 39].)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Burden of Proof and Presumptions, §§ 116–120

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

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical*

Malpractice, § 415.11[2] (Matthew Bender)

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

519–530. Reserved for Future Use

530A. Medical Battery

[*Name of plaintiff*] claims that [*name of defendant*] committed a medical battery. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **[That [*name of defendant*] performed a medical procedure without [*name of plaintiff*]'s consent; [or]]**

   [That [*name of plaintiff*] consented to one medical procedure, but [*name of defendant*] performed a substantially different medical procedure;]

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

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

A patient can consent to a medical procedure by words or conduct.

Derived from former CACI No. 530 April 2007; Revised October 2008

Directions for Use

Select either or both of the two bracketed options in the first element depending on the nature of the case. In a case of a conditional consent in which it is alleged that the defendant proceeded without the condition having occurred, give CACI No. 530B, *Medical Battery—Conditional Consent*.

Sources and Authority

- "The California Supreme Court has described the right to consent to medical treatment as ' "basic and fundamental," ' 'intensely individual,' and 'broadly based.' The same court has also emphasized that excusing the patient from a judicial proceeding regarding a surgery to be performed over his objection 'denie[s] fundamental due process.' It is immaterial that a doctor has said the treatment is required to save the patient's life. Rather, ' "A doctor might well believe that an operation or form of treatment is desirable or necessary, but the law does not permit him to substitute his own judgment for that of the patient by any form of artifice or deception." ' Finally, the patient's reasons for refusing are irrelevant. 'For self-determination to have any meaning, it cannot be subject to the scrutiny of anyone else's conscience or sensibilities.' " (*Stewart v. Superior Court* (2017) 16 Cal.App.5th 87, 105 [224 Cal.Rptr.3d 219], internal citations omitted.)
- Battery may also be found if a substantially different procedure is performed: "Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery." (*Cobbs v. Grant* (1972) 8

Cal.3d 229, 239 [104 Cal.Rptr. 505, 502 P.2d 1].)

- "The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence." (*Cobbs, supra,* 8 Cal.3d at p. 240.)
- "Our high court has made it clear that battery and lack of informed consent are separate causes of action. A claim based on lack of informed consent—which sounds in negligence—arises when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast, a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent." (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324 [71 Cal.Rptr.3d 469].)
- "Confusion may arise in the area of 'exceeding a patient's consent.' In cases where a doctor exceeds the consent and such excess surgery is found necessary due to conditions arising during an operation which endanger the patient's health or life, the consent is presumed. The surgery necessitated is proper (though exceeding specific consent) on the theory of assumed consent, were the patient made aware of the additional need." (*Pedesky v. Bleiberg* (1967) 251 Cal.App.2d 119, 123 [59 Cal.Rptr. 294].)
- "Consent to medical care, including surgery, may be express or may be implied from the circumstances." (*Bradford v. Winter* (1963) 215 Cal.App.2d 448, 454 [30 Cal.Rptr. 243].)
- "It is elemental that consent may be manifested by acts or conduct and need not necessarily be shown by a writing or by express words." (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 38–39 [224 P.2d 808].)
- "[T]he reason why CACI No. 530B has an explicit intent and knowledge requirement and CACI No. 530A does not is clear. The law presumes that '[w]hen the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present.' That situation is covered by CACI No. 530A." (*Dennis v. Southard* (2009) 174 Cal.App.4th 540, 544 [94 Cal.Rptr.3d 559], internal citation omitted.)
- "In the absence of any definitive case law establishing whether operating on the wrong disk within inches of the correct disk is a 'substantially different procedure,' we conclude the matter is a factual question for a finder of fact to decide and at least in this instance, not one capable of being decided on demurrer." (*Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, 647 [75 Cal.Rptr.3d 861.)

- "Although . . . consent to surgery necessarily encompasses consent to postoperative care, not all postoperative *contact* between doctor and patient constitutes *care*. The question of the nature of the contact between plaintiff and [defendant], and whether that contact was within the scope of plaintiff's consent, is a factual question for a finder of fact to decide." (*So v. Shin* (2013) 212 Cal.App.4th 652, 669 [151 Cal.Rptr.3d 257], original italics.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 459–1635

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶ 3:1394 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 3-F, *MICRA Provisions Affecting Damages*, ¶ 3:1883–3:1885 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.11–9.16

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.41, Ch. 41, *Assault and Battery*, § 41.01 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, §§ 415.13, 415.20 (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.28 et seq. (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

530B. Medical Battery—Conditional Consent

[*Name of plaintiff***] claims that [***name of defendant***] committed a medical battery. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] consented to a medical procedure, but only on the condition that [***describe what had to occur before consent would be given***];**
2. **That [***name of defendant***] proceeded without this condition having occurred;**
3. **That [***name of defendant***] intended to perform the procedure with knowledge that the condition had not occurred;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

A patient can consent to a medical procedure by words or conduct.

Derived from former CACI No. 530 April 2007; Revised October 2008

Directions for Use

Give this instruction in a case of a conditional consent in which it is alleged that the defendant proceeded without the condition having occurred. If the claim is that the defendant proceeded without any consent or deviated from the consent given, give CACI No. 530A, *Medical Battery*.

Sources and Authority

- Battery may also be found if a conditional consent is violated: "[I]t is well recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 610 [278 Cal.Rptr. 900].)
- Battery is an intentional tort. Therefore, a claim for battery against a doctor as a violation of conditional consent requires proof that the doctor intentionally violated the condition placed on the patient's consent. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1498 [21 Cal.Rptr.3d 36], internal citations omitted.)
- "[T]he reason why CACI No. 530B has an explicit intent and knowledge requirement and CACI No. 530A does not is clear. The law presumes that '[w]hen the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present.' That situation is covered by CACI No. 530A.

On the other hand, in a case involving conditional consent, the requisite element of deliberate intent to deviate from the consent given cannot be presumed simply from the act itself. This is because if the intent element is not explicitly stated in the instruction, it would be possible for a jury (incorrectly) to find a doctor liable for medical battery even if it believed the doctor negligently forgot about the condition precedent." (*Dennis v. Southard* (2009) 174 Cal.App.4th 540, 544 [94 Cal.Rptr.3d 559], internal citation omitted.)

- "Our high court has made it clear that battery and lack of informed consent are separate causes of action. A claim based on lack of informed consent—which sounds in negligence—arises when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast, a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent." (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324 [71 Cal.Rptr.3d 469].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 459–740

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.11–9.16

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.41, Ch. 41, *Assault and Battery*, § 41.01 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, §§ 415.13, 415.20 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.25 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.28 et seq. (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

531. Consent on Behalf of Another

In this case [*name of patient***] could not consent to the [***insert medical procedure***] because [he/she/***nonbinary pronoun***] was [***insert reason—e.g., a minor/incompetent/unconscious***]. In this situation, the law allows [***name of authorized person***] to give consent on behalf of [***name of patient***].**

You must decide whether [*name of authorized person***] consented to the [***insert medical procedure***] performed on [***name of patient***].**

New September 2003

Sources and Authority

- Parent Delegation of Right to Authorize Medical Care. Family Code section 6910.
- "If the patient is a minor or incompetent, the authority to consent is transferred to the patient's legal guardian or closest available relative." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 244 [104 Cal.Rptr. 505, 502 P.2d 1]; *Farber v. Olkon* (1953) 40 Cal.2d 503, 509 [254 P.2d 520].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 460, 463

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.16

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14

32 California Forms of Pleading and Practice, Ch. 365, *Minors: Contract Actions*, § 365.13; Ch. 366, *Minors: Court Consent for Medical Care or Enlistment*, § 366.10 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 394, *Parent and Child*, § 394.54 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

532. Informed Consent—Definition

A patient's consent to a medical procedure must be "informed." A patient gives an "informed consent" only after the [*insert type of medical practitioner***] has adequately explained the proposed treatment or procedure.**

[A/An] [*insert type of medical practitioner***] must explain the likelihood of success and the risks of agreeing to a medical procedure in language that the patient can understand. [A/An] [***insert type of medical practitioner***] must give the patient as much information as [he/she/***nonbinary pronoun***] needs to make an informed decision, including any risk that a reasonable person would consider important in deciding to have the proposed treatment or procedure, and any other information skilled practitioners would disclose to the patient under the same or similar circumstances. The patient must be told about any risk of death or serious injury or significant potential complications that may occur if the procedure is performed. [A/An] [***insert type of medical practitioner***] is not required to explain minor risks that are not likely to occur.**

New September 2003; Revised December 2005, October 2008, June 2014

Directions for Use

This instruction should be read in conjunction with CACI No. 533, *Failure to Obtain Informed Consent—Essential Factual Elements*. Do not give this instruction with CACI No. 530A, *Medical Battery*, or CACI No. 530B, *Medical Battery—Conditional Consent*. (See *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324 [71 Cal.Rptr.3d 469].)

If the patient is a minor or is incapacitated, tailor the instruction accordingly. If a medical practitioner knows or should know of a patient's unique concerns or lack of familiarity with medical procedures, this knowledge may expand the scope of required disclosures and require additional instructional language. (See *Truman v. Thomas* (1980) 27 Cal.3d 285, 291 [165 Cal.Rptr. 308, 611 P.2d 902].)

Also, see CACI No. 531, *Consent on Behalf of Another*.

Sources and Authority

- "From the foregoing axiomatic ingredients emerges a necessity, and a resultant requirement, for divulgence by the physician to his patient of all information relevant to a meaningful decisional process." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 242 [104 Cal.Rptr. 505, 502 P.2d 1].)
- " '[A] physician has a fiduciary duty to disclose all information material to the patient's decision,' when soliciting a patient's consent to a medical procedure. A cause of action premised on a physician's breach of this fiduciary duty may

alternatively be referred to as a claim for lack of informed consent." (*Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1164 [155 Cal.Rptr.3d 755], internal citations omitted.)

- "When a doctor recommends a particular procedure then he or she must disclose to the patient all material information necessary to the decision to undergo the procedure, including a reasonable explanation of the procedure, its likelihood of success, the risks involved in accepting or rejecting the proposed procedure, and any other information a skilled practitioner in good standing would disclose to the patient under the same or similar circumstances." (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 343 [13 Cal.Rptr.2d 819].)
- "A physician has a duty to inform a patient in lay terms of the dangers inherently and potentially involved in a proposed treatment." (*McKinney v. Nash* (1981) 120 Cal.App.3d 428, 440 [174 Cal.Rptr. 642].)
- "First, a physician must disclose to the patient the potential of death, serious harm, and other complications associated with a proposed procedure. Second, '[b]eyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances.' " (*Cobbs, supra*, 8 Cal.3d at p. 244, internal citations omitted.)
- "Material information is that which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure. To be material, a fact must also be one which is not commonly appreciated. If the physician knows or should know of a patient's unique concerns or lack of familiarity with medical procedures, this may expand the scope of required disclosure." (*Truman, supra*, 27 Cal.3d at p. 291, internal citations omitted.)
- "Obviously involved in the equation of materiality are countervailing factors of the seriousness and remoteness of the dangers involved in the medical procedure as well as the risks of a decision not to undergo the procedure." (*McKinney, supra,* 120 Cal.App.3d at p. 441.)
- "Where a shoulder is injured in an appendectomy, or a clamp is left in the abdomen, expert testimony is not required since the jury is capable of appreciating and evaluating the significance of such events. However, when a doctor relates the facts he has relied upon in support of his decision to operate, and where the facts are not commonly susceptible of comprehension by a lay juror, medical expert opinion is necessary to enable the trier of fact to determine if the circumstances indicated a need for surgery." (*Cobbs, supra*, 8 Cal.3d at p. 236, internal citations omitted.)
- "We underline the limited and essentially subsidiary role of expert testimony in informed consent litigation. . . . [A] rule that filters the scope of patient disclosure entirely through the standards of the medical community ' "arrogate[s] the decision [of what to disclose] . . . to the physician alone." ' We explicitly rejected such an absolute rule as inimical to the rationale and objectives of the

informed consent doctrine; we reaffirm that position. Nevertheless, . . . there may be a limited number of occasions in the trial of informed consent claims where the adequacy of disclosure in a given case may turn on the standard of practice within the relevant medical community. In such instances, expert testimony will usually be appropriate." (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1191 [23 Cal.Rptr.2d 131, 858 P.2d 598], internal citation omitted.)

- "[A] physician must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgment." (*Moore v. Regents of Univ. of Cal.* (1990) 51 Cal.3d 120, 129 [271 Cal.Rptr. 146, 793 P.2d 479], cert. denied, 499 U.S. 936 (1991).)
- "While . . . there is no general duty of disclosure with respect to nonrecommended procedures, we do not conclude . . . that there can never be such a duty. In an appropriate case there may be evidence that would support the conclusion that a doctor should have disclosed information concerning a nonrecommended procedure." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1071 [9 Cal.Rptr.2d 463].)
- "Our high court has made it clear that battery and lack of informed consent are separate causes of action. A claim based on lack of informed consent—which sounds in negligence—arises when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast, a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent." (*Saxena, supra,* 159 Cal.App.4th at p. 324.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 466, 471

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.41 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery,* § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, §§ 415.13, 415.20 (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.28 (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives,* § 104.11 (Matthew Bender)

533. Failure to Obtain Informed Consent—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she/***nonbinary pronoun***] performed [a/an] [***insert medical procedure***] on [***name of plaintiff***] without first obtaining [his/her/***nonbinary pronoun***] informed consent. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] performed [a/an] [***insert medical procedure***] on [***name of plaintiff***];**
2. **That [***name of defendant***] did not disclose to [***name of plaintiff***] the important potential results and risks of[and alternatives to] the [***insert medical procedure***];**
3. **That a reasonable person in [***name of plaintiff***]'s position would not have agreed to the [***insert medical procedure***] if that person had been adequately informed; and**
4. **That [***name of plaintiff***] was harmed by a result or risk that [***name of defendant***] should have explained**.

New September 2003; Revised June 2014, May 2020

Directions for Use

This instruction should be read in conjunction with CACI No. 532, *Informed Consent—Definition*. See also the Directions for Use and Sources and Authority to that instruction.

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see CACI No. 531, *Consent on Behalf of Another*.

Sources and Authority

- "[W]hen there is a more complicated procedure, . . . the jury should be instructed that when a given procedure inherently involves a known risk of death or serious bodily harm, a medical doctor has a duty to disclose to his patient the potential of death or serious harm, and to explain in lay terms the complications that might possibly occur. Beyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 244–245 [104 Cal.Rptr. 505, 502 P.2d 1], internal citations omitted.)
- "There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such causal connection arises only if it is established that had revelation been made consent to treatment would not have

been given." (*Cobbs, supra,* 8 Cal.3d at p. 245.)

- "[T]he 'burden of going forward' is different from the 'burden of proof,' and the burden of proof *always* remains with the plaintiff. Indeed, the only time the burden of proof on informed consent shifts to the defendant-physician is *after* the plaintiff has carried her burden of showing the nondisclosure of material information *and* when the defendant-physician is attempting to prove that 'even though a reasonably prudent person might not have undergone the procedure if properly informed of the perils, *this particular plaintiff* still would have consented to the procedure.' " (*Flores v. Liu* (2021) 60 Cal.App.5th 278, 298 [274 Cal.Rptr.3d 444], original italics, internal citations omitted.)
- "[E]ven though a physician has no general duty of disclosure with respect to nonrecommended procedures, he nevertheless must make such disclosures as are required for competent practice within the medical community." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1071 [9 Cal.Rptr.2d 463].)
- "The patient-plaintiff may testify on this subject but the issue extends beyond his credibility. Since at the time of trial the uncommunicated hazard has materialized, it would be surprising if the patient-plaintiff did not claim that had he been informed of the dangers he would have declined treatment. Subjectively he may believe so, with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment. Thus an objective test is preferable: i.e., what would a prudent person in the patient's position have decided if adequately informed of all significant perils." (*Cobbs, supra*, 8 Cal.3d at p. 245.)
- "[T]he objective test required of the plaintiff does not prevent the defendant-physician from showing, *by way of defense*, that even though a reasonably prudent person might not have undergone the procedure if properly informed of the perils, this particular plaintiff still would have consented to the procedure." (*Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1206 [67 Cal.Rptr.2d 573], original italics.)
- "[A]n action for failure to obtain informed consent lies where 'an *undisclosed* inherent complication . . . occurs,' not where a disclosed complication occurs." (*Warren, supra,* 57 Cal.App.4th at p. 1202, original italics, internal citation omitted.)
- "[Plaintiff] is entitled to recover not only for the undisclosed complications, but also for the disclosed complications, because she would not have consented to either surgery had the true risk been disclosed, and therefore would not have suffered either category of complications." (*Warren*, *supra*, 57 Cal.App.4th at p. 1195.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 466, 471

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.23 et seq. (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, §§ 175.23, 175.29 (Matthew Bender)

534. Informed Refusal—Definition

[A/An] [*insert type of medical practitioner***] must explain the risks of refusing a procedure in language that the patient can understand and give the patient as much information as [he/she/***nonbinary pronoun***] needs to make an informed decision, including any risk that a reasonable person would consider important in deciding not to have [a/an] [***insert medical procedure***]. The patient must be told about any risk of death or serious injury or significant potential complications that may occur if the procedure is refused. [A/An] [***insert type of medical practitioner***] is not required to explain minor risks that are not likely to occur.**

New September 2003

Directions for Use

This instruction should be read in conjunction with CACI No. 535, *Risks of Nontreatment—Essential Factual Elements*.

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see CACI No. 531, *Consent on Behalf of Another*.

Sources and Authority

- The definition of "informed consent" in *Cobbs v. Grant* (1972) 8 Cal.3d 229 [104 Cal.Rptr. 505, 502 P.2d 1] applies "whether the procedure involves treatment or a diagnostic test." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 292 [165 Cal.Rptr. 308, 611 P.2d 902].)
- In *Truman*, "the high court extended the duty to make disclosure to include recommended diagnostic as well as therapeutic procedures and to include situations in which the patient declines the recommended procedure." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1069 [9 Cal.Rptr.2d 463].) This has been termed the "informed refusal" doctrine. (*Townsend v. Turk* (1990) 218 Cal.App.3d 278, 284 [266 Cal.Rptr. 821].)
- "In a nutshell, a doctor has a duty to disclose all material information to his patient which will enable that patient to make an informed decision regarding the taking or refusal to take such a test." (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 736 [223 Cal.Rptr. 859].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 466, 471, 475, 477, 478, 480, 481

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.12

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.23 (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

535. Risks of Nontreatment—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she/***nonbinary pronoun***] did not adequately inform [***name of plaintiff***] about the risks of refusing the [***insert medical procedure***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] did not perform the [***insert medical procedure***] on [***name of plaintiff***];**
2. **That [***name of defendant***] did not disclose to [***name of plaintiff***] the important potential risks of refusing the [***insert medical procedure***];**
3. **That a reasonable person in [***name of plaintiff***]'s position would have agreed to the [***insert medical procedure***] if that person had been adequately informed about these risks; and**
4. **That [***name of plaintiff***] was harmed by the failure to have the [***insert medical procedure***] performed.**

New September 2003; Revised June 2014, May 2020

Directions for Use

This instruction presents the "informed refusal" doctrine. (See *Townsend v. Turk* (1990) 218 Cal.App.3d 278, 284 [266 Cal.Rptr. 821].) It should be given with CACI No. 534, *Informed Refusal—Definition*.

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see CACI No. 531, *Consent on Behalf of Another*.

Sources and Authority

- "Applying these principles, the court in *Cobbs* [*Cobbs v. Grant* (1972) 8 Cal.3d 229, 243 [104 Cal.Rptr. 505, 502 P.2d 1]] stated that a patient must be apprised not only of the 'risks inherent in the procedure [prescribed, but also] the risks of a decision not to undergo the treatment, and the probability of a successful outcome of the treatment.' This rule applies whether the procedure involves treatment or a diagnostic test. On the one hand, a physician recommending a risk-free procedure may safely forego discussion beyond that necessary to conform to competent medical practice and to obtain the patient's consent. If a patient indicates that he or she is going to decline the risk-free test or treatment, then the doctor has the additional duty of advising of all material risks of which a reasonable person would want to be informed before deciding not to undergo the procedure. On the other hand, if the recommended test or treatment is itself risky, then the physician should always explain the potential consequences of declining to follow the recommended course of action." (*Truman v. Thomas*

(1980) 27 Cal.3d 285, 292 [165 Cal.Rptr. 308, 611 P.2d 902], internal citations omitted.)

- "The duty of reasonable disclosure was expanded in *Truman v. Thomas* [*supra*]. There, a doctor recommended that his patient undergo a risk-free diagnostic procedure but failed to advise her of the risks involved in the failure to follow his recommendation. The Supreme Court concluded that for a patient to make an informed choice to decline a recommended procedure the patient must be adequately advised of the risks of refusing to undergo the procedure. Thus, the high court extended the duty to make disclosure to include recommended diagnostic as well as therapeutic procedures and to include situations in which the patient declines the recommended procedure." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1069 [9 Cal.Rptr.2d 463].)
- "In a nutshell, a doctor has a duty to disclose all material information to his patient which will enable that patient to make an informed decision regarding the taking or refusal to take such a test." (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 736 [223 Cal.Rptr. 859].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 466, 471, 475, 477, 480, 481

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.12

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13[2] (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.33 (Matthew Bender)

536–549. Reserved for Future Use

550. Affirmative Defense—Plaintiff Would Have Consented

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*] is not responsible for [*name of plaintiff*]'s harm because [*name of plaintiff*] would have consented to the procedure, even if [he/she/*nonbinary pronoun*] had been informed of the risks. To establish this defense, [*name of defendant*] must prove that had [*name of plaintiff*] been adequately informed about the risks of the [*insert medical procedure*], [he/she/*nonbinary pronoun*] would have consented, even if a reasonable person in [*name of plaintiff*]'s position might not have consented.

New September 2003; Revised June 2015, May 2020

Directions for Use

Give this instruction if the defendant asserts as an affirmative defense that the plaintiff would have consented (and thereby would have suffered the same harm) had the plaintiff been informed of the risks. This instruction can be modified to cover "informed refusal" cases by redrafting it to state, in substance, that even if the plaintiff had known of the risks of refusal, the plaintiff still would have refused the test.

Sources and Authority

- "Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1].)
- "The patient-plaintiff may testify on this subject but the issue extends beyond his credibility. Since at the time of trial the uncommunicated hazard has materialized, it would be surprising if the patient-plaintiff did not claim that had he been informed of the dangers he would have declined treatment. Subjectively he may believe so, with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment. Thus an objective test is preferable: i.e., what would a prudent person in the patient's position have decided if adequately informed of all significant perils." (*Cobbs, supra*, 8 Cal.3d at p. 245.)
- "The prudent person test for causation was established to protect defendant physicians from the unfairness of having a jury consider the issue of proximate cause with the benefit of the '20/20 vision of hindsight . . .' This standard should not be employed to prevent a physician from raising the defense that even given adequate disclosure the injured patient would have made the same decision, regardless of whether a reasonably prudent person would have decided differently if adequately informed." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 294 fn. 5 [165 Cal. Rptr. 308, 611 P.2d 902].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 466, 469

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

551. Affirmative Defense—Waiver

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] did not have to inform [***name of patient***] of the risks of the [***insert medical procedure***] because [***name of patient***] asked not to be told of the risks.**

If [*name of defendant***] has proved that [***name of patient***] told [him/her/***nonbinary pronoun***] that [he/she/***nonbinary pronoun***] did not want to be informed of the risks of the [***insert medical procedure***], then you must conclude that [***name of defendant***] was not negligent in failing to inform [***name of patient***] of the risks.**

New September 2003; Revised May 2020

Directions for Use

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1].) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the plaintiff indicated that the plaintiff did not want to be informed of the risks of refusing the test.

Sources and Authority

- "[A] medical doctor need not make disclosure of risks when the patient requests that he not be so informed." (*Cobbs, supra,* 8 Cal.3d at p. 245.)
- This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9 [13 Cal.Rptr.2d 819].)
- In *Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1083–1084 [91 Cal.Rptr. 319], the court held that it was not error for the court to refuse an instruction on informed consent where the evidence showed that the doctor's attempt to explain the medical procedure was prevented by the plaintiff's insistence on remaining ignorant of the risks involved.

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 466, 469

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

552. Affirmative Defense—Simple Procedure

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] did not have to inform [***name of plaintiff***] of the risks of [a/an] [***insert medical procedure***]. [A/An] [***insert type of medical practitioner***] is not required to tell a patient about the dangers of a simple procedure if it is commonly understood that the dangers are not likely to occur.**

If [*name of defendant***] has proved that [a/an] [***insert medical procedure***] is a simple procedure, and that it is commonly understood that any dangers are not likely to occur, then [***name of defendant***] was not required to inform [***name of plaintiff***] of the risks.**

New September 2003; Revised June 2014

Directions for Use

The court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law. (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1].) This instruction could be modified to cover "informed refusal" cases (see CACI No. 534, *Informed Refusal—Definition*, and CACI No. 535, *Risks of Nontreatment—Essential Factual Elements*) by redrafting it to state, in substance, that the risks of refusing the test were commonly understood to be unlikely to occur.

Sources and Authority

- "[D]isclosure need not be made if the procedure is simple and the danger remote and commonly appreciated to be remote." (*Cobbs, supra*, 8 Cal.3d at p. 245.)
- "[T]here is no physician's duty to discuss the relatively minor risks inherent in common procedures, when it is common knowledge that such risks inherent in the procedure are of very low incidence." (*Cobbs, supra,* 8 Cal.3d at p. 244.)
- "We note that under our law justification is regarded as an affirmative defense and that the defendant normally bears the burden of proof with respect to affirmative defenses." (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9 [13 Cal.Rptr.2d 819].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 466, 469

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical*

Malpractice, § 415.13 (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

553. Affirmative Defense—Emotional State of Patient

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*] did not have to inform [*name of plaintiff*] of the risks of the [*insert medical procedure*]. [A/An] [*insert type of medical practitioner*] does not have to provide information about risks if the information will so seriously upset the patient that the patient will not be able to reasonably consider the risks of refusing to have the medical procedure.

If [*name of defendant*] has proved that [*name of plaintiff*] would have been so seriously upset by being told of the risks that [he/she/*nonbinary pronoun*] would not have been able to reasonably consider the risks of refusing to have the [*insert medical procedure*], then [*name of defendant*] was not required to inform [*name of plaintiff*] of the risks.

New September 2003

Directions for Use

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1].) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the information regarding the risks of refusing the test would have seriously upset the patient.

Sources and Authority

- "A disclosure need not be made beyond that required within the medical community when a doctor can prove by a preponderance of the evidence he relied upon facts which would demonstrate to a reasonable man the disclosure would have so seriously upset the patient that the patient would not have been able to dispassionately weigh the risks of refusing to undergo the recommended treatment." (*Cobbs, supra,* 8 Cal.3d at p. 246.)
- This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9 [13 Cal.Rptr.2d 819].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 466, 469

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons* (Matthew

Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

554. Affirmative Defense—Emergency

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] did not have to obtain [***name of patient/authorized person***]'s informed consent to the [***insert medical procedure***] because an emergency existed. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] reasonably believed the [***insert medical procedure***] had to be done immediately in order to preserve the life or health of [***name of patient***]; and**
2. **That [***insert one or more of the following:***]**

   [[*name of patient***] was unconscious] [or]**

   [there was not enough time to inform [*name of patient***]] [or]**

   [there was not enough time to get consent from an authorized person].

New September 2003

Directions for Use

"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1].) This instruction could be modified to cover "informed refusal" cases by redrafting it to state, in substance, that the emergency situation made it impossible to inform the patient regarding the risks of refusing the test.

Sources and Authority

- When Consent Not Required. Business and Professions Code sections 2397(a) (doctor), 1627.7(a) (dentist).
- Consent is implied in an emergency situation. (*Cobbs, supra,* 8 Cal.3d at p. 243.)
- This defense is considered a "justification." Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 347, fn. 9 [13 Cal.Rptr.2d 819].)
- The existence of an emergency situation can also be a defense to battery. (*Wheeler v. Barker* (1949) 92 Cal.App.2d 776, 781 [208 P.2d 68]; *Preston v. Hubbell* (1948) 87 Cal.App.2d 53, 57–58 [196 P.2d 113]; *Hundley v. St. Francis Hospital* (1958) 161 Cal.App.2d 800, 802 [327 P.2d 131].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 470

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.15

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.14, 31.62 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13[7] (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.38 (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

555. Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit (Code Civ. Proc., § 340.5)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that before [***insert date one year before date of filing***], [***name of plaintiff***] discovered, or knew of facts that would have caused a reasonable person to suspect, that [he/she/***nonbinary pronoun***] had suffered harm that was caused by someone's wrongful conduct.**

[If, however, [*name of plaintiff***] proves [***insert tolling provision(s) of general applicability, e.g., Code Civ. Proc., §§ 351 [absence from California], 352 [insanity], 352.1 [prisoners], 352.5 [restitution orders], 353.1 [court's assumption of attorney's practice], 354 [war], 356 [injunction]***], the period within which [***name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] was absent from California***].]**

New April 2009; Revised May 2020

Directions for Use

Use CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*, if the three-year limitation provision is at issue.

If the notice of intent to sue required by Code of Civil Procedure section 364 is served within 90 days of the date on which the statute of limitations will run, the statute of limitations is tolled for 90 days beyond the end of the limitations period. (See Code Civ. Proc., § 364; *Woods v. Young* (1991) 53 Cal.3d 315, 325–326 [279 Cal.Rptr. 613, 807 P.2d 455].) Adjust the "date one year before the date of filing" in the instruction accordingly. If there is an issue of fact with regard to compliance with the requirements of section 364, the instruction may need to be modified accordingly.

Give the optional last paragraph if there is a question of fact concerning a tolling provision from the Code of Civil Procedure. If so, the verdict form should ask the jury to find (1) the "discovery" date (the date on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that the person had suffered harm that was caused by someone's wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Contrary to the otherwise applicable rule (see CACI No. 455, *Statute of Limitations—Delayed Discovery*), the defendant has been given the burden of proving that the plaintiff discovered or should have discovered the facts alleged to constitute the defendant's wrongdoing more than one year before filing the action.

(See *Samuels v. Mix* (1999) 22 Cal.4th 1, 8–10 [91 Cal.Rptr.2d 273, 989 P.2d 701] [construing structurally similar Code Civ. Proc., § 340.6, on legal malpractice, to place burden regarding delayed discovery on the defendant and disapproving *Burgon v. Kaiser Foundation Hospitals* (1979) 93 Cal.App.3d 813 [155 Cal.Rptr. 763], which had reached the opposite result under Code Civ. Proc., § 340.5].) See also CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*.

Sources and Authority

- Statutes of Limitation for Medical Malpractice. Code of Civil Procedure section 340.5.
- Notice of Intent to Commence Action. Code of Civil Procedure section 364(a).
- 90-Day Extension of Limitation Period. Code of Civil Procedure section 364(d).
- "The one-year limitation period of section 340.5 is a codification of the discovery rule, under which a cause of action accrues when the plaintiff is aware, or reasonably should be aware, of 'injury,' a term of art which means 'both the negligent cause and the damaging effect of the alleged wrongful act.' " (*Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 290 [170 Cal.Rptr.3d 125].)
- "When a plaintiff has information which would put a reasonable person on inquiry, when a plaintiff's "reasonably founded suspicions [have been] aroused" and the plaintiff has "become alerted to the necessity for investigation and pursuit of her remedies," the one-year period commences. "Possession of 'presumptive' as well as 'actual' knowledge will commence the running of the statute." ' " (*Dolan v. Borelli* (1993) 13 Cal.App.4th 816, 823 [16 Cal.Rptr.2d 714], internal citations omitted.)
- "[W]hen the plaintiff in a medical malpractice action alleges the defendant health care provider misdiagnosed or failed to diagnose a preexisting disease or condition, there is no injury for purposes of section 340.5 until the plaintiff first experiences appreciable harm as a result of the misdiagnosis, which is when the plaintiff first becomes aware that a preexisting disease or condition has developed into a more serious one." (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1183–1184 [209 Cal.Rtpr.3d 332].)
- "Injury from the failure to diagnose a latent, progressive condition occurs 'when the undiagnosed condition develops into a more serious condition,' and that more serious condition is made manifest by an appreciable increase or alteration in symptoms. A patient's concerns or suspicions about a diagnosis do not trigger the statute of limitations when no more serious condition is manifest and no lack of diligence is shown." (*Filosa v. Alagappan* (2020) 59 Cal.App.5th 772, 781 [273 Cal.Rptr.3d 731], internal citations omitted.)
- "The fact that [plaintiff] contemplated suing [defendants] is strong evidence that [plaintiff] suspected the doctors had not properly diagnosed or treated his headaches. Even with the presence of such suspicions, however, the one-year and three-year limitations periods did not begin to run until [plaintiff] discovered

his injury—that is, became aware of additional, appreciable harm from his preexisting condition—and, with respect to the one-year limitations period, also had reason to believe that injury was caused by the wrongdoing of [defendants]." (*Drexler, supra*, 4 Cal.App.5th at p. 1190, internal citation omitted.)

- "We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does not require us to expand that sentence beyond its language." (*Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [Code Civ. Proc., § 352.1, which tolls statutes of limitation for prisoners, applies to extend one-year period of Code Civ. Proc., § 340.5].)
- "The implications of *Belton's* analysis for our case here is inescapable. Like tolling the statute of limitations for confined prisoners under section 352.1, tolling under section 351 for a defendant's absence from California is of general applicability [and therefore extends the one-year period of Code of Civil Procedure section 340.5]. (For other general tolling provisions, see § 352 [minors or insanity]; § 352.5 [restitution orders]; § 353.1 [court's assumption of attorney's practice]; § 354 [war]; § 356 [injunction].)" (*Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, 643 [75 Cal.Rptr.3d 861].)
- "[A] plaintiff's minority as such does not toll the limitations period of section 340.5. When the Legislature added the separate statute of limitations for minors to section 340.5 in 1975, it clearly intended that the general provision for tolling of statutes of limitation during a person's minority (§ 352, subd. (a)(1)) should no longer apply to medical malpractice actions." (*Steketee v. Lintz* (1985) 38 Cal.3d 46, 53 [210 Cal.Rptr 781, 694 P.2d 1153], internal citations omitted.)
- "Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first 'discovers' the injury *and the negligent cause* of that injury. Secondly, she must file within three years after she first experiences harm from the injury. This means that if a plaintiff does not 'discover' the negligent cause of her injury until more than three years after she first experiences harm from the injury, she will not be able to bring a malpractice action against the medical practitioner or hospital whose malpractice caused her injury." (*Ashworth v. Memorial Hospital* (1988) 206 Cal.App.3d 1046, 1054 [254 Cal.Rptr. 104], original italics.)
- "That legislative purpose [re: Code Civ. Proc., § 364] is best effectuated by construing section 364(d) as tolling the one-year statute of limitations when section 364(a)'s ninety-day notice of intent to sue is served during, but not before, the last ninety days of the one-year limitations period. Because the statute of limitations is tolled for 90 days and not merely extended by 90 days from the date of service of the notice, this construction results in a period of 1 year and 90 days in which to file the lawsuit. In providing for a waiting period of at least 90 days before suit can be brought, this construction achieves the

legislative objective of encouraging negotiated resolutions of disputes." (*Woods, supra*, 53 Cal.3d at p. 325.)

- "[I]f the act or omission that led to the plaintiff's injuries was negligence in the maintenance of equipment that, under the prevailing standard of care, was reasonably required to treat or accommodate a physical or mental condition of the patient, the plaintiff's claim is one of professional negligence under section 340.5. But section 340.5 does not extend to negligence in the maintenance of equipment and premises that are merely convenient for, or incidental to, the provision of medical care to a patient." (*Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 88 [201 Cal.Rptr.3d 449, 369 P.3d 229]; see *Johnson v. Open Door Community Health Centers* (2017) 15 Cal.App.5th 153, 157–162 [222 Cal.Rptr.3d 839] [tripping over scale does not involve provision of medical care].)
- "[W]hile MICRA is not limited to suits by patients, it 'applies only to actions alleging injury suffered as a result of negligence in . . . the provision of medical care to patients.' Driving to an accident victim is not the same as providing medical care to the victim. A paramedic's exercise of due care while driving is not 'necessary or otherwise integrally related to the medical treatment and diagnosis of the patient", at least when the patient is not in the vehicle.' " (*Aldana v. Stillwagon* (2016) 2 Cal.App.5th 1, 8 [205 Cal.Rptr.3d 719], internal citations omitted.)

Secondary Sources

Haning et al., California Practice Guide: Personal Injury, Ch. 5-B, *When To Sue—Statute Of Limitations*, ¶ 5:109 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.26, 9.67–9.72

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Professionals*, § 31.60 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.47 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.45 et seq. (Matthew Bender)

McDonald, California Medical Malpractice: Law and Practice, §§ 7:1–7:7 (Thomson Reuters)

556. Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit (Code Civ. Proc., § 340.5)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s alleged injury occurred before [***insert date three years before date of filing***].**

[If, however, [*name of plaintiff***] proves**

[*Choose one or more of the following options:***]**

[that [he/she/*nonbinary pronoun***/it] did not discover the alleged wrongful act or omission because [***name of defendant***] acted fraudulently[,/; or]]**

[that [*name of defendant***] intentionally concealed facts constituting the wrongful act or omission[,/; or]]**

[that the alleged wrongful act or omission involved the presence of an object that had no therapeutic or diagnostic purpose or effect in [*name of plaintiff***]'s body[,/;]]**

the period within which [*name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] intentionally concealed the facts***].]**

New April 2009; Revised November 2017

Directions for Use

Use CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit*, if the one-year limitation provision is at issue.

If no tolling provision from Code of Civil Procedure section 340.5 is at issue, read only the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the date on which the alleged injury occurred; (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the date of injury and determine whether the action is timely.

If the notice of intent to sue required by Code of Civil Procedure section 364 is served within 90 days of the date on which the statute of limitations will run, the statute of limitations is tolled for 90 days beyond the end of the limitation period. (See Code Civ. Proc., § 364; *Russell v. Stanford Univ. Hospital* (1997) 15 Cal.4th 783, 789–790 [64 Cal.Rptr.2d 97, 937 P.2d 640].) If there is an issue of fact with regard to compliance with the requirements of section 364, the instruction may need to be modified accordingly.

If the claim involves a diagnosis error, the cause of action accrues when the plaintiff

first experiences "appreciable harm" as a result of the defendant's diagnosis error. Appreciable harm occurs when the plaintiff first becomes aware, or reasonably should have become aware, that a preexisting disease or condition has developed into a more serious one. (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1183–1184, 1194 [209 Cal.Rptr.3d 332].) When this has occurred is a question of fact for the jury unless the facts are undisputed. (*Id.* at p. 1197.) Appreciable harm determines when the injury occurred to complete the cause of action; it is not a question of delayed discovery. Therefore, appreciable harm is required to trigger the three-year limitation period of Code of Civil Procedure section 340.5. (*Steingart v. White* (1988) 198 Cal.App.3d 406, 414–417 [243 Cal.Rptr. 678].)

Sources and Authority

- Three-Year Limitation Period for Medical Malpractice. Code of Civil Procedure section 340.5.
- "No tolling provision outside of MICRA can extend the three-year maximum time period that section 340.5 establishes." (*Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 931 [86 Cal.Rptr.2d 107, 978 P.2d 591]; see also *Fogarty v. Superior Court* (1981) 117 Cal.App.3d 316, 319–321 [172 Cal.Rptr. 594] [Code Civ. Proc., § 352 does not toll statute for insanity].)
- "The three-year limitations period of section 340.5 provides an outer limit which terminates all malpractice liability and it commences to run when the patient is aware of the physical manifestation of her injury without regard to awareness of the negligent cause." (*Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 760 [199 Cal.Rptr. 816].)
- "The fact that [plaintiff] contemplated suing [defendants] is strong evidence that [plaintiff] suspected the doctors had not properly diagnosed or treated his headaches. Even with the presence of such suspicions, however, the one-year and three-year limitations periods did not begin to run until [plaintiff] discovered his injury—that is, became aware of additional, appreciable harm from his preexisting condition—and, with respect to the one-year limitations period, also had reason to believe that injury was caused by the wrongdoing of [defendants]." (*Drexler, supra*, 4 Cal.App.5th at p. 1190, internal citation omitted.)
- "Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first 'discovers' the injury *and the negligent cause* of that injury. Secondly, she must file within three years after she first experiences harm from the injury. This means that if a plaintiff does not 'discover' the negligent cause of her injury until more than three years after she first experiences harm from the injury, she will not be able to bring a malpractice action against the medical practitioner or hospital whose malpractice caused her injury." (*Ashworth v. Memorial Hospital* (1988) 206 Cal.App.3d 1046, 1054 [254 Cal.Rptr. 104], original italics.)
- "The same considerations of legislative intent that compelled us, in [*Woods v. Young* (1991) 53 Cal.3d 315, 325–326 [279 Cal.Rptr. 613, 807 P.2d 455]], to

construe Code of Civil Procedure section 364, subdivision (d), as 'tolling' the one-year limitations period also apply to the three-year limitation. Unless the limitations period is so construed, the legislative purpose of reducing the cost and increasing the efficiency of medical malpractice litigation by, among other things, encouraging negotiated resolution of disputes will be frustrated. Moreover, a plaintiff's attorney who gives notice within the last 90 days of the 3-year limitations period will confront the dilemma we addressed in *Woods*, i.e., a choice between preserving the plaintiff's cause of action by violating the 90-day notice period under Code of Civil Procedure section 364, subdivision (d)—thereby invoking potential disciplinary proceedings by the State Bar—and forfeiting the client's cause of action. In the absence of tolling, the practical effect of the statute would be to shorten the statutory limitations period from three years to two years and nine months. As in the case of the one-year limitation, we discern no legislative intent to do so." (*Russell, supra*, 15 Cal.4th at pp. 789–790.)

- "[T]he 'no therapeutic or diagnostic purpose or effect' qualification in section 340.5 means the foreign body exception does not apply to objects and substances intended to be permanently implanted, but items temporarily placed in the body as part of a procedure and meant to be removed at a later time do come within it." (*Maher v. County of Alameda* (2014) 223 Cal.App.4th 1340, 1352 [168 Cal.Rptr.3d 56].)
- "[I]f the act or omission that led to the plaintiff's injuries was negligence in the maintenance of equipment that, under the prevailing standard of care, was reasonably required to treat or accommodate a physical or mental condition of the patient, the plaintiff's claim is one of professional negligence under section 340.5. But section 340.5 does not extend to negligence in the maintenance of equipment and premises that are merely convenient for, or incidental to, the provision of medical care to a patient." (*Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 88 [201 Cal.Rptr.3d 449, 369 P.3d 229]; see *Johnson v. Open Door Community Health Centers* (2017) 15 Cal.App.5th 153, 157–162 [222 Cal.Rptr.3d 839] [tripping over scale does not involve provision of medical care].)
- "[W]hile MICRA is not limited to suits by patients, it 'applies only to actions alleging injury suffered as a result of negligence in . . . the provision of medical care to patients.' Driving to an accident victim is not the same as providing medical care to the victim. A paramedic's exercise of due care while driving is not 'necessary or otherwise integrally related to the medical treatment and diagnosis of the patient", at least when the patient is not in the vehicle.. . .' " (*Aldana v. Stillwagon* (2016) 2 Cal.App.5th 1, 8 [205 Cal.Rptr.3d 719], internal citations omitted.)
- "[W]hen the plaintiff in a medical malpractice action alleges the defendant health care provider misdiagnosed or failed to diagnose a preexisting disease or condition, there is no injury for purposes of section 340.5 until the plaintiff first experiences appreciable harm as a result of the misdiagnosis, which is when the

plaintiff first becomes aware that a preexisting disease or condition has developed into a more serious one." (*Drexler, supra,* 4 Cal.App.5th 1183–1184.)

- "Applying the well-settled definition of injury set forth in the cases cited *ante* to the facts here, it must be concluded [plaintiff] suffered no damaging affect or appreciable harm from [defendant]'s asserted neglect until [doctor] discovered her cancer in April 1985. Her complaint was therefore timely with respect to the three-year limit." (*Steingart, supra,* 198 Cal.App.3d at p. 414.)

Secondary Sources

Haning et al., California Practice Guide: Personal Injury, Ch. 1-B, *First Steps in Handling a Personal Injury Case—Initial Evaluation of Case: Decision to Accept or Reject Employment or Undertake Further Evaluation of Claim*, ¶ 1:67.1 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.26, 9.67–9.72

4 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Professionals*, § 31.60 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.47 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.45 et seq. (Matthew Bender)

McDonald, California Medical Malpractice: Law and Practice, §§ 7:1–7:7 (Thomson Reuters)

557–599. Reserved for Future Use

VF-500. Medical Negligence

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] negligent in the diagnosis or treatment of [*name of plaintiff*]?**

   _____ Yes _____ No

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

2. **Was [*name of defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

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

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

   Total Future Economic Damages: $_____]

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

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

   TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 500, *Medical Negligence—Essential Factual Elements.*

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

If specificity is not required, users do not have to itemize all the damages listed in question 3. The breakdown is optional depending on the circumstances.

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

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

VF-501. Medical Negligence—Informed Consent—Affirmative Defense—Plaintiff Would Have Consented Even If Informed

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] perform a [***insert medical procedure***] on [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

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

2. **Did [***name of plaintiff***] give [his/her/***nonbinary pronoun***] informed consent for the [***insert medical procedure***]?**

   _____ **Yes** _____ **No**

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

3. **Would a reasonable person in [***name of plaintiff***]'s position have refused the [***insert medical procedure***] if that person had been adequately informed of the possible results and risks of [and alternatives to] the [***insert medical procedure***]?**

   _____ **Yes** _____ **No**

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

4. **Would [***name of plaintiff***] have consented to the [***insert medical procedure***] even if [he/she/***nonbinary pronoun***] had been given adequate information about the risks of the [***insert medical procedure***]?**

   _____ **Yes** _____ **No**

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

5. **Was [***name of plaintiff***] harmed as a consequence of a result or risk that [***name of defendant***] should have explained before the [***insert medical procedure***] was performed?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you

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

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

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2015, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 533, *Failure to Obtain Informed Consent—Essential Factual Elements,* and CACI No. 550, *Affirmative Defense—Plaintiff Would Have Consented.*

The special verdict forms in this section are intended only as models. They may

need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

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

If the affirmative defense, which is contained in question 4, is not an issue in the case, question 4 should be omitted and the remaining questions renumbered accordingly.

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

VF-502. Medical Negligence—Informed Consent—Affirmative Defense—Emergency

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] perform a [***insert medical procedure***] on [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

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

2. **Did [***name of plaintiff***] give [his/her/***nonbinary pronoun***] informed consent to the [***insert medical procedure***]?**

   _____ **Yes** _____ **No**

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

3. **Would a reasonable person in [***name of plaintiff***]'s position have refused the [***insert medical procedure***] if that person had been fully informed of the possible results and risks of [and alternatives to] the [***insert medical procedure***]?**

   _____ **Yes** _____ **No**

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

4. **Was [***name of plaintiff***] harmed as a consequence of a result or risk that [***name of defendant***] should have explained before the [***insert medical procedure***] was performed?**

   _____ **Yes** _____ **No**

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

5. **Did [***name of defendant***] reasonably believe the [***insert medical procedure***] had to be done immediately in order to preserve the life or health of [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is no, then answer question 7. If you answered yes to this question, answer question 6.

6. Was [*name of plaintiff*] unconscious?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, October 2008, December 2010, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 533, *Failure to Obtain Informed*

Consent—Essential Factual Elements, and CACI No. 554, *Affirmative Defense—Emergency.*

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

Depending on the facts, alternative language may be substituted for question 6 as in item 2 of CACI No. 554. If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

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

If the affirmative defense, which is contained in questions 5 and 6, is not an issue in the case, then questions 5 and 6 should be omitted and the remaining questions renumbered accordingly.

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

VF-503–VF-599. Reserved for Future Use

PROFESSIONAL NEGLIGENCE

600. Standard of Care

[A/An] [*insert type of professional***] is negligent if [he/she/***nonbinary pronoun***] fails to use the skill and care that a reasonably careful [***insert type of professional***] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."**

[You must determine the level of skill and care that a reasonably careful [*insert type of professional***] would use in similar circumstances based only on the testimony of the expert witnesses[, including [***name of defendant***],] who have testified in this case.]**

New September 2003; Revised October 2004, December 2007, May 2020

Directions for Use

Use this instruction for all professional negligence cases other than professional medical negligence, for which CACI No. 501, *Standard of Care for Health Care Professionals*, should be used. See CACI No. 400, *Negligence—Essential Factual Elements*, for an instruction on the plaintiff's burden of proof. The word "legal" or "professional" should be added before the word "negligence" in the first paragraph of CACI No. 400. (See *Sources and Authority* following CACI No. 500, *Medical Negligence—Essential Factual Elements*.)

Read the second paragraph if the standard of care must be established by expert testimony.

See CACI Nos. 219–221 on evaluating the credibility of expert witnesses.

If the defendant is a specialist in a field, this instruction should be modified to reflect that the defendant is held to the standard of care of a specialist. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810 [121 Cal.Rptr. 194].) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id.* at pp. 810–811.)

Whether an attorney-client relationship exists is a question of law. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 [20 Cal.Rptr.2d 756].) If the evidence bearing upon this decision is in conflict, preliminary factual determinations are necessary. (*Ibid.*) Special instructions may need to be crafted for that purpose.

Sources and Authority

- "The elements of a cause of action in tort for professional negligence are (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's

negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433].)

- "Plaintiffs' argument that CACI No. 600 altered their burden of proof is misguided in that it assumes that a 'professional' standard of care is inherently different than the standard in ordinary negligence cases. It is not. 'With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional "circumstances' relevant to an overall assessment of what constitutes "ordinary prudence" in a particular situation.' 'Since the standard of care remains constant in terms of "ordinary prudence," it is clear that denominating a cause of action as one for "professional negligence" does not transmute its underlying character. For substantive purposes, it merely serves to establish the basis by which "ordinary prudence" will be calculated and the defendant's conduct evaluated.' " (*LAOSD Asbestos Cases* (2016) 5 Cal.App.5th 1022, 1050 [211 Cal.Rptr.3d 261], internal citation omitted.)
- " 'In addressing breach of duty, "the crucial inquiry is whether [the attorney's] advice was so legally deficient when it was given that he [or she] may be found to have failed to use 'such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.' . . ." . . .' " (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 [89 Cal.Rptr.3d 710].)
- "[A]n attorney's duty to exercise the skill and care that a reasonably careful attorney would use in similar circumstances extends to prelitigation investigation and evaluation of a client's potential claims. ' "When one suspects that another has caused harm, a preliminary investigation is usually necessary in order to know whether one has a potential legal claim, evaluate the likelihood of success, and *decide whether or not to assert it*. Consequently, the investigation of a potential claim is normally and reasonably part of effective litigation, if not an essential part of it." ' With the duty to investigate comes an attorney's duty to evaluate and advise clients of the risks of contemplated litigation." (*Mireskandari v. Edwards Wildman Palmer LLP* (2022) 77 Cal.App.5th 247, 260 [292 Cal.Rptr.3d 410], internal citations omitted.)
- "[I]f the allegedly negligent conduct does not cause damage, it generates no cause of action in tort." (*Moua v. Pittullo, Howington, Barker, Abernathy, LLP* (2014) 228 Cal.App.4th 107, 112–113 [174 Cal.Rptr.3d 662].)
- "[T]he issue of negligence in a legal malpractice case is ordinarily an issue of fact." (*Blanks, supra*, 171 Cal.App.4th at p. 376.)
- " '[T]he requirement that the plaintiff prove causation should not be confused with the method or means of doing so. Phrases such as "trial within a trial," "case within a case," . . . and "better deal" scenario describe methods of proving causation, not the causation requirement itself or the test for determining whether causation has been established.' " (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1091 [236 Cal.Rptr.3d 473].)

- "Plaintiffs argue that 'laying pipe is not a "profession." ' However, case law, statutes, and secondary sources suggest that the scope of those held to a 'professional' standard of care—a standard of care similar to others in their profession, as opposed to that of a 'reasonable person'—is broad enough to encompass a wide range of specialized skills. As a general matter, '[t]hose undertaking to render expert services in the practice of a profession or trade are required to have and apply the skill, knowledge and competence ordinarily possessed by their fellow practitioners under similar circumstances, and failure to do so subjects them to liability for negligence.' " (*LAOSD Asbestos Cases, supra*, 5 Cal.App.5th at p. 1050.)
- "It is well settled that an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900 [218 Cal.Rptr. 313, 705 P.2d 886].)
- "[A] lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." (*Wright, supra*, 47 Cal.App.3d at p. 810.)
- "To establish a [professional] malpractice claim, a plaintiff is required to present expert testimony establishing the appropriate standard of care in the relevant community. 'Standard of care " 'is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations] . . . .' " [Citation.]' " (*Quigley v. McClellan* (2013) 214 Cal.App.4th 1276, 1283 [154 Cal.Rptr.3d 719], internal citations omitted.)
- "California law does not require an expert witness to prove professional malpractice in all circumstances. 'In professional malpractice cases, expert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care [citation], except in cases where the negligence is obvious to laymen.' " (*Ryan v. Real Estate of the Pacific, Inc.* (2019) 32 Cal.App.5th 637, 644–645 [244 Cal.Rptr.3d 129].)
- "Where . . . the malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against him is related to his expertise as such, then only a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met." (*Wright, supra*, 47 Cal.App.3d at pp. 810–811, footnote and internal citations omitted.)
- "The standard is that of members of the profession 'in the same or a similar locality under similar circumstances' . . . . The duty encompasses both a knowledge of law and an obligation of diligent research and informed judgment." (*Wright, supra*, 47 Cal.App.3d at p. 809, internal citations omitted; but see *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470–471 [71 Cal.Rptr.3d 707] [geographical location may be a factor to be considered, but by itself, does not provide a practical basis for measuring similar circumstances].)

- Failing to Act Competently. Rules of Professional Conduct, rule 3-110.

Secondary Sources

1 Witkin, California Procedure (6th ed. 2021) Attorneys, §§ 307

4 Witkin, California Procedure (6th ed. 2021) Pleadings, § 598

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1066–1070, 1124, 1125–1126, 1128–1131

Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 1-A, *Sources Of Regulation Of Practice Of Law In California-Overview*, ¶ 1:39 (The Rutter Group)

Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 6-E, *Professional Liability*, ¶¶ 6:230–6:234 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.31 (Matthew Bender)

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, §§ 30.12, 30.13, Ch. 32, *Liability of Attorneys*, §§ 32.11, 32.13 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.50, 76.51, 76.53 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, §§ 380.50, 380.51 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.20 et seq. (Matthew Bender)

601. Legal Malpractice—Causation

To recover damages from [*name of defendant***], [***name of plaintiff***] must prove that [he/she/***nonbinary pronoun***/it] would have obtained a better result if [***name of defendant***] had acted as a reasonably careful attorney. [***Name of plaintiff***] was not harmed by [***name of defendant***]'s conduct if the same harm would have occurred anyway without that conduct.**

New September 2003; Revised June 2015, May 2020, December 2022

Directions for Use

In cases involving professionals other than attorneys, this instruction would need to be modified by inserting the type of the professional in place of "attorney." (See, e.g., *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 829–830 [60 Cal.Rptr.2d 780] [trial-within-a-trial method was applied to accountants].)

The plaintiff must prove that *but for* the attorney's negligent acts or omissions, the plaintiff would have obtained a more favorable result. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244 [135 Cal.Rptr.2d 629, 70 P.3d 1046].) The second sentence expresses this "but for" standard.

Sources and Authority

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 749–750 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
- "In the legal malpractice context, the elements of causation and damage are particularly closely linked." (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1582 [171 Cal.Rptr.3d 23].)
- "In a client's action against an attorney for legal malpractice, the client must prove, among other things, that the attorney's negligent acts or omissions caused the client to suffer some financial harm or loss. When the alleged malpractice occurred in the performance of transactional work (giving advice or preparing documents for a business transaction), must the client prove this causation element according to the 'but for' test, meaning that the harm or loss would not have occurred without the attorney's malpractice? The answer is yes." (*Viner, supra*, 30 Cal.4th at p. 1235.)
- "[The trial-within-a-trial method] is the most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit damages to those actually *caused* by a professional's malfeasance." (*Mattco Forge Inc., supra*, 52 Cal.App.4th at p. 834.)

- " 'Damage to be subject to a proper award must be such as follows the act complained of *as a legal certainty* . . . .' Conversely, ' " '[t]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages.' " ' " (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 165–166 [149 Cal.Rptr.3d 422], original italics, footnote and internal citations omitted.)
- "One who establishes malpractice on the part of his or her attorney *in prosecuting a lawsuit* must also prove that careful management of it would have resulted in a favorable judgment and collection thereof, as there is no damage in the absence of these latter elements." (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1506–1507 [33 Cal.Rptr.2d 219], original italics.)
- "[W]hen an attorney breaches the duty of care by failing to advise the client of reasonably foreseeable risks of litigation before a complaint is filed, the client need not prove the subsequently filed litigation would have been successful to establish the causation element of his professional negligence claim. Rather, the client can demonstrate he 'would have obtained a more favorable result', by proving that, but for the attorney's negligence, he would not have pursued the litigation and thus would not have incurred the damages attributable to the foreseeable risks that the attorney negligently failed to disclose. In other words, to answer the 'crucial causation inquiry' articulated in *Viner*—'what would have happened if the defendant attorney had not been negligent'—the client may respond with evidence showing he would not have filed the litigation in the first place and he would have been better off as a result." (*Mireskandari v. Edwards Wildman Palmer LLP* (2022) 77 Cal.App.5th 247, 262 [292 Cal.Rptr.3d 410], internal citations omitted.)
- " 'The element of collectibility requires a showing of the debtor's solvency. "['W]here a claim is alleged to have been lost by an attorney's negligence, . . . to recover more than nominal damages it must be shown that it was a valid subsisting debt, *and that the debtor was solvent*.' [Citation.]" The loss of a collectible judgment "by definition means the lost opportunity to collect a money judgment from a solvent [defendant] and is certainly legally sufficient evidence of actual damage." ' " (*Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1190 [164 Cal.Rptr.3d 54], original italics, internal citations omitted.)
- "Collectibility is part of the plaintiff's case, and a component of the causation and damages showing, rather than an affirmative defense which the Attorney Defendants must demonstrate." (*Wise, supra*, 220 Cal.App.4th at p. 1191.)
- "Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine." (*Arciniega v. Bank of San Bernardino* (1997) 52 Cal.App.4th 213, 231 [60 Cal.Rptr.2d 495].)
- "Where the attorney's negligence does not result in a total loss of the client's claim, the measure of damages is the difference between what was recovered and

what would have been recovered but for the attorney's wrongful act or omission. [¶] Thus, in a legal malpractice action, if a reasonably competent attorney would have obtained a $3 million recovery for the client but the negligent attorney obtained only a $2 million recovery, the client's damage due to the attorney's negligence would be $1 million—the difference between what a competent attorney would have obtained and what the negligent attorney obtained." (*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1758 [30 Cal.Rptr.2d 217].)

- "[A] plaintiff who alleges an inadequate settlement in the underlying action must prove that, if not for the malpractice, she would *certainly* have received more money in settlement or at trial. [¶] The requirement that a plaintiff need prove damages to 'a legal certainty' is difficult to meet in any case. It is particularly so in 'settle and sue' cases . . . ." (*Filbin*, *supra*, 211 Cal.App.4th at p. 166, original italics, internal citation omitted.)
- "[W]e conclude the applicable standard of proof for the elements of causation and damages in a 'settle and sue' legal malpractice action is the preponderance of the evidence standard. First, use of the preponderance of the evidence standard of proof is appropriate because it is the 'default standard of proof in civil cases' and use of a higher standard of proof 'occurs only when interests " 'more substantial than mere loss of money' " are at stake.' " (*Masellis v. Law Office of Leslie F. Jensen* (2020) 50 Cal.App.5th 1077, 1092 [264 Cal.Rptr.3d 621].)
- "In a legal malpractice action, causation is an issue of fact for the jury to decide except in those cases where reasonable minds cannot differ; in those cases, the trial court may decide the issue itself as a matter of law." (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)
- "For purposes of determining whether a more favorable outcome would have been obtained, the object of the exercise is not to ' "recreate what a particular judge or fact finder would have done. Rather, the [finder of fact's] task is to determine what a reasonable judge or fact finder would have done . . . ." ' " (*O'Shea v. Lindenberg* (2021) 64 Cal.App.5th 228, 236 [278 Cal.Rptr.3d 654].)
- "If the underlying issue originally was a factual question that would have gone to a tribunal rather than a judge, it is the jury who must decide what a reasonable tribunal would have done. The identity or expertise of the original trier of fact (i.e., a judge or an arbitrator or another type of adjudicator) does not alter the jury's responsibility in the legal malpractice trial-within-a-trial." (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357–358 [89 Cal.Rptr.3d 710].)

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, §§ 330–331, 333

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-E, *Professional Liability*, ¶ 6:322 (The Rutter Group)

3 Neil M. Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.30 (Matthew Bender, Rev. Ed.)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.70 et seq. (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.20 et seq. (Matthew Bender)

602. Success Not Required

[A/An] [*insert type of professional***] is not necessarily negligent just because [his/her/***nonbinary pronoun***] efforts are unsuccessful or [he/she/***nonbinary pronoun***] makes an error that was reasonable under the circumstances. [A/An] [***insert type of professional***] is negligent only if [he/she/***nonbinary pronoun***] was not as skillful, knowledgeable, or careful as another reasonable [***insert type of professional***] would have been in similar circumstances.**

New September 2003; Revised December 2007

Directions for Use

Use this instruction for all professional negligence cases other than professional medical negligence, for which CACI No. 505, *Success Not Required*, should be used.

Sources and Authority

- "The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance." (*Gagne v. Bertran* (1954) 43 Cal.2d 481, 489 [275 P.2d 15].)
- "This rule [of *Gagne v. Bertran, supra*] has been consistently followed in this state with respect to professional services (*Roberts v. Karr*, 178 Cal.App.2d 535 [3 Cal.Rptr. 98] (surveyor); *Gautier v. General Telephone Co.*, 234 Cal.App.2d 302 [44 Cal.Rptr. 404] (communications services); *Bonadiman-McCain, Inc. v. Snow*, 183 Cal.App.2d 58 [6 Cal.Rptr. 52] (engineer); *Lindner v. Barlow, Davis & Wood*, 210 Cal.App.2d 660 [27 Cal.Rptr. 101] (accountant); *Pancoast v. Russell*, 148 Cal.App.2d 909 [307 P.2d 719] (architect))." (*Allied Properties v. John A. Blume & Associates* (1972) 25 Cal.App.3d 848, 856 [102 Cal.Rptr. 259].)
- "The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers." (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591 [15 Cal.Rptr. 821, 364 P.2d 685], cert. denied (1962) 368 U.S. 987 [82 S.Ct. 603, 7 L.Ed.2d 525], internal citations omitted.)
- Jury instructions stating this principle are proper: "[A]n attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable

for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." (*Smith v. Lewis* (1975) 13 Cal.3d 349, 358 [118 Cal.Rptr. 621, 530 P.2d 589], overruled in part on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851 [126 Cal.Rptr. 633, 544 P.2d 561].)

- "In order to prevail on this theory and escape a negligence finding, an attorney must show that there were unsettled or debatable areas of the law that were the subject of the legal advice rendered and this advice was based upon 'reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.' " (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 378–379 [89 Cal.Rptr.3d 710].)

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, §§ 326–329

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-E, *Professional Liability*, ¶ 6:234 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, §§ 32.11, 32.62 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.50 (Matthew Bender)

1 California Legal Forms, Ch. 1A, *Role of Counsel in Starting a New Business*, §§ 1A.30–1A.32 (Matthew Bender)

603. Alternative Legal Decisions or Strategies

An attorney is not necessarily negligent just because the attorney [chooses one legal strategy/makes a decision/makes a recommendation] and it turns out that another [strategy/decision/recommendation] would have been a better choice.

New September 2003; Revised May 2020

Sources and Authority

- "We recognize, of course, that an attorney engaging in litigation may have occasion to choose among various alternative strategies available to his client . . . ." (*Smith v. Lewis* (1975) 13 Cal.3d 349, 359 [118 Cal.Rptr. 621, 530 P.2d 589], overruled in part on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851 [126 Cal.Rptr. 633, 544 P.2d 561].)
- " 'In view of the complexity of the law and the circumstances which call for difficult choices among possible courses of action, the attorney cannot be held legally responsible for an honest and reasonable mistake of law or an unfortunate selection of remedy *or other procedural step*.' [Citation.]" (*Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, 613 [116 Cal.Rptr. 919].)

Secondary Sources

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.11 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability* (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice* (Matthew Bender)

604. Referral to Legal Specialist

If a reasonably careful attorney in a similar situation would have referred [*name of plaintiff*] to a legal specialist, then [*name of defendant*] was negligent if [he/she/*nonbinary pronoun*] did not do so.

However, if [*name of defendant*] handled the matter with as much skill and care as a reasonable legal specialist would have, then [*name of defendant*] was not negligent.

New September 2003

Sources and Authority

- This type of an instruction was approved for use in legal malpractice cases in *Horne v. Peckham* (1979) 97 Cal.App.3d 404, 414–415 [158 Cal.Rptr. 714], disapproved on other grounds in *ITT Small Business Finance Corp. v. Niles* (1994) 9 Cal.4th 245, 256 [36 Cal.Rptr.2d 552, 885 P.2d 965].
- Failing to Act Competently. Rule of Professional Conduct: Rule 3-110(C).

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, § 294

605. Reserved for Future Use

606. Legal Malpractice Causing Criminal Conviction—Actual Innocence

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[*Name of plaintiff*] alleges that [*name of defendant*] was negligent in defending [him/her/*nonbinary pronoun*] in a criminal case, and as a result, [he/she/*nonbinary pronoun*] was wrongly convicted. To establish this claim, [*name of plaintiff*] must first prove that [he/she/*nonbinary pronoun*] was actually innocent of the charges for which [he/she/*nonbinary pronoun*] was convicted.

New April 2009

Directions for Use

Give this instruction after CACI No. 400, *Negligence—Essential Factual Elements,* and CACI No. 600, *Standard of Care,* in a legal malpractice action arising from an underlying criminal case.

To prove actual innocence, the plaintiff must first prove legal exoneration. (See *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201 [108 Cal.Rptr.2d 471, 25 P.3d 670].) Presumably, exoneration will be decided by the court as a matter of law. If there is a question of fact regarding exoneration, this instruction should be modified accordingly.

However, one may be exonerated without actually being innocent of the charges; for example, by the People's decision not to retry the case on remand because of insufficient evidence. (See *Coscia, supra,* 25 Cal.4th at p. 1205 [exoneration is *prerequisite* to proving actual innocence (emphasis added)].) Do not give this instruction if the court determines as a matter of law that the exoneration does establish actual innocence; for example, if later-discovered DNA evidence conclusively proved that the plaintiff could not have committed the offense.

Sources and Authority

- Statute of Limitations: Factual Innocence. Code of Civil Procedure section 340.6(a).
- "In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. In a legal malpractice case arising out of a criminal proceeding, California, like most jurisdictions, also requires proof of actual innocence." (*Wilkinson v. Zelen* (2008) 167 Cal.App.4th 37, 45 [83 Cal.Rptr.3d 779], internal citations omitted.)
- "[T]hose policy considerations [underlying the actual-innocence requirement] are

as follows. 'First, we should not permit a guilty defendant to profit from his or her own wrong. [Citation.] Second, to allow guilty defendants to shift their punishment to their former attorneys would undermine the criminal justice system. [Citation.] Third, "a defendant's own criminal act remains the ultimate source of his predicament irrespective of counsel's subsequent negligence." [Citation.] Fourth, a guilty defendant who is convicted or given a longer sentence as a result of counsel's incompetence can obtain postconviction relief on that basis; in contrast, "a civil matter lost through an attorney's negligence is lost forever." [Citation.] Fifth, there are formidable practical problems with criminal malpractice litigation, including the difficulty of quantifying damages and the complexity of the standard of proof, which must combine the preponderance of the evidence standard with the reasonable doubt standard applicable in a criminal trial. [Citation.]' " (*Khodayari v. Mashburn* (2011) 200 Cal.App.4th 1184, 1193 [132 Cal.Rptr.3d 903].)

- "If the defendant has in fact committed a crime, the remedy of a new trial or other relief is sufficient reparation in light of the countervailing public policies and considering the purpose and function of constitutional guaranties." *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 543 [79 Cal.Rptr.2d 672, 966 P.2d 983].)
- "The question of actual innocence is inherently factual. While proof of the government's inability to prove guilt may involve technical defenses and evidentiary rules, proof of actual innocence obliges the malpractice plaintiff 'to convince the civil jurors of his innocence.' Thus, the determination of actual innocence is rooted in the goal of reliable factfinding." (*Salisbury v. County of Orange* (2005) 131 Cal.App.4th 756, 764–765 [31 Cal.Rptr.3d 831], internal citations omitted.)
- "[A]n individual convicted of a criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action. . . . [P]ublic policy considerations require that only an innocent person wrongly convicted be deemed to have suffered a legally compensable harm. Unless a person convicted of a criminal offense is successful in obtaining postconviction relief, the policies reviewed in *Wiley* [*supra*] preclude recovery in a legal malpractice action." (*Coscia, supra,* 25 Cal.4th at p. 1201.)
- "[A] plaintiff must obtain postconviction relief in the form of a final disposition of the underlying criminal case—for example, by acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the People's refusal to continue the prosecution, or a grant of habeas corpus relief—as a prerequisite to proving actual innocence in a malpractice action against former criminal defense counsel." (*Coscia, supra,* 25 Cal.4th at p. 1205.)
- "[T]he rationale of *Wiley* and *Coscia* requires a plaintiff in a criminal legal malpractice case to show actual innocence and postconviction exoneration on any guilty finding for a lesser included offense, even though the plaintiff alleges he received negligent representation only on the greater offense." (*Sangha v.*

LaBarbera (2006) 146 Cal.App.4th 79, 87 [52 Cal.Rptr.3d 640].)

- "[Plaintiff] must be exonerated of all transactionally related offenses in order to satisfy the holding in *Coscia*. Because the judicially noticed facts unequivocally demonstrate that [plaintiff] plead no contest to two offenses transactionally related to the felony charge of battery on a custodial officer in order to settle the criminal action, and she was placed on probation for those offenses, she cannot in good faith plead exoneration." (*Wilkinson, supra,* 167 Cal.App.4th at p. 48.)

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, § 290

Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 6-H, *Professional Competence In Criminal Cases*, ¶¶ 6:935–6:944 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.02 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.10, 76.381 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.32 (Matthew Bender)

607–609. Reserved for Future Use

610. Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit (Code Civ. Proc., § 340.6)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that before [***insert date one year before date of filing***] [***name of plaintiff***] knew, or with reasonable diligence should have discovered, the facts of [***name of defendant***]'s alleged wrongful act or omission.**

[If, however, [*name of plaintiff***] proves**

[*Choose one or more of the following three options:***]**

[that [he/she/*nonbinary pronoun***/it] did not sustain actual injury until on or after [***insert date one year before date of filing***][,/; or]]**

[that on or after [*insert date one year before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred[,/; or]]**

[that on or after [*insert date one year before date of filing***] [he/she/***nonbinary pronoun***/it] was under a legal or physical disability that restricted [his/her/***nonbinary pronoun***/its] ability to file a lawsuit[,/;]]**

the period within which [*name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] continued to represent [name of plaintiff]***].]**

New April 2007; Revised April 2009, May 2020

Directions for Use

Use CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*, if the four-year limitation provision is at issue.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the "discovery" date (the date on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that the person had suffered harm that was caused by someone's wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Sources and Authority

- Statute of Limitation for Attorney Malpractice. Code of Civil Procedure section 340.6.
- Persons Under Disabilities. Code of Civil Procedure section 352.
- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
- "Summary judgment was proper under section 340.6, subdivision (a)'s one-year limitations period only if the undisputed facts compel the conclusion that [plaintiff] was on inquiry notice of his claim more than one year before the complaint was filed. Inquiry notice exist where 'the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them.' ' "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." [Citation.]' " (*Genisman v. Carley* (2018) 29 Cal.App.5th 45, 50–51 [239 Cal.Rptr.3d 780], internal citation omitted.)
- " ' "[S]ubjective suspicion is not required. If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation." [Citation.]' " (*Genisman, supra,* 29 Cal.App.5th at p. 51.)
- "For purposes of section 340.6, 'actual injury occurs when the plaintiff sustains any loss or injury legally cognizable as damages in a legal malpractice action based on the acts or omissions that the plaintiff alleged.' While 'nominal damages will not end the tolling of section 340.6's limitations period,' it is 'the fact of damage, rather than the amount, [that] is the critical factor.' " (*Genisman, supra,* 29 Cal.App.5th at p. 52, internal citation omitted.)
- "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences." (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)
- " '[S]ection 340.6, subdivision (a)(1), will not toll the limitations period once the client can plead damages that could establish a cause of action for legal

malpractice.' '[T]he limitations period is not tolled after the plaintiff sustains actual injury [even] if the injury is, in some sense, remediable. [Citation.] Furthermore, the statutory scheme does not depend on the plaintiff's recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.' On the other hand, 'the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence' because the plaintiff cannot allege actual injury resulted from an attorney's malpractice." (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1148 [144 Cal.Rptr.3d 180], internal citations omitted.)

- "[A]ctual injury exists even if the client has yet to 'sustain[] all, or even the greater part, of the damages occasioned by his attorney's negligence'; even if the client will encounter 'difficulty in proving damages'; and even if that damage might be mitigated or entirely eliminated in the future. [¶] However, 'actual injury' does not include 'speculative and contingent injuries . . . that do not yet exist . . . .' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 [190 Cal.Rptr.3d 90], internal citations omitted.)
- "[B]ecause 'determining actual injury is predominately a factual inquiry' to the extent a question remains on this point, the matter is properly resolved by the trier of fact . . . ." (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 576 [125 Cal.Rptr.3d 120].)
- "[W]here, as here, the 'material facts are undisputed, the trial court can resolve the matter [of actual injury] as a question of law in conformity with summary judgment principles.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra*, 238 Cal.App.4th at pp. 1037–1038.)
- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)
- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)
- "[D]efendant, if he is to avail himself of the statute's one-year-from-discovery limitation defense, has the burden of proving, under the 'traditional allocation of the burden of proof' that plaintiff discovered or should have discovered the facts alleged to constitute defendant's wrongdoing more than one year prior to filing this action." (*Samuels, supra*, 22 Cal.4th at pp. 8–9, internal citations omitted.)
- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the

wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)

- "We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action." (*Neel, supra*, 6 Cal.3d at p. 194.)
- " '[W]here there is a professional relationship, the degree of diligence in ferreting out the negligence for the purpose of the statute of limitations is diminished. [Citation.]' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 315 [166 Cal.Rptr.3d 116].)
- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)
- "A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same 'specific subject matter.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra*, 238 Cal.App.4th at p. 1038.)
- "The continuous representation tolling provision in section 340.6, subdivision (a)(2) 'was adopted in order to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired." ' " (*Kelly v. Orr* (2016) 243 Cal.App.4th 940, 950 [196 Cal.Rptr.3d 901].)
- "The mere existence of an attorney-client relationship does not trigger the continuous representation rule: 'Instead, the statute's tolling language addresses a particular phase of such a relationship-representation regarding a *specific subject matter*. Moreover, the limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff. Therefore, "[t]he *inquiry is not whether an attorney-client relationship still exists but when the representation of the specific matter terminated.*" ' Tolling does not apply where there is a continuing relationship between the attorney and client 'involving only unrelated matters.' " (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1064 [109 Cal.Rptr.3d 392], original italics, internal citations omitted.)
- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire

partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)

- " '[W]hen an attorney leaves a firm and takes a client with him or her, . . . the tolling in ongoing matters [does not] continue for claims against the former firm and partners.' " (*Stueve Bros. Farms, LLC, supra*, 222 Cal.App.4th at p. 314.)
- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)
- "[A]n attorney may withdraw from representation within the meaning of the statute, 'even absent a client's consent.' Such withdrawal 'does not depend on whether the attorney has formally withdrawn from representation, such as by securing a court order granting permission to withdraw.' ' " '[I]n the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. [Citations.] That may occur upon the attorney's express notification to the client that the attorney will perform no further services.' " ' " (*Wang v. Nesse* (2022) 81 Cal.App.5th 428, 440 [297 Cal.Rptr.3d 149], internal citations omitted.)
- "[T]he continuous representation tolling provision in section 340.6, subdivision (a)(2), applies to toll legal malpractice claims brought by successor trustees against attorneys who represented the predecessor trustee." (*Kelly, supra*, 243 Cal.App.4th at p. 951.)
- "[A]bsent a statutory standard to determine when an attorney's representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of . . . section 340.6, subdivision (a)(2), in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends *when the client actually has or reasonably should have no expectation that the attorney will provide further legal services.* . . . That may occur upon the attorney's express

notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude*, a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no reasonable expectation that the attorney will provide further legal services*, however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end. To this extent and for these reasons, *we conclude that continuous representation should be viewed objectively from the client's perspective* . . . ." (*Laclette v. Galindo* (2010) 184 Cal.App.4th 919, 928 [109 Cal.Rptr.3d 660], original italics.)

- "Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship." (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248 [208 Cal.Rptr.3d 428], original italics.)
- "Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [applying rule to one-year limitation period]; cf. *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [substantially similar language in Code Civ. Proc., § 340.5, applicable to medical malpractice, construed to apply only to three-year limitation period].)
- "[T]he fourth tolling provision of section 340.6, subdivision (a)—that is, the provision applicable to legal and physical disabilities—encompasses the circumstances set forth in section 351 [exception, where defendant is out of the state]." (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 569 [107 Cal.Rptr.3d 539].)
- "[A] would-be plaintiff is 'imprisoned on a criminal charge' within the meaning of section 352.1 if he or she is serving a term of imprisonment in the state prison." (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 597 [230 Cal.Rptr.3d 528].)
- "In light of the Legislature's intent that section 340.6(a) cover more than claims for legal malpractice, the term 'professional services' is best understood to include nonlegal services governed by an attorney's professional obligations." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].)
- "For purposes of section 340.6(a), the question is not simply whether a claim

alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation." (*Lee, supra*, 61 Cal.4th at p. 1238.)

- "*Lee* held that 'section 340.6(a)'s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. In this context, a "professional obligation" is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct.' " (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 292 [211 Cal.Rptr.3d 372].)
- "In sum, consistent with *Lee*, section 340.6(a) applies to malicious prosecution claims against attorneys who performed professional services in the underlying litigation." (*Connelly v. Bornstein* (2019) 33 Cal.App.5th 783, 799 [245 Cal.Rptr.3d 452].)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, §§ 679–702

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150[3] (Matthew Bender)

611. Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit (Code Civ. Proc., § 340.6)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [his/her/***nonbinary pronoun***/its] alleged wrongful act or omission occurred before [***insert date four years before date of filing***].**

[If, however, [*name of plaintiff***] proves**

[*Choose one or more of the following four options:***]**

[that [he/she/*nonbinary pronoun***/it] did not sustain actual injury until on or after [***insert date four years before date of filing***]][,/; or]]**

[that on or after [*insert date four years before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred[,/; or]]**

[that on or after [*insert date four years before date of filing***] [***name of defendant***] knowingly concealed the facts constituting the wrongful act or omission[,/; or]]**

[that on or after [*insert date four years before date of filing***] [he/she/***nonbinary pronoun***/it] was under a legal or physical disability that restricted [his/her/***nonbinary pronoun***/its] ability to file a lawsuit[,/;]]**

the period within which [*name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] knowingly concealed the facts***].]**

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, if the one-year limitation provision is at issue.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the date on which the alleged wrongful act or omission occurred; (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the date on which the alleged wrongful act or omission occurred and determine whether the action is timely.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

Sources and Authority

- Statute of Limitation for Attorney Malpractice. Code of Civil Procedure section 340.6.
- Persons Under Disabilities. Code of Civil Procedure section 352.
- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
- "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences. The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor." (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)
- " '[S]ection 340.6, subdivision (a)(1), will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice.' '[T]he limitations period is not tolled after the plaintiff sustains actual injury [even] if the injury is, in some sense, remediable. [Citation.] Furthermore, the statutory scheme does not depend on the plaintiff's recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.' On the other hand, 'the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence' because the plaintiff cannot allege actual injury resulted from an attorney's malpractice." (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1148 [144 Cal.Rptr.3d 180], internal citations omitted.)
- "[A]ctual injury exists even if the client has yet to 'sustain[] all, or even the greater part, of the damages occasioned by his attorney's negligence'; even if the client will encounter 'difficulty in proving damages'; and even if that damage might be mitigated or entirely eliminated in the future. [¶] However, 'actual injury' does not include 'speculative and contingent injuries . . . that do not yet exist . . . .' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 [190 Cal.Rptr.3d 90], internal citations omitted.)
- "[B]ecause 'determining actual injury is predominately a factual inquiry' to the extent a question remains on this point, the matter is properly resolved by the trier of fact . . . ." (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 576 [125 Cal.Rptr.3d 120].)

- "[W]here, as here, the 'material facts are undisputed, the trial court can resolve the matter [of actual injury] as a question of law in conformity with summary judgment principles.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra*, 238 Cal.App.4th at pp. 1037–1038.)
- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 598 fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)
- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)
- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)
- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)
- "A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same 'specific subject matter.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra*, 238 Cal.App.4th at p. 1038.)
- "The continuous representation tolling provision in section 340.6, subdivision (a)(2) 'was adopted in order to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired." ' " (*Kelly v. Orr* (2016) 243 Cal.App.4th 940, 950 [196 Cal.Rptr.3d 901].)
- "The mere existence of an attorney-client relationship does not trigger the continuous representation rule: 'Instead, the statute's tolling language addresses a particular phase of such a relationship-representation regarding a *specific subject matter*. Moreover, the limitations period is not tolled when an attorney's

subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff. Therefore, "[t]he *inquiry is not whether an attorney-client relationship still exists but when the representation of the specific matter terminated*." ' Tolling does not apply where there is a continuing relationship between the attorney and client 'involving only unrelated matters.' " (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1064 [109 Cal.Rptr.3d 392], original italics, internal citations omitted.)

- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)
- " '[W]hen an attorney leaves a firm and takes a client with him or her, . . . the tolling in ongoing matters [does not] continue for claims against the former firm and partners.' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 314 [166 Cal.Rptr.3d 116].)
- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)
- "[T]he continuous representation tolling provision in section 340.6, subdivision (a)(2), applies to toll legal malpractice claims brought by successor trustees against attorneys who represented the predecessor trustee." (*Kelly, supra*, 243 Cal.App.4th at p. 951.)
- "[A]bsent a statutory standard to determine when an attorney's representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of . . . section 340.6, subdivision (a)(2), in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends *when the client actually has or reasonably should have no expectation that the attorney will provide further legal services*. . . . That may occur upon the attorney's express

notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude*, a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no reasonable expectation that the attorney will provide further legal services*, however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end. To this extent and for these reasons, *we conclude that continuous representation should be viewed objectively from the client's perspective* . . . ." (*Laclette v. Galindo* (2010) 184 Cal.App.4th 919, 928 [109 Cal.Rptr.3d 660], original italics.)

- "Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship." (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248 [208 Cal.Rptr.3d 428], original italics.)
- "[T]he fourth tolling provision of section 340.6, subdivision (a)—that is, the provision applicable to legal and physical disabilities—encompasses the circumstances set forth in section 351 [exception, where defendant is out of the state]." (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 569 [107 Cal.Rptr.3d 539].)
- "[A] would-be plaintiff is 'imprisoned on a criminal charge' within the meaning of section 352.1 if he or she is serving a term of imprisonment in the state prison." (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 597 [230 Cal.Rptr.3d 528].)
- "In light of the Legislature's intent that section 340.6(a) cover more than claims for legal malpractice, the term 'professional services' is best understood to include nonlegal services governed by an attorney's professional obligations." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].)
- "For purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation." (*Lee, supra*, 61 Cal.4th at p. 1238.)
- "*Lee* held that 'section 340.6(a)'s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. In this context, a "professional obligation" is an obligation that an attorney has by virtue of being an attorney,

such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct.' " (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 292 [211 Cal.Rptr.3d 372].)

- "In sum, consistent with *Lee*, section 340.6(a) applies to malicious prosecution claims against attorneys who performed professional services in the underlying litigation." (*Connelly v. Bornstein* (2019) 33 Cal.App.5th 783, 799 [245 Cal.Rptr.3d 452].)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, §§ 679–702

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150[3] (Matthew Bender)

612–699. Reserved for Future Use

MOTOR VEHICLES AND HIGHWAY SAFETY

700. Basic Standard of Care

A person must use reasonable care in driving a vehicle. Drivers must keep a lookout for pedestrians, obstacles, and other vehicles. They must also control the speed and movement of their vehicles. The failure to use reasonable care in driving a vehicle is negligence.

New September 2003

Directions for Use

This instruction states the common-law standard of reasonable care in driving. It applies to negligent conduct that is not covered by provisions of the Vehicle Code: "Aside from the mandate of the statute, the driver of a motor vehicle is bound to use reasonable care to anticipate the presence on the streets of other persons having equal rights with himself to be there." (*Zarzana v. Neve Drug Co.* (1919) 180 Cal. 32, 37 [179 P. 203].)

The instructions in this series should be used in conjunction with instructions on the elements of negligence contained in the negligence series.

Sources and Authority

- The common-law duty supplements statutory driving regulations: "[A driver is] under a duty, both by statute and common law, to operate his vehicle without negligence so as to abstain from injuring any other person or his property." (*Bewley v. Riggs* (1968) 262 Cal.App.2d 188, 194 [68 Cal.Rptr. 520].)
- The standard of care is that of a reasonably careful person under the circumstances: "[The driver] was required to act as a reasonably prudent person under the same or similar circumstances . . . ." (*Watkins v. Ohman* (1967) 251 Cal.App.2d 501, 502–503 [59 Cal.Rptr. 709].)
- " 'The degree of care required in watching the movements of a particular machine depends upon the facts and circumstances existing at the time and place of the accident' and a driver is required to use that degree of care, only, which would be required of a reasonably prudent driver under similar circumstances." (*Whitford v. Pacific Gas and Electric Co.* (1955) 136 Cal.App.2d 697, 702 [289 P.2d 278], internal citations omitted.)
- The common-law requirement goes to the issues of lookout and control. Regardless of whether a driver was complying with the speed limit, "[he was] still bound to anticipate that he might meet persons at any point of the street and in order to avoid a charge of negligence he was bound to use ordinary care and to keep an ordinarily careful lookout for such persons and keep his machine under such control as would enable him to avoid a collision." (*Boccalero v. Wadleigh* (1931) 113 Cal.App. 376, 379 [298 P. 526], internal citation omitted.)
- "The operator of a vehicle must keep a proper lookout for other vehicles or

persons on the highway and must keep his car under such control as will enable him to avoid a collision; failure to keep such a lookout constitutes negligence." (*Downing v. Barrett Mobile Home Transport, Inc.* (1974) 38 Cal.App.3d 519, 524 [113 Cal.Rptr. 277].)

- On the lookout requirement, one court observed: "The driver of an automobile is bound to use reasonable care to anticipate the presence on the highway of others who have equal right to be there and the fact that his vision is temporarily interfered with, either by the glaring sun or headlights, does not relieve him from that duty." (*Hill v. Peres* (1934) 136 Cal.App. 132, 137 [28 P.2d 946], internal citations omitted.)
- On the control requirement, one court observed: "Cases in which the problem has been presented adhere to the view that a driver must at all times exercise ordinary care to avoid a collision including swerving or altering his course, in addition to applying his brakes, if that would be a reasonable means of avoiding the collision." (*Guyton v. City of Los Angeles* (1959) 174 Cal.App.2d 354, 362 [344 P.2d 910].)
- "The age of a minor who operates a motor vehicle will not excuse him from liability for driving it in a negligent manner, and he will be required to meet the standard established primarily for adults." (*Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 732 [47 Cal.Rptr. 904, 408 P.2d 360].)
- Drivers with mental disabilities are required to exercise the ordinary care required of an adult without such disability. (*Fox v. City and County of San Francisco* (1975) 47 Cal.App.3d 164, 173 [120 Cal.Rptr. 779].)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.1–4.5

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.01 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.10 (Matthew Bender)

California Civil Practice: Torts § 25:22 (Thomson Reuters)

701. Definition of Right-of-Way

When the law requires a [driver/pedestrian] to "yield the right-of-way" to [another/a] [vehicle/pedestrian], this means that the [driver/pedestrian] must let the [other] [vehicle/pedestrian] go first.

Even if someone has the right-of-way, that person must use reasonable care to avoid an accident.

New September 2003

Directions for Use

This instruction should be given following a reading of the appropriate Vehicle Code section.

If the case involves a statutory right-of-way, the jury could also be given instructions on negligence per se, if applicable.

Sources and Authority

- "Right of Way" Defined. Vehicle Code section 525.
- Intersection Right of Way. Vehicle Code section 21800.
- Left Turn Right of Way. Vehicle Code section 21801.
- Approaching Entrance to Intersection. Vehicle Code section 21802.
- Intersection Controlled by Yield Right-of-Way Sign. Vehicle Code section 21803.
- Entry Onto Highway. Vehicle Code section 21804.
- Equestrian Crossings. Vehicle Code section 21805.
- Authorized Emergency Vehicles. Vehicle Code section 21806.
- "Right of way rules have been described as simply establishing 'a practical basis for necessary courtesy on the highway.' " (*Eagar v. McDonnell Douglas Corp.* (1973) 32 Cal.App.3d 116, 122 [107 Cal.Rptr. 819].)
- "[A] driver entering a public highway from private property who collides with a vehicle traveling on the public road is not necessarily liable for a violation of [Vehicle Code] section 21804. Rather, the driver violates this section only if he or she fails to act as a ' "reasonably prudent and cautious [person]." ' Whether the driver failed to so act is a question of fact for the trier of fact to decide." (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 266 [155 Cal.Rptr.3d 306], internal citation omitted.)
- "Of course, even if [defendant] had the right of way, he had a duty to exercise reasonable care to avoid an accident, and the jury was so instructed." (*Eagar, supra,* 32 Cal.App.3d. at p. 123, fn. 3, internal citation omitted.)
- "Where a car has actually entered an intersection before the other approaches it,

the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision. He has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision." (*Minnegren v. Nozar* (2016) 4 Cal.App.5th 500, 508 [208 Cal.Rptr.3d 655].)

- "When, as here, each motorist has acted reasonably and the pedestrian has failed to exercise due care for her own safety, the law of this state does not permit the technical violation of the pedestrian's right of way statute to impose negligence on the motorists as a matter of law. The statute creates a preferential, but not absolute, right in favor of the pedestrian who is still under a duty to exercise ordinary care." (*Byrne v. City and County of San Francisco* (1980) 113 Cal.App.3d 731, 742 [170 Cal.Rptr. 302].)
- " 'Even where a right of way is given by statute, if conditions so require it to avoid injury to others, the right of way must be yielded.' " (*Bove v. Beckman* (1965) 236 Cal.App.2d 555, 563 [46 Cal.Rptr. 164], internal citation omitted.)
- "Although such a driver may have the right-of-way, he is not absolved of the duty to exercise ordinary care; may not proceed blindly in disregard of an obvious danger; and must be watchful of the direction in which danger is most likely to be apprehended." (*Malone v. Perryman* (1964) 226 Cal.App.2d 227, 234 [37 Cal.Rptr. 864].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1010, 1011

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, § 4.15

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.68 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, §§ 82.10, 82.68 (Matthew Bender)

California Civil Practice: Torts § 25:26 (Thomson Reuters)

702. Waiver of Right-of-Way

A [driver/pedestrian] who has the right-of-way may give up that right and let another person go first. If the other person reasonably believes that a [driver/pedestrian] has given up the right-of-way, then the other person may go first.

New September 2003; Revised May 2020, May 2021

Sources and Authority

- "[I]f one who has the right of way 'conducts himself in such a definite manner as to create a reasonable belief in the mind of another person that the right-of-way has been waived, then such other person is entitled to assume that the right of way has been given up to him . . .'." (*Hopkins v. Tye* (1959) 174 Cal.App.2d 431, 433 [344 P.2d 640].)
- "A conscious intentional act of waiver of the right of way by the pedestrian is not required. Whether there is a waiver depends upon the acts of the pedestrian. If they are such that a driver could reasonably believe that the pedestrian did not intend to assert her right of way, a waiver occurs." (*Cohen v. Bay Area Pie Company* (1963) 217 Cal.App.2d 69, 72–73 [31 Cal.Rptr. 426], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1010, 1011

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.15

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.68[1][c] (Matthew Bender)

703. Definition of "Immediate Hazard"

The statute just read to you uses the words "immediate hazard." An immediate hazard exists if the approaching vehicle is so near or is approaching so fast that a reasonably careful person would realize that there is a danger of collision [or accident].

New September 2003

Directions for Use

This instruction is designed to be given as a supplement to the several Vehicle Code provisions that contain the term "immediate hazard." (Veh. Code, §§ 21802 [Approaching intersection entrance], 21803 [Yield right of way], 21804 [Public or private property], 21805 [Equestrian crossings], 21950 [Crosswalks], 21953 [Tunnel or overhead crossing], 21954 [Pedestrian outside crosswalk], 22451 [Train signals].)

Sources and Authority

- "It is to be noted that the legislature has not set a hard and fast rule for the conduct of drivers approaching through highways but has provided the general rule that such drivers must yield the right of way to others traveling on the highway who are approaching so closely as to constitute 'an immediate hazard.' Our complex traffic problems are such that the circumstances of the traffic on a through highway as a driver approaches must govern his conduct in determining whether it is an immediate hazard. Whether a driver acts with due care or negligently in proceeding across a through highway must as a general rule be left to the determination of the jury in view of all the circumstances." (*Wilkinson v. Marcellus* (1952) 51 Cal.App.2d 630, 633 [125 P.2d 584].)
- At least one court has held that the term "immediate hazard" should be defined for the jury if a party so requests. (*Hickenbottom v. Jeppesen* (1956) 144 Cal.App.2d 115, 121 [300 P.2d 689].) However, any error in failing to define the term will be considered harmless if other instructions cover that point: "The words 'immediate hazard' seem reasonably clear in the context in which they appear, both in the statute and in the instruction given; the hazard of a collision." (*Ibid.*)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1010, 1011

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.10–4.11

704. Left Turns (Veh. Code, § 21801)

The statute just read to you uses the word "hazard." A "hazard" exists if any approaching vehicle is so near or is approaching so fast that a reasonably careful person would realize that there is a danger of a collision [or accident].

[A driver who is attempting to make a left turn must make sure that no oncoming vehicles are close enough to be a hazard before the driver proceeds across each lane.]

New September 2003; Revised May 2020

Directions for Use

The bracketed paragraph should be given in appropriate cases involving multiple lanes of oncoming traffic. (*Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 227 [268 Cal.Rptr. 70].)

Sources and Authority

- Duty to Yield Right of Way: Left Turn. Vehicle Code section 21801(a).
- "We hold section 21802, subdivision (a), requires that where, as here, some, but not all, of the oncoming vehicles have yielded their right-of-way to a left-turning driver, that driver has a continuing duty during the turning movement to ascertain, before proceeding across the next open lane(s), if any vehicle is approaching from the opposite direction so close as to constitute a hazard." (*Sesler, supra,* 219 Cal.App.3d at pp. 224–225)
- Noting that in 1957 the Legislature added the phrase "at any time during the turning movement" to this section, the court in *In re Kirk* (1962) 202 Cal.App.2d 288, 291 [20 Cal.Rptr. 787], reasoned that "if the oncoming vehicle in the lane closest to the left turning vehicle surrenders its right of way by indicating to the operator of the left turning vehicle that it desires him to proceed, such operator may not proceed beyond that first lane of traffic, now effectively blocked by the waiving vehicle, if in fact other vehicles approaching in any of the other oncoming lanes will constitute a hazard to the left turning vehicle during the turning movement."

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1010, 1011

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.10–4.11

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.68[2][g] (Matthew Bender)

705. Turning (Veh. Code, § 22107)

A driver must use reasonable care when turning [or moving to the right or to the left].

New September 2003

Directions for Use

An instruction on this point should be given only if the jury is instructed on Vehicle Code section 22107. It should be read after that section has been given. (*Anderson v. Latimer* (1985) 166 Cal.App.3d 667, 672–673 [212 Cal.Rptr. 544].)

Sources and Authority

- Turning and Changing Lanes. Vehicle Code section 22107.
- "This provision does not require the driver to know that a turn can be made with safety but only that he must exercise reasonable care, and whether such care has been exercised is normally a question of fact." (*Butigan v. Yellow Cab Co.* (1958) 49 Cal.2d 652, 656 [320 P.2d 500].)
- Courts have held that a reading of section 22107 should be followed by an instruction clarifying that the driver is under a duty to exercise only as much care as a reasonably prudent person when making a turn or movement: "An instruction to a jury concerning Vehicle Code, section 544 [now 22107] must make it clear that the driver who is about to turn must exercise such care as would a reasonably prudent man under similar circumstances, no more and no less." (*Lewis v. Franklin* (1958) 161 Cal.App.2d 177, 184 [326 P.2d 625].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1014, 1015, 1017

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.10–4.11

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.67 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, §§ 82.66, 82.67 (Matthew Bender)

706. Basic Speed Law (Veh. Code, § 22350)

A person must drive at a reasonable speed. Whether a particular speed is reasonable depends on the circumstances such as traffic, weather, visibility, and road conditions. Drivers must not drive so fast that they create a danger to people or property.

If [*name of plaintiff/defendant***] has proved that [***name of defendant/plaintiff***] was not driving at a reasonable speed at the time of the accident, then [***name of defendant/plaintiff***] was negligent.**

New September 2003; Revised December 2016

Directions for Use

Driving at an unreasonable speed is negligence per se (see *Hert v. Firestone Tire & Rubber Co.* (1935) 4 Cal.App.2d 598, 599 [41 P.2d 369]), which establishes the first element of CACI No. 400, *Negligence—Essential Factual Elements.* Plaintiff must still prove the other two elements of harm and causation. (See CACI No. 430, *Causation: Substantial Factor*.)

Sources and Authority

- Speeding. Vehicle Code section 22350.
- "The so-called basic speed law is primarily a regulation of the conduct of the operators of vehicles. They are bound to know the conditions which dictate the speeds at which they can drive with a reasonable degree of safety. They know, or should know, their cars and their own ability to handle them, and especially their ability to come to a stop at different speeds and under different conditions of the surface of the highway." (*Wilding v. Norton* (1957) 156 Cal.App.2d 374, 379 [319 P.2d 440].)
- "Whether Vehicle Code section 22350 has been violated is a question of fact." (*Leighton v. Dodge* (1965) 236 Cal.App.2d 54, 57 [45 Cal.Rptr. 820], internal citation omitted.)
- "A number of cases have held that it is proper to give an instruction in the terms of this section and to inform the jury that a violation of the statute is negligence." (*Hardin v. San Jose City Lines, Inc.* (1953) 41 Cal.2d 432, 438 [260 P.2d 63].)
- Compliance with the posted speed law does not negate negligence as a matter of law. (*Maxwell v. Colburn* (1980) 105 Cal.App.3d 180, 186 [163 Cal.Rptr. 912].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1009

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.16

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.63[3][a] (Matthew Bender)

707. Speed Limit (Veh. Code, § 22352)

The speed limit where the accident occurred was [*insert number*] miles per hour.

The speed limit is a factor to consider when you decide whether or not [*name of plaintiff/name of defendant*] was negligent. A driver is not necessarily negligent just because the driver was driving faster than the speed limit. However, a driver may be negligent even if the driver was driving at or below the speed limit.

New September 2003; Revised May 2020

Sources and Authority

- Speed Limits. Vehicle Code section 22352.
- Speeding as Negligence. Vehicle Code section 40831.
- A party is entitled to an instruction that the prima facie speed limit is a factor for the jury to consider in making its negligence determination. (*Hardin v. San Jose City Lines, Inc.* (1953) 41 Cal.2d 432, 439 [260 P.2d 63].)
- "The mere driving of an automobile in excess of the speed limit does not show negligence as a matter of law. The jury was free to find [defendant] not guilty of negligence even if they found that he was exceeding the speed limit." (*Williams v. Cole* (1960) 181 Cal.App.2d 70, 74 [5 Cal.Rptr. 24], internal citations omitted.)
- The burden of proving negligence in a civil action is on the party charging negligence, and even if such party has established speed in excess of the applicable prima facie limit the party must establish negligence under the circumstances. (*Faselli v. Southern Pacific Co.* (1957) 150 Cal.App.2d 644, 648 [310 P.2d 698].)
- "Even though the Texaco truck was traveling at a speed less than the maximum specified in the Vehicle Code, the reasonableness of its speed was a question of fact under all the circumstances, and circumstances may make travel at a speed less than the maximum rate a negligent operation of a motor vehicle." (*Scott v. Texaco, Inc.* (1966) 239 Cal.App.2d 431, 436–437 [48 Cal.Rptr. 785], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1009

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.18

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.63[2][c], [4] (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.10 (Matthew Bender)

708. Maximum Speed Limit (Veh. Code, §§ 22349, 22356)

The maximum speed limit where the accident occurred was [*insert number***] miles per hour.**

New September 2003

Directions for Use

An instruction on maximum speed limits could be useful to help frame the issue for the jury. On the other hand, a specific instruction on the maximum speed limits may be unnecessary. In the event that there is sufficient evidence to support an instruction that one of the parties violated the maximum speed limit, the judge could give the negligence per se instructions while reciting the specific code section. In that event, the judge would not give an instruction on the basic speed law. (See *Hargrave v. Winquist* (1982) 134 Cal.App.3d 916 [185 Cal.Rptr. 30].)

Sources and Authority

- General Maximum Speed is 65 Miles Per Hour. Vehicle Code section 22349(a).
- Basic Maximum Speed for Two-Lane Undivided Highways is 55 Miles Per Hour. Vehicle Code section 22349(b).
- Maximum Speed at Selected Locations is 70 Miles Per Hour. Vehicle Code section 22356.
- Driving Too Slowly. Vehicle Code section 22400(a).

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1009

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.17

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.63[2][b], [4][b][iii] (Matthew Bender)

709. Driving Under the Influence (Veh. Code, §§ 23152, 23153)

The statute just read to you uses the term "under the influence." A driver is not necessarily "under the influence" just because the driver has consumed some alcohol [or drugs]. A driver is "under the influence" when the driver has consumed an amount of alcohol [or drugs] that impairs the driver's ability to drive in a reasonably careful manner.

New September 2003; Revised May 2020

Directions for Use

This instruction is designed to supplement a negligence per se instruction on driving under the influence.

The presumption of intoxication based on a 0.08 blood level applies to criminal prosecutions only. There is no statutory or case authority supporting the conclusion that the presumption applies in civil cases. (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 334 [145 Cal.Rptr. 47].)

For a definition of "drug," see Vehicle Code section 312: "The term 'drug' means any substance or combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions."

Sources and Authority

- Driving Under the Influence of Alcohol or Drugs. Vehicle Code sections 23152(a), 23153(a).
- "All of the decided cases on the subject recognize that it is negligence as a matter of law to drive a vehicle upon a public highway while in an intoxicated condition." (*Zamucen v. Crocker* (1957) 149 Cal.App.2d 312, 316 [308 P.2d 384], internal citations omitted.)
- The term "under the influence" was first defined in *People v. Dingle* (1922) 56 Cal.App. 445, 449 [205 P. 705], as follows: "[I]f intoxicating liquor has so far affected the nervous system, brain, or muscles of the driver of an automobile as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions, then such driver is 'under the influence of intoxicating liquor' within the meaning of the statute."
- "One is not necessarily under the influence of intoxicating liquor as the result of taking one or more drinks. The circumstances and effect must be considered; whether or not a person was under the influence of intoxicating liquor at a

certain time is a question of fact for the jury to decide." (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 217 [57 Cal.Rptr. 319].)

- Driving while "under the influence" under Vehicle Code sections 23152 and 23153 is not the same as "being under the influence" of a controlled substance under Health and Safety Code section 11550. Under the Vehicle Code provisions, "the defendant's ability to drive must actually be impaired," while the Health and Safety Code provision is violated as soon as the influence is present "in any detectable manner." (*People v. Enriquez* (1996) 42 Cal.App.4th 661, 665 [49 Cal.Rptr.2d 710].)
- Courts have also distinguished the "under the influence" standard from the "obvious intoxication" standard used in Business and Professions Code section 25602.1. (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 368 [243 Cal.Rptr. 611]: " 'Under the influence' is defined by a person's capability to drive safely, whereas 'obvious intoxication' is defined by a person's appearance.")

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1014, 1015, 1017

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.25

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.02[3][b] (Matthew Bender)

2 California Civil Practice: Torts § 25:28 (Thomson Reuters)

710. Duties of Care for Pedestrians and Drivers in Crosswalk (Veh. Code, § 21950)

A driver of a vehicle must yield the right-of-way to a pedestrian who is crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection. When approaching a pedestrian who is within any marked or unmarked crosswalk, a driver must use reasonable care and must reduce the vehicle's speed or take any other action necessary to ensure the safety of the pedestrian.

Pedestrians must also use reasonable care for their own safety. Pedestrians may not suddenly leave a curb or other place of safety and walk or run into the path of a vehicle that is so close as to constitute an immediate hazard. Pedestrians also must not unnecessarily stop or delay traffic while in a marked or unmarked crosswalk.

The failure of a pedestrian to exercise reasonable care does not relieve a driver of a vehicle from the duty of exercising reasonable care for the safety of any pedestrian within any marked crosswalk or within any unmarked crosswalk at an intersection.

New September 2003; Revised December 2016, May 2020

Directions for Use

This instruction sets forth the respective duties of drivers and pedestrians in a crosswalk. (See Veh. Code, § 21950.) Crosswalk accidents often present a comparative negligence analysis based on the statutory duties of both parties.

Sources and Authority

- Right-of-Way at Crosswalks. Vehicle Code section 21950.
- Vehicles Stopped for Pedestrians at Crosswalks. Vehicle Code section 21951.
- "Driving a motor vehicle may be sufficiently dangerous to warrant special instructions, but it is not so hazardous that it always requires 'extreme caution.' " (*Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 544 [67 Cal.Rptr. 775, 439 P.2d 903], internal citations omitted.)
- "When the pedestrian *suddenly* leaves his place of safety, the vehicle must be so close as to constitute an *immediate hazard*. Such wording [in Veh. Code, § 21950] indicates the statute was intended to apply to those situations where a pedestrian unexpectedly asserts his right-of-way in an intersection at a time when the vehicle is so close that it is virtually impossible to avoid an accident. Typical situations include when a pedestrian steps, jumps, walks or runs directly in front of a vehicle travelling in lanes which are adjacent to the curb or other place of safety occupied by the pedestrian. Under such circumstances, the

vehicle would most certainly constitute an immediate hazard to the pedestrian." (*Spann v. Ballesty* (1969) 276 Cal.App.2d 754, 761 [81 Cal.Rptr. 229], original italics.)

- "It is undisputed that defendant did not yield the right of way to plaintiff. Such failure constitutes a violation of the statute and negligence as a matter of law in the absence of reasonable explanation for defendant's conduct." (*Schmitt v. Henderson* (1969) 1 Cal.3d 460, 463 [82 Cal.Rptr 502, 462 P.2d 30].)
- "When, as here, each motorist has acted reasonably and the pedestrian has failed to exercise due care for her own safety, the law of this state does not permit the technical violation of the pedestrian's right of way statute to impose negligence on the motorists as a matter of law. The statute creates a preferential, but not absolute, right in favor of the pedestrian who is still under a duty to exercise ordinary care." (*Byrne v. City and County of San Francisco* (1980) 113 Cal.App.3d 731, 742 [170 Cal.Rptr. 302], internal citation omitted.)
- "While it is the duty of both the driver of a motor vehicle and a pedestrian, using a public roadway, to exercise ordinary care, that duty does not require necessarily the same amount of caution from each. The driver of a motor vehicle, when ordinarily careful, will be alertly conscious of the fact that he is in charge of a machine capable of projecting into serious consequences any negligence of his own. Thus his caution must be adequate to that responsibility as related to all the surrounding circumstances. A pedestrian, on the other hand, has only his own physical body to manage and with which to set in motion a cause of injury. While, usually, that fact limits his capacity to cause injury, as compared with a vehicle driver, still, in exercising ordinary care, he, too, will be alertly conscious of the mechanical power acting, or that may act, on the public roadway, and of the possible, serious consequences from any conflict between himself and such forces. And the caution required of him is measured by the possibilities of injury apparent to him in the conditions at hand, or that would be apparent to a person of ordinary prudence in the same position." (*Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 75–76, 81 [265 P.2d 513] [proposed jury instruction correctly stated the law].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1012, 1013, 1016

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.72–4.73

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, §§ 20.10–20.12 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.10 (Matthew Bender)

711. The Passenger's Duty of Care for Own Safety

A passenger is not required to be aware of the conditions on the highway and is entitled to expect that a driver will use reasonable care. However, if a passenger becomes aware of [a danger on the highway] [the driver's impairment or failure to use reasonable care], then the passenger must take reasonable steps to protect the passenger's own safety.

New September 2003; Revised May 2020

Sources and Authority

- " 'In the absence of some fact brought to his attention which would cause a person of ordinary prudence to act otherwise, a passenger in an automobile has no duty to observe traffic conditions on the highway, and his mere failure to do so, without more, will not support a finding of contributory negligence. In other words, an automobile passenger's "duty to look" does not arise until some factor of danger comes to his attention, thus charging him as a person of ordinary prudence to take steps for his own safety. . . .' " (*Casey v. Russell* (1982) 138 Cal.App.3d 379, 386–387 [188 Cal.Rptr. 18], internal citations omitted.)
- "Even when negligence of a driver may not be imputed to him, the passenger is bound to exercise ordinary care for his own safety. He may not shut his eyes to an obvious danger; he may not blindly rely on the driver in approaching a place of danger. He is normally bound to protest against actual negligence or recklessness of the driver, the extent of his duty in this regard depending upon the particular circumstances of each case and ordinarily being a question of fact for the jury." (*Pobor v. Western Pacific Railroad Co.* (1961) 55 Cal.2d 314, 324 [11 Cal.Rptr. 106, 359 P.2d 474], internal citations omitted.)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 4.67–4.71

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.03[2][c] (Matthew Bender)

2 California Civil Practice: Torts § 25:29 (Thomson Reuters)

712. Affirmative Defense—Failure to Wear a Seat Belt

[*Name of defendant***] claims that [***name of plaintiff***] was negligent because [he/she/***nonbinary pronoun***] failed to wear a seat belt. To succeed, [***name of defendant***] must prove all of the following:**

1. **That a working seat belt was available;**
2. **That a reasonably careful person in [***name of plaintiff***]'s situation would have used the seat belt;**
3. **That [***name of plaintiff***] failed to wear a seat belt; and**
4. **That [***name of plaintiff***]'s injuries would have been avoided or less severe if [he/she/***nonbinary pronoun***] had used the seat belt.**

[In deciding whether a reasonably careful person would have used a seat belt, you may consider Vehicle Code section 27315, which states: [*insert pertinent provision***].]**

New September 2003; Revised October 2008

Directions for Use

Note that the Motor Vehicle Safety Act (Veh. Code, § 27315) applies only to persons 16 years or older. (Veh. Code, § 27315(d)(1).) No case law regarding whether persons under 16 can be found comparatively negligent for failing to wear a seat belt has been found.

Sources and Authority

- Failure to Wear Seat Belt as Negligence. Vehicle Code section 27315(i).
- "Defendants . . . are required to prove two issues of fact: (1) the defendant must show whether in the exercise of ordinary care the plaintiff should have used the seat belt which was available to him. . . . (2) The defendant must show what the consequence to the plaintiff would have been had seat belts been used." (*Franklin v. Gibson* (1982) 138 Cal.App.3d 340, 343 [188 Cal.Rptr. 23].)
- "Upon a retrial the court or jury will determine whether in the exercise of ordinary care [plaintiff] should have used the seat belt; expert testimony will be required to prove whether [plaintiff] would have been injured, and, if so, the extent of the injuries he would have sustained if he had been using the seat belt . . . ." (*Truman v. Vargas* (1969) 275 Cal.App.2d 976, 983 [80 Cal.Rptr. 373].)
- In *Housley v. Godinez* (1992) 4 Cal.App.4th 737, 747 [6 Cal.Rptr.2d 111], the court approved of the following jury instruction, which was read in addition to section 27315: "The Defendants have raised the seat belt defense in this case. First, you must decide whether in the exercise of ordinary care, the Plaintiff

should have used seat belts, if available to him. Second you must determine with expert testimony the nature of injuries and damages Plaintiff would have sustained if he had used seat belts."

- "[Section 27315] permits the civil trial courts to instruct on the existence of the seat belt statute in appropriate cases, while allowing the jury to decide what weight, if any, to give the statute in determining the standard of reasonable care." (*Housley, supra*, 4 Cal.App.4th at p. 747.)
- "[N]othing in the statute prohibits a jury from knowing and considering its very existence when determining the reasonableness of driving without a seat belt." (*Housley, supra,* 4 Cal.App.4th at p. 744.)
- "There was evidence presented that appellant's failure to wear a seat belt worsened his injuries. The foreseeability test clearly eliminates this act as a supervening cause because it is the general likelihood of the type of injury that must be unforeseeable in order to absolve defendant; the extent of injury need not be foreseeable." (*Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 28 [22 Cal.Rptr.2d 106].)
- "Expert testimony is not always required to prove that failure to use a seat belt may cause at least some, if not all, of plaintiff's claimed injuries. [¶] Depending on the facts of the case, expert testimony may be necessary for the jury to distinguish the injuries that [plaintiff] unavoidably sustained in the collision from the injuries he could have avoided if he had worn a seat belt." (*Lara v. Nevitt* (2004) 123 Cal.App.4th 454, 458–459 [19 Cal.Rptr.3d 865], internal citation omitted.)
- "The seat belt defense does not depend on a Vehicle Code violation nor is it eviscerated by a Vehicle Code exemption from the requirement to wear seat belts." (*Lara, supra,* 123 Cal.App.4th at p. 461 fn. 3.)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.71

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.05[2] (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.10 (Matthew Bender)

California Civil Practice: Torts § 25:26 (Thomson Reuters)

713–719. Reserved for Future Use

720. Motor Vehicle Owner Liability—Permissive Use of Vehicle

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed and that [*name of defendant*] is responsible for the harm because [*name of defendant*] gave [*name of driver*] permission to operate the vehicle. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of driver*] was negligent in operating the vehicle;**
2. **That [*name of defendant*] was an owner of the vehicle at the time of the injury to [*name of plaintiff*]; and**
3. **That [*name of defendant*], by words or conduct, gave permission to [*name of driver*] to use the vehicle.**

In determining whether permission was given, you may consider the relationship between the owner and the operator. [For example, if the parties are related or the owner and the operator are employer and employee, such a relationship may support a finding that there was implied permission to use the vehicle.]

[If the vehicle owner has given a person permission to use the vehicle, and that person authorizes a third person to operate the vehicle, the third person may be considered to have used the vehicle with the permission of the owner.]

New September 2003

Directions for Use

Separate instructions will be necessary regarding the negligence of the driver and that it caused harm to the plaintiff. Read bracketed language if appropriate to the facts. If ownership of the vehicle is uncontested, element 2 may be deleted.

Sources and Authority

- Permissive Use. Vehicle Code section 17150.
- Permissive Use: Limitation on Liability. Vehicle Code section 17151(a).
- The statutory limitation under section 17151(a) "does not apply . . . to a vehicle owner's own common law negligence, as distinguished from the owner's statutory vicarious liability for the operator's negligence." (*Fremont Compensation Insurance Co. v. Hartnett* (1993) 19 Cal.App.4th 669, 675–676 [23 Cal.Rptr.2d 567].)
- "[U]nless the evidence points to one conclusion only, the question of the existence of the requisite permission under [section 17150] is one to be determined by the trier of fact, 'upon the facts and circumstances in evidence and the inferences reasonably to be drawn therefrom.' " (*Peterson v. Grieger,*

Inc. (1961) 57 Cal.2d 43, 51 [17 Cal.Rptr. 828, 367 P.2d 420], internal citations omitted.)

- "[P]ermission cannot be left to speculation or conjecture nor be assumed, but must be affirmatively proved, and the fact of permission is just as important to sustain the imposition of liability as is the fact of ownership." (*Scheff v. Roberts* (1950) 35 Cal.2d 10, 12 [215 P.2d 925], internal citations omitted.)
- "Where the issue of implied permissive use is involved, the general relationship existing between the owner and the operator, is of paramount importance. Where, for example, the parties are related by blood, or marriage, or where the relationship between the owner and the operator is that of principal and agent, weaker direct evidence will support a finding of such use than where the parties are only acquaintances or strangers." (*Elkinton v. California State Automobile Assn., Interstate Insurance Bureau* (1959) 173 Cal.App.2d 338, 344 [343 P.2d 396], internal citations omitted.)
- "There is no doubt that the word 'owner' as used in [the predecessor to Vehicle Code section 17150] for the purpose of creating a liability thereunder, is not synonymous with that word as used in the ordinary sense of referring to a person or persons whose title is good as against all others. Under the Vehicle Code there may be several such 'owners' at any one time. One or more persons may be an 'owner,' and thus liable for the injuries of a third party, even though no such 'owner' possesses all of the normal incidents of ownership." (*Stoddart v. Peirce* (1959) 53 Cal.2d 105, 115 [346 P.2d 774], internal citation omitted.)
- "The question whether the [defendant] was an owner for purposes of imposition of liability for negligence [under Vehicle Code section 17150] was one of fact." (*Campbell v. Security Pacific Nat. Bank* (1976) 62 Cal.App.3d 379, 385 [133 Cal.Rptr. 77].)
- "Strict compliance with Vehicle Code section 5602 [regarding the sale or transfer of a vehicle] is required to enable a transferring owner to escape the liability imposed by section 17150 on account of an accident occurring before notice of the transfer is received by the Motor Vehicle Department." (*Laureano v. Christensen* (1971) 18 Cal.App.3d 515, 520–521 [95 Cal.Rptr. 872].)
- "[T]he true and actual owner of an automobile [is not] relieved from liability by the expedient of registration in the name of another. . . . It is clear that it was the legislative intent to make the actual owners of automobiles liable for the negligence of those to whom permission is given to drive them. According to the allegations of the complaint defendants . . . were in fact the true owners of the car and had control of it, the registration being in the name of defendant [driver] for the purpose of avoiding liability." (*McCalla v. Grosse* (1941) 42 Cal.App.2d 546, 549–550 [109 P.2d 358].)
- "[I]t is a question of fact in cases of co-ownership, as it is in cases of single ownership, whether the operation of an automobile is with or without the consent, express or implied, of an owner who is not personally participating in such operation. The mere fact of co-ownership does not necessarily or

conclusively establish that the common owners have consented to any usage or possession among themselves of a type for which permission is essential." (*Krum v. Malloy* (1943) 22 Cal.2d 132, 136 [137 P.2d 18].)

- "The immunity of the negligent operator under the [Workers' Compensation] Act does not insulate a vehicle owner who is neither the plaintiff's employer nor co-employee from liability under section 17150. [¶] Since the owner's liability does not arise from the status or liability of the operator, the defenses applicable to the operator are not available to the owner." (*Galvis v. Petito* (1993) 13 Cal.App.4th 551, 554 [16 Cal.Rptr.2d 560].)
- "The doctrine of 'negligent entrustment' is clearly distinguishable from the theory of 'vicarious liability.' Negligent entrustment is a common law liability doctrine. Conversely, the obligation of a lending owner of an automobile is one of statutory liability. An owner of an automobile may be independently negligent in entrusting it to an incompetent driver. California is one of several states which recognizes the liability of an automobile owner who has entrusted a car to an incompetent, reckless, or inexperienced driver, and has supplemented the common law doctrine of negligent entrustment by enactment of a specific consent statute." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 538 [55 Cal.Rptr. 741], internal citations omitted.)
- For purposes of liability under the permissive use statute, "[s]ince defendant [car owner] had the opportunity of making such investigation as he deemed necessary to satisfy himself as to the identity of the [renter] to whom he intrusted his automobile, he should not be permitted to escape liability to a third party because of any fraudulent misrepresentation made by the renter of the car to him." (*Tuderios v. Hertz Drivurself Stations, Inc.* (1945) 70 Cal.App.2d 192, 198 [160 P.2d 554].)
- "[T]he provisions of Proposition 51 do not operate to reduce the liability of vehicle owners imposed by Vehicle Code section 17150." (*Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1849 [12 Cal.Rptr.2d 411].)
- "[I]f the evidence shows that an automobile was being driven by an employee of the owner at the time of an accident, the jury may infer that the employee was operating the automobile with the permission of the owner." (*Hicks v. Reis* (1943) 21 Cal.2d 654, 659 [134 P.2d 788], internal quotation marks and citations omitted.)
- "The mere fact that at the time of an accident one is driving an automobile belonging to another is not, of itself, sufficient to establish that the former was driving the car with the permission of the owner." (*Di Rebaylio v. Herndon* (1935) 6 Cal.App.2d 567, 569 [44 P.2d 581].)
- "[I]mplied permission to use an automobile may be found even where the owner and permittee expressly deny that permission was given." (*Anderson v. Wagnon* (1952) 110 Cal.App.2d 362, 366 [242 P.2d 915].)
- "[I]n determining whether there has been an implied permission, it is not

necessary that the owner have prior knowledge that the driver intends to use the car, but it must be 'under circumstances from which consent to use the car is necessarily implied.' " (*Mucci v. Winter* (1951) 103 Cal.App.2d 627, 631 [230 P.2d 22], internal citation omitted.)

- For purposes of statutory vicarious liability, "if the owner entrusts his car to another he invests him with the same authority to select an operator which the owner has in the first instance. . . . [¶] . . . The owner is thus liable for negligent acts by a subpermittee even though the subpermittee operated the owner's vehicle with authorization only from the permittee, since the foundation of the statutory liability is the permission given to another to use an instrumentality which if improperly used is a danger and menace to the public." (*Peterson v. Grieger, Inc.* (1961) 57 Cal.2d 43, 54 [17 Cal.Rptr. 828, 367 P.2d 420], internal quotation marks and citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1416–1421, 1427

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, §§ 4.28–4.32, 4.37

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.20 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, §§ 82.11, 82.16 (Matthew Bender)

California Civil Practice: Torts §§ 25:44–25:45 (Thomson Reuters)

721. Motor Vehicle Owner Liability—Affirmative Defense—Use Beyond Scope of Permission

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[*Name of defendant*] claims that [he/she/*nonbinary pronoun*] is not responsible for [*name of plaintiff*]'s harm because [*name of driver*]'s use of the vehicle exceeded the scope of the permission given. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of defendant*], by words or conduct, gave permission to [*name of driver*] to use the vehicle for a limited time, place, or purpose; and**
2. **That [*name of driver*]'s use of the vehicle substantially violated the time, place, or purpose specified.**

New September 2003

Directions for Use

This instruction is intended for use when the vehicle owner contends that the use of the vehicle exceeded the scope of the permission, thereby terminating the permission.

Sources and Authority

- Permissive Use. Vehicle Code section 17150.
- "[W]here the permission is granted for a limited time, any use after the expiration of the period is without consent, and the owner is not liable, unless the circumstances justify an inference of implied consent to further use. [¶] . . . On principle, there is no fundamental ground of distinction between a limitation of time and one of purpose or place, insofar as permission is concerned; and it would seem clear that a substantial violation of either limitation terminates the original express consent and makes the subsequent use without permission. . . . [¶] . . . [T]he substantial violation of limitations as to locality or purpose of use operate in the same manner as violation of time limitations, absolving the owner from liability." (*Henrietta v. Evans* (1938) 10 Cal.2d 526, 528–529 [75 P.2d 1051], internal citations omitted.)
- "[W]here restrictions by the owner as to time, purpose, or area are involved, the owner's permission is considered terminated only where there has been a substantial violation of such restrictions, and it is a question of fact whether under all the circumstances presented, such restrictions as to time, purpose, or area have been substantially violated prior to the occurrence of the accident so as to vitiate the owner's permission and thus absolve him from the vicarious liability imposed under [the predecessor to section 17150]." (*Peterson v. Grieger, Inc.* (1961) 57 Cal.2d 43, 52 [17 Cal.Rptr. 828, 367 P.2d 420], internal citations omitted.)

- "What is a substantial deviation from a permitted use is a question of fact under the circumstances of each case." (*Garmon v. Sebastian* (1960) 181 Cal.App.2d 254, 260 [5 Cal.Rptr. 101].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1428

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, §§ 4.35–4.36

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.20[5][c] (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.16 (Matthew Bender)

722. Adult's Liability for Minor's Permissive Use of Motor Vehicle

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[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed and that [*name of defendant*] is responsible for the harm because [*name of defendant*] gave [*name of minor*] permission to operate the vehicle. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of minor*] was negligent in operating the vehicle;**
2. **That [*name of plaintiff*] was harmed;**
3. **That [*name of minor*]'s negligence was a substantial factor in causing the harm; and**
4. **That [*name of defendant*], by words or conduct, gave [*name of minor*] permission to use the vehicle.**

New September 2003; Revised April 2004, October 2004

Directions for Use

Under Vehicle Code section 17708, an element of this cause of action is that the defendant must have "custody" of the minor driver. The instruction omits this element because it will most likely be stipulated to or decided by the judge as a matter of law. If there are contested issues of fact regarding this element, this instruction may be augmented to include the specific factual findings necessary to arrive at a determination of custody.

Sources and Authority

- Parental Liability for Minor's Vehicle Operation. Vehicle Code section 17708.
- "[I]t was incumbent upon [plaintiffs], in order to fasten liability upon [the parents] for the minor's negligence, to establish two necessary facts. These facts were, first, that at the time the collision occurred respondents had custody of the minor and, second, that they had given to the minor their permission, either express or implied, to his driving the automobile by the negligent operation of which the injuries were caused." (*Sommers v. Van Der Linden* (1938) 24 Cal.App.2d 375, 380 [75 P.2d 83].)
- "Whether or not a sufficient custody existed, within the meaning of the statute, might well depend upon evidence of specific facts showing the nature, kind and extent of the custody and right of control which the respondent [grandfather] actually had." (*Hughes v. Wardwell* (1953) 117 Cal.App.2d 406, 409 [255 P.2d 881].)
- "In the absence of statute, ordinarily a parent is not liable for the torts of his minor child. A parent, however, becomes liable for the torts of his minor child if that child in committing a tort is his agent and acting within the child's authority." (*Van Den Eikhof v. Hocker* (1978) 87 Cal.App.3d 900, 904–905 [151

Cal.Rptr. 456], internal citations omitted.)

- " '[P]erson having custody of the minor' means person having permanent legal custody, and not a person such as a school teacher whose control over his pupils is limited in time and scope." (*Hathaway v. Siskiyou Union High School Dist.* (1944) 66 Cal.App.2d 103, 114 [151 P.2d 861].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1412–1415

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, §§ 4.42–4.43

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.30[1] (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.16, Ch. 83, *Automobiles: Bringing the Action*, § 83.133 (Matthew Bender)

California Civil Practice: Torts § 25:52 (Thomson Reuters)

723. Liability of Cosigner of Minor's Application for Driver's License

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed by [*name of minor*]'s negligence in operating the vehicle and that [*name of defendant*] is responsible for the harm because [*name of defendant*] signed [*name of minor*]'s application for a driver's license. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of minor*] was negligent in operating the vehicle;**
2. **That [*name of plaintiff*] was harmed;**
3. **That [*name of minor*]'s negligence was a substantial factor in causing the harm;**
4. **That [*name of defendant*] signed [*name of minor*]'s application for a driver's license; and**
5. **That at the time of the collision [*name of minor*]'s driver's license had not been canceled or revoked by the Department of Motor Vehicles.**

New September 2003

Sources and Authority

- Liability of Cosigner of Minor's Driver's License Application. Vehicle Code section 17707.
- No Liability if Minor is Agent of Another. Vehicle Code section 17710.
- Application for Relief From Liability. Vehicle Code section 17711.
- "Cancellation accomplishes voluntarily what revocation [of minor's driver's license] accomplishes involuntarily. If termination is accomplished by the latter method, resort to the former becomes superfluous. Once revocation occurs, the driving privilege is at an end. Thereafter there is no reason and no necessity for a voluntary application to terminate that which has already been terminated involuntarily. Both means are equally effective to terminate the driving privilege and to terminate the signer's liability." (*Hamilton v. Dick* (1967) 254 Cal.App.2d 123, 125 [61 Cal.Rptr. 894].)
- "[T]he negligence of the minor son of the [parents] is imputed to them . . . by virtue of their having signed his application for an operator's license, which was not revoked or cancelled at the time of the accident in question, notwithstanding the fact that the license was then temporarily suspended" and even though the parents specifically forbade the minor from operating the vehicle. (*Sleeper v. Woodmansee* (1936) 11 Cal.App.2d 595, 598 [54 P.2d 519].)
- "It seems quite evident that, in adopting [the predecessors to sections 17150 and

17707] of the Vehicle Code, the legislature intended to create a limited liability for imputed negligence against both the owner of an automobile and the signer of a driver's license. . . . We must assume the legislature intended to fix a limited liability . . . for imputed negligence against the owner of an automobile and the signer of a driver's license or either of them and that it did not intend to double that limited liability when the same individual was both the owner of the machine and the signer of the license." (*Rogers v. Foppiano* (1937) 23 Cal.App.2d 87, 92–93 [72 P.2d 239].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1412–1415

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, §§ 4.41, 4.43

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.30[2] (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.16, Ch. 83, *Automobiles: Bringing the Action*, § 83.134 (Matthew Bender)

California Civil Practice: Torts § 25:52 (Thomson Reuters)

724. Negligent Entrustment of Motor Vehicle

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed because [***name of defendant***] negligently permitted [***name of driver***] to use [***name of defendant***]'s vehicle. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of driver***] was negligent in operating the vehicle;**
2. **That [***name of defendant***] [owned the vehicle operated by [***name of driver***]/had possession of the vehicle operated by [***name of driver***] with the owner's permission];**
3. **That [***name of defendant***] knew, or should have known, that [***name of driver***] was incompetent or unfit to drive the vehicle;**
4. **That [***name of defendant***] permitted [***name of driver***] to drive the vehicle; and**
5. **That [***name of driver***]'s incompetence or unfitness to drive was a substantial factor in causing harm to [***name of plaintiff***].**

New September 2003; Revised December 2009

Directions for Use

For a definition of "negligence," see CACI No. 401, *Basic Standard of Care*.

Sources and Authority

- Permissive Use by Unlicensed Driver. Vehicle Code section 14606(a).
- Permissive Use by Unlicensed Minor. Vehicle Code section 14607.
- Rental to Unlicensed Driver. Vehicle Code section 14608(a).
- " ' "[I]t is generally recognized that one who places or entrusts his [or her] motor vehicle in the hands of one whom he [or she] knows, or from the circumstances is charged with knowing, is incompetent or unfit to drive, may be held liable for an injury inflicted by the use made thereof by that driver, provided the plaintiff can establish that the injury complained of was proximately caused by the driver's disqualification, incompetency, inexperience or recklessness . . . ." ' " (*Flores v. Enterprise Rent-A-Car Co.* (2010) 188 Cal.App.4th 1055, 1063 [116 Cal.Rptr.3d 71].)
- "A rental car company may be held liable for negligently entrusting one of its cars to a customer. . . . In determining whether defendant was negligent in entrusting its car to [the driver], defendant's conduct is to be measured by what an ordinarily prudent person would do in similar circumstances." (*Osborn v. Hertz Corp.* (1988) 205 Cal.App.3d 703, 709 [252 Cal.Rptr. 613], internal citations omitted.)

- "Liability for negligent entrustment is determined by applying general principles of negligence, and ordinarily it is for the jury to determine whether the owner has exercised the required degree of care." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 421 [167 Cal.Rptr. 270], internal citations omitted.)
- " 'A claim that an employer was negligent in hiring or retaining an employee-driver rarely differs in substance from a claim that an employer was negligent in entrusting a vehicle to the employee. Awareness, constructive or actual, that a person is unfit or incompetent to drive underlies a claim that an employer was negligent in hiring or retaining that person as a driver. (See Judicial Council of Cal. Civ. Jury Instns. (2010) CACI No. 426.) That same awareness underlies a claim for negligent entrustment. (See CACI No. 724.) In a typical case . . . the two claims are functionally identical.' " (*McKenna v. Beesley* (2021) 67 Cal.App.5th 552, 566–567 [282 Cal.Rptr.3d 431], internal citation and footnote omitted.)
- "[I]f an employer admits vicarious liability for its employee's negligent driving in the scope of employment, 'the damages attributable to both employer and employee will be coextensive.' Thus, when a plaintiff alleges a negligent entrustment or hiring cause of action against the employer and the employer admits vicarious liability for its employee's negligent driving, the universe of defendants who can be held responsible for plaintiff's damages is reduced by one—the employer—for purposes of apportioning fault under Proposition 51. Consequently, the employer would not be mentioned on the special verdict form. The jury must divide fault for the accident among the listed tortfeasors, and the employer is liable only for whatever share of fault the jury assigns to the employee." (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1159 [126 Cal.Rptr.3d 443, 253 P.3d 535], internal citation omitted.)
- "[O]rdinarily, in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another and . . . this rule applies even where the third person's conduct is made possible only because the defendant has relinquished control of his property to the third person, unless the defendant has reason to believe that the third person is incompetent to manage it." (*Grafton v. Mollica* (1965) 231 Cal.App.2d 860, 863 [42 Cal.Rptr. 306].)
- "[T]he tort requires demonstration of actual knowledge of facts showing or suggesting the driver's incompetence—not merely his lack of a license. . . . For liability to exist, knowledge must be shown of the user's incompetence or inability safely to use the [vehicle]." (*Dodge Center v. Superior Court* (1988) 199 Cal.App.3d 332, 341 [244 Cal.Rptr. 789], internal citations omitted.)
- "Knowledge of possession of a temporary permit allowing a person to drive only if accompanied by a licensed driver is sufficient to put the entrustor 'upon inquiry as to the competency of' the unlicensed driver. . . . It is then for the jury to determine under the circumstances whether the entrustor is negligent in permitting the unlicensed driver to operate the vehicle." (*Nault v. Smith* (1961) 194 Cal.App.2d 257, 267–268 [14 Cal.Rptr. 889], internal citations omitted.)

- "In cases involving negligent entrustment of a vehicle, liability ' "is imposed on [a] vehicle owner or permitter because of his own independent negligence and not the negligence of the driver." ' " (*Ghezavat v. Harris* (2019) 40 Cal.App.5th 555, 559 [252 Cal.Rptr.3d 887].)
- "[E]ntrustment of a vehicle to an intoxicated person is not negligence per se. A plaintiff must prove defendant had knowledge of plaintiff's incompetence when entrusting the vehicle." (*Blake v. Moore* (1984) 162 Cal.App.3d 700, 706 [208 Cal.Rptr. 703].)
- "[T]he mere sale of an automobile to an unlicensed and inexperienced person does not constitute negligence per se." (*Perez v. G & W Chevrolet, Inc.* (1969) 274 Cal.App.2d 766, 768 [79 Cal.Rptr. 287].)
- "It is well-settled that where a company knows that an employee has no operator's license that such knowledge is sufficient to put the employer on inquiry as to his competency; it is for the jury to determine under such circumstances whether the employer was negligent in permitting the employee to drive a vehicle." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 545 [55 Cal.Rptr. 741].)
- "[I]t has generally been held that the owner of an automobile is under no duty to persons who may be injured by its use to keep it out of the hands of a third person in the absence of facts putting the owner on notice that the third person is incompetent to handle it." (*Richards v. Stanley* (1954) 43 Cal.2d 60, 63 [271 P.2d 23], internal citations omitted.)
- "[T]he mere fact of co-ownership does not prevent one co-owner from controlling use of the vehicle by the other co-owner. Thus, where . . . plaintiff alleges that one co-owner had power over the use of the vehicle by the other and that the negligent co-owner drove with the express or implied consent of such controlling co-owner, who knew of the driver's incompetence, the basis for a cause of action for negligent entrustment has been stated." (*Mettelka v. Superior Court* (1985) 173 Cal.App.3d 1245, 1250 [219 Cal.Rptr. 697].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1372–1377

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-B, *Liability Arising From Operation Of Motor Vehicle*, ¶ 2:985 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 7D-D, *Liability Based On Negligent Entrustment*, ¶ 7:1332 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, § 4.38

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.21 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.11 (Matthew Bender)

California Civil Practice: Torts § 25:47 (Thomson Reuters)

725–729. Reserved for Future Use

730. Emergency Vehicle Exemption (Veh. Code, § 21055)

[*Name of defendant*] claims that [*name of public employee*] was not required to comply with Vehicle Code section [*insert section number*] because [he/she/*nonbinary pronoun*] was operating an authorized emergency vehicle and was responding to an emergency at the time of the accident.

To establish that [*name of public employee*] was not required to comply with section [*insert section number*], [*name of defendant*] must prove all of the following:

1. **That [*name of public employee*] was operating an authorized emergency vehicle;**
2. **That [*name of public employee*] was responding to an emergency situation at the time of the accident; and**
3. **That [*name of public employee*] sounded a siren when reasonably necessary and displayed front red warning lights.**

If you decide that [*name of defendant*] proved all of these things, then you cannot find it negligent for a violation of section [*insert section number*]. However, even if you decide that [*name of defendant*] proved all of these things, you may find it negligent if [*name of public employee*] failed to operate [his/her/*nonbinary pronoun*] vehicle with reasonable care, taking into account the emergency situation.

New September 2003; Revised December 2022

Directions for Use

This instruction assumes that the public employer is the only defendant. Change the "it" pronouns in the final paragraph if there are other defendants in the case (e.g., if the public employee is also a defendant).

For a definition of "emergency," see CACI No. 731, *Definition of "Emergency."*

Sources and Authority

- Authorized Emergency Vehicle Exemption. Vehicle Code section 21055.
- "Authorized Emergency Vehicle" Defined. Vehicle Code section 165.
- Authorized Emergency Vehicle: Public Employee Immunity. Vehicle Code section 17004.
- Emergency Vehicle Drivers: Duty Regarding Public Safety. Vehicle Code section 21056.
- "The purpose of the statute is to provide a 'clear and speedy pathway' for these

municipal vehicles on their flights to emergencies in which the entire public are necessarily concerned." (*Peerless Laundry Services v. City of Los Angeles* (1952) 109 Cal.App.2d 703, 707 [241 P.2d 269].)

- "The effect of Vehicle Code sections 21055 and 21056 is: where the driver of an authorized emergency vehicle is engaged in a specified emergency function he may violate certain rules of the road, such as speed and right of way laws, if he activates his red light and where necessary his siren in order to alert other users of the road to the situation. In such circumstances the driver may not be held to be negligent solely upon the violation of specified rules of the road, but may be held to be negligent if he fails to exercise due regard for the safety of others under the circumstances. Where the driver of an emergency vehicle fails to activate his red light, and where necessary his siren, he is not exempt from the rules of the road even though he may be engaged in a proper emergency function, and negligence may be based upon the violation of the rules of the road." (*City of Sacramento v. Superior Court* (1982) 131 Cal.App.3d 395, 402–403 [182 Cal.Rptr. 443], internal citations omitted.)
- "Notwithstanding [Vehicle Code section 17004], a public entity is liable for injuries proximately caused by negligent acts or omissions in the operation of any motor vehicle by an employee of the public entity, acting within the scope of his or her employment." (*City of San Jose v. Superior Court* (1985) 166 Cal.App.3d 695, 698 [212 Cal.Rptr. 661], internal citations omitted.)
- "If the driver of an authorized emergency vehicle is responding to an emergency call and gives the prescribed warnings by red light and siren, a charge of negligence against him may not be predicated on his violation of the designated Vehicle Code sections; but if he does not give the warnings, the contrary is true; and in the event the charged negligence is premised on conduct without the scope of the exemption a common-law standard of care is applicable." (*Grant v. Petronella* (1975) 50 Cal.App.3d 281, 286 [123 Cal.Rptr. 399], internal citations omitted.)
- "Where the driver of an emergency vehicle responding to an emergency call does not give the warnings prescribed by section 21055, the legislative warning policy expressed in that section dictates the conclusion [that] the common-law standard of care governing his conduct does not include a consideration of the emergency circumstances attendant upon his response to an emergency call." (*Grant, supra,* 50 Cal.App.3d at p. 289, footnote omitted.)
- "It will be remembered that the exemption provided by section 454 [from which section 21055] of the Vehicle Code [was derived] was available to appellant as an affirmative defense, and upon appellant rested the burden of proving the necessary compliance with its provisions." (*Washington v. City and County of San Francisco* (1954) 123 Cal.App.2d 235, 242 [266 P.2d 828].)
- "In short the statute exempts the employer of such a driver from liability for negligence attributable to his failure to comply with specified statutory provisions, but it does not in any manner purport to exempt the employer from

liability due to negligence attributable to the driver's failure to maintain that standard of care imposed by the common law." (*Torres v. City of Los Angeles* (1962) 58 Cal.2d 35, 47 [22 Cal.Rptr. 866, 372 P.2d 906].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 394–398

2 Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 11.140–11.144

2 Neil M. Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.55 (Matthew Bender, Rev. Ed.)

20 California Forms of Pleading and Practice, Ch. 246, *Emergency Vehicles*, § 246.13 (Matthew Bender)

731. Definition of "Emergency" (Veh. Code, § 21055)

An "emergency" exists if the driver of an authorized emergency vehicle is [*insert one of the following***]**

[responding to an emergency call.]

[involved in rescue operations.]

[in the immediate pursuit of an actual or suspected violator of the law.]

[responding to, but not returning from, a fire alarm.]

[operating a fire department vehicle while traveling from one place to another place because of an emergency call.]

New September 2003

Directions for Use

This instruction is based on the language of Vehicle Code section 21055(a) and is only intended for cases in which there is a factual issue regarding whether the defendant was acting in response to an emergency at the time of the accident. (*Washington v. City and County of San Francisco* (1954) 123 Cal.App.2d 235, 241 [266 P.2d 828].)

Sources and Authority

- Authorized Emergency Vehicle Exemption. Vehicle Code section 21055(a).
- "Whether a vehicle is driven in response to an emergency call depends on the nature of the call received and the situation as presented to the mind of the driver and not upon whether there is an emergency in fact. The driver, of course, should have reasonable grounds to believe that there is an emergency." (*Gallup v. Sparks-Mundo Engineering Co.* (1954) 43 Cal.2d 1, 5 [271 P.2d 34], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 358, 394–398

2 Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 11.140–11.144

732–799. Reserved for Future Use

VF-700. Motor Vehicle Owner Liability—Permissive Use of Vehicle

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We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] an owner of the vehicle at the time of the injury to [*name of plaintiff*]?**

   _____ Yes _____ No

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

2. **Did [*name of defendant*], by words or conduct, give permission to [*name of driver*] to use the vehicle?**

   _____ Yes _____ No

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2010, May 2024

Directions for Use

This is for use in conjunction with the general negligence verdict forms involving motor vehicles. The two questions here should be incorporated into the verdict form regarding the underlying case. The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 720, *Motor Vehicle Owner Liability—Permissive Use of Vehicle.*

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

VF-701. Motor Vehicle Owner Liability—Permissive Use of Vehicle—Affirmative Defense—Use Beyond Scope of Permission

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] an owner of the vehicle at the time of the injury to [*name of plaintiff*]?**

   _____ Yes _____ No

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

2. **Did [*name of defendant*], by words or conduct, give permission to [*name of driver*] to use the vehicle?**

   _____ Yes _____ No

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

3. **Was [*name of defendant*]'s permission to use the vehicle given for a limited time, place, or purpose?**

   _____ Yes _____ No

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

4. **Did [*name of driver*]'s use of the vehicle substantially violate the limitations as to time, place, or purpose?**

   _____ Yes _____ No

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2010, May 2024

Directions for Use

This is for use in conjunction with the general negligence verdict forms involving motor vehicles. The four questions here should be incorporated into the verdict form

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

This verdict form is based on CACI No. 720, *Motor Vehicle Owner Liability—Permissive Use of Vehicle,* and CACI No. 721*, Motor Vehicle Owner Liability—Affirmative Defense—Use Beyond Scope of Permission.*

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

VF-702. Adult's Liability for Minor's Permissive Use of Motor Vehicle

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We answer the questions submitted to us as follows:

1. **Was [*name of minor*] negligent in operating the vehicle?**

   _____ Yes _____ No

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

2. **Was [*name of minor*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

3. **Did [*name of defendant*], by words or conduct, give [*name of minor*] permission to use the vehicle?**

   _____ Yes _____ No

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

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

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

   Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised October 2004, April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 722, *Adult's Liability for Minor's Permissive Use of Motor Vehicle.*

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

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

VF-703. Liability of Cosigner of Minor's Application for Driver's License

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We answer the questions submitted to us as follows:

1. **Was [*name of minor*] negligent in operating the vehicle?**

   _____ Yes _____ No

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

2. **Was [*name of minor*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

3. **Did [*name of defendant*] sign [*name of minor*]'s application for a driver's license?**

   _____ Yes _____ No

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

4. **At the time of the collision, had [*name of minor*]'s driver's license been cancelled or revoked by the Department of Motor Vehicles?**

   _____ Yes _____ No

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

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

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 723, *Liability of Cosigner of Minor's Application for Driver's License.*

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

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

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

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

findings that are required in order to calculate the amount of prejudgment interest.

VF-704. Negligent Entrustment of Motor Vehicle

We answer the questions submitted to us as follows:

1. **Was [*name of driver*] negligent in operating the vehicle?**

   _____ **Yes** _____ **No**

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

2. **Did [*name of defendant*] own the vehicle operated by [*name of driver*] or did [*name of defendant*] have possession of the vehicle operated by [*name of driver*] with the owner's permission?**

   _____ **Yes** _____ **No**

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

3. **Did [*name of defendant*] know, or should [he/she/*nonbinary pronoun*] have known, that [*name of driver*] was incompetent or unfit to drive?**

   _____ **Yes** _____ **No**

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

4. **Did [*name of defendant*] permit [*name of driver*] to drive the vehicle?**

   _____ **Yes** _____ **No**

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

5. **Was [*name of driver*]'s incompetence or unfitness to drive a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

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

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

   [a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2011, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 724, *Negligent Entrustment of Motor Vehicle*. Modify to include elements of negligence instruction against the driver if plaintiff is suing both driver and owner.

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

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

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

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

VF-705–VF-799. Reserved for Future Use

RAILROAD CROSSINGS

800. Basic Standard of Care for Railroads

Railroad companies must use reasonable care to avoid causing injury to anyone crossing railroad tracks from a street or roadway. [Railroad companies must use reasonable care in the design and maintenance of warning signals and protective devices at railroad crossings.] [Train operators must use reasonable care in operating their trains at railroad crossings.] The failure to use reasonable care is negligence.

New September 2003

Directions for Use

The instructions in this series should be used together with one or more of the instructions that follow, which give specific guidance on the nature and scope of a railroad's duties of care regarding grade crossings.

Consideration should be given as to whether any of the asserted theories of liability are preempted by federal law (see *CSX Transportation, Inc. v. Easterwood* (1993) 507 U.S. 658 [113 S.Ct. 1732, 123 L.Ed.2d 387] and *Norfolk Southern Railway Co. v. Shanklin* (2000) 529 U.S. 344 [120 S.Ct. 1467, 146 L.Ed.2d 374]). If so, it may be necessary to modify this instruction to avoid indirect reference to these theories.

Sources and Authority

- The California Supreme Court has stated the duty of railroads at crossings as follows: "Generally speaking, the duty to exercise reasonable or ordinary care is imposed upon the operator of a railroad at public highway crossings with respect to persons traveling upon the highway and over the crossing, both as to the manner of operating the train and the maintenance of the crossing. The standard of care is that of the man of ordinary prudence under the circumstances." (*Peri v. Los Angeles Junction Ry. Co.* (1943) 22 Cal.2d 111, 120 [137 P.2d 441], internal citations omitted.)
- "Ordinarily the issue of the negligence in crossing cases, whether the railroad was negligent in the design and maintenance of the crossing or in the operation of the train, is one of fact as in other negligence cases." (*Romo v. Southern Pacific Transportation Co.* (1977) 71 Cal.App.3d 909, 916 [139 Cal.Rptr. 787], internal citations omitted.)
- The amount of care that is "reasonable" varies in proportion to the circumstances constituting the probable danger. (*Romo, supra,* 71 Cal.App.3d at p. 916.)
- "Where the conditions existing at the crossing create an unusual hazard or danger, the operator of the railroad must exercise care commensurate with those circumstances, and whether he has done so is a question of fact." (*Peri, supra,* 22 Cal.2d at p. 123.)
- "We hold that . . . federal regulations adopted by the Secretary of

Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed." (*CSX Transportation, Inc., supra,* 507 U.S. at p. 676.)

- "When the [Federal Highway Administration] approves a crossing improvement project and the State installs the warning devices using federal funds, [federal regulations] establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject." (*Norfolk Southern Railway Co., supra,* 529 U.S. at p. 357.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1039, 1239, 1240, 1479

California Tort Guide (Cont.Ed.Bar 3d ed.) Railroad Crossings, § 12.2

2 Levy et al., California Torts, Ch. 23, *Carriers*, §§ 23.25–23.26 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.61 (Matthew Bender)

801. Duty to Comply With Safety Regulations

An [ordinance/regulation] of the [*insert name of entity***] provides as follows: [***insert text of ordinance or regulation***]**

Railroad companies must obey safety regulations. Regulations state only the minimum measure of care required of a railroad company. Particular conditions and situations may require a company to use more care than the regulations require.

New September 2003

Directions for Use

Regulations adopted by the Secretary of Transportation pursuant to the Federal Railroad Safety Act preempt state common-law negligence claims based on general allegations of "excessive speed." (*CSX Transportation, Inc. v. Easterwood* (1993) 507 U.S. 658, 675 [113 S.Ct. 1732, 123 L.Ed.2d 387].) Also, claims alleging inadequate warning devices are preempted where federally funded grade crossing improvements have been installed. (*Norfolk Southern Railway Co. v. Shanklin* (2000) 529 U.S. 344, 359 [120 S.Ct. 1467, 146 L.Ed.2d 374].) This instruction is not intended to apply to situations in which a railroad's compliance with these federal safety regulations would preempt state law negligence claims.

Sources and Authority

- " ' "It is well settled that such statutory regulations constitute only the minimum measure of care required by the railroad, and it is usually a matter for the jury to determine whether something more than the minimum was required under the evidence in the case." ' A railroad company is not necessarily free from negligence, even though it may have literally complied with safety statutes or rules. The circumstances may require it to do more." (*Hogue v. Southern Pacific Co.* (1969) 1 Cal.3d 253, 258 [81 Cal.Rptr. 765, 460 P.2d 965], internal citations omitted; *Peri v. Los Angeles Junction Ry. Co.* (1943) 22 Cal.2d 111, 126 [137 P.2d 441].)
- "If the peculiar characteristics of a crossing call for the installation of automatic protection—or the upgrading of existing automatic protection—the railroad may be guilty of negligence in failing to provide such protection." (*Romo v. Southern Pacific Transportation Co.* (1977) 71 Cal.App.3d 909, 916 [139 Cal.Rptr. 787], internal citations omitted.)
- "We hold that . . . federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed." (*CSX Transportation, Inc., supra,* 507 U.S. at p. 676.)
- "When the [Federal Highway Administration] approves a crossing improvement

project and the State installs the warning devices using federal funds, [federal regulations] establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject." (*Norfolk Southern Railway Co., supra,* 529 U.S. at p. 357.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1039, 1239, 1240, 1479

California Tort Guide (Cont.Ed.Bar 3d ed.) Railroad Crossings, § 12.4

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.25[4] (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.64 (Matthew Bender)

802. Reserved for Future Use

803. Regulating Speed

[A railroad company] [A train operator] must use reasonable care to control the train's speed as it approaches and passes through a railroad crossing. The [railroad company] [train operator] must control train speed with due regard for the safety of human life and property, taking into consideration the location and conditions of the crossing.

New September 2003

Directions for Use

This instruction may not be appropriate in certain cases. Regulations adopted by the Secretary of Transportation pursuant to the Federal Railroad Safety Act preempt state common-law negligence claims based on general allegations of "excessive speed." (*CSX Transportation, Inc. v. Easterwood* (1993) 507 U.S. 658, 675 [113 S.Ct. 1732, 123 L.Ed.2d 387].) However, a negligence action based on a duty to slow or stop a train to avoid a specific, individual hazard is not preempted. (*CSX Transportation, Inc., supra*, 507 U.S. at 676, fn. 15.)

Sources and Authority

- "We hold that . . . federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed." (*CSX Transportation, Inc., supra,* 507 U.S. at p. 676.)
- "While it is true that no rate of speed is negligence per se in the absence of a statute or ordinance, it does not follow that a railroad company will be permitted to run its trains under all conditions at any rate of speed it may choose. It must regulate its speed with proper regard for the safety of human life and property, especially when running through towns and cities. . . . [T]he question whether or not a rate of speed is excessive is one of fact for the jury." (*Young v. Pacific Electric Ry. Co*. (1929) 208 Cal. 568, 572–573 [283 P. 61].)
- "The 'reasonably prudent person' test applies also to the speed at which a train approaches and passes a crossing, and material in the application of that test is 'that no unnecessary risk shall be cast upon the public' considering the 'location and surroundings' of the crossing involved. Specially mentioned is a 'crossing in a thickly populated community and extensively used.' " (*Rice v. Southern Pacific Co.* (1967) 247 Cal.App.2d 701, 707 [55 Cal.Rptr. 840], internal citations omitted.)
- "[I]t is for the jury to say whether the speed of a train was too high for a particular intersection." (*Romo v. Southern Pacific Transportation Co.* (1977) 71 Cal.App.3d 909, 916 [139 Cal.Rptr. 787].)
- Even when crossing protection is provided and the company speed limit is not

exceeded, speeding is still a question of fact. (*Herrera v. Southern Pacific Co.* (1957) 155 Cal.App.2d 781, 787 [318 P.2d 784].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1039, 1239, 1240, 1479

California Tort Guide (Cont.Ed.Bar 3d ed.) Railroad Crossings, § 12.5

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.26[6] (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.64 (Matthew Bender)

804. Lookout for Crossing Traffic

A train operator must keep a reasonable lookout for vehicles and people. If an operator discovers, or should have discovered, that a vehicle or a person is on or near the track, the operator must use reasonable care to avoid causing harm.

New September 2003

Directions for Use

For an instruction regarding the right to expect that others will use reasonable care, see CACI No. 411, *Reliance on Good Conduct of Others*.

Regulations adopted by the Secretary of Transportation pursuant to the Federal Railroad Safety Act preempt state common-law negligence claims based on general allegations of "excessive speed." (*CSX Transportation, Inc. v. Easterwood* (1993) 507 U.S. 658, 675 [113 S.Ct. 1732, 123 L.Ed.2d 387].) However, a negligence action based on a duty to slow or stop a train to avoid a specific, individual hazard is not preempted. (*CSX Transportation, Inc., supra*, 507 U.S. at p. 675, fn. 15.)

Sources and Authority

- "Obviously, the railroad may not be required to guarantee the safety of those crossing its tracks. It is not required to anticipate that at every crossing, an automobile will be driven in the path of the train. It is only required to exercise ordinary care to discover such automobiles and to thereafter exercise care to avoid a collision." (*Essick v. Union Pacific Ry. Co.* (1960) 182 Cal.App.2d 456, 463 [6 Cal.Rptr. 208].)
- The following instruction was approved in *Essick, supra,* 182 Cal.App.2d at p. 461: " 'The duty of [defendant] toward persons using the private crossing we are here concerned with was to exercise ordinary care to discover any such persons on or near the crossing and to exercise ordinary care to avoid injuring such persons after their presence on or near the track was discovered.' "
- "The train crew cannot assume that a highway crossing in the middle of a city will be clear and they must keep a reasonable lookout for the presence of intersecting traffic. This implies as a corollary the further obligation to have the train under such control as may be reasonably necessary to deal with situations which an ordinarily prudent operator would anticipate." (*Herrera v. Southern Pacific Co.* (1957) 155 Cal.App.2d 781, 785 [318 P.2d 784], internal citations omitted.)
- "The installation and maintenance of automatic signals does not relieve a railroad company of this duty of keeping a reasonable lookout for other traffic." (*Herrera, supra,* 155 Cal.App.2d at p. 786, internal citations omitted.)
- "We hold that . . . federal regulations adopted by the Secretary of

Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed." (*CSX Transportation, Inc., supra,* 507 U.S. at p. 676.) However, a negligence action based on a duty to slow or stop a train to avoid a specific, individual hazard is not preempted. (*Ibid*, fn. 15.)

- In a thoughtful opinion, the Oklahoma Supreme Court has held the following: "We hold that a specific, individual hazard is a person, vehicle, obstruction, object, or event which is not a fixed condition or feature of the crossing and which is not capable of being taken into account by the Secretary of Transportation in the promulgation of uniform, national speed regulations. In short, a specific, individual hazard refers to a unique occurrence which could lead to a specific and imminent collision and not to allegedly dangerous conditions at a particular crossing." (*Myers v. Missouri Pacific Railroad Co.* (Okla. 2002) 52 P.3d 1014, 1027, footnotes omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1039, 1239, 1240, 1479

California Tort Guide (Cont.Ed.Bar 3d ed.) Railroad Crossings, § 12.6

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.26[2] (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.62 (Matthew Bender)

805. Installing Warning Systems

Railroad companies must post signs or other devices that give the public reasonable warning of the presence of its tracks. A railroad company must use reasonable care in the design, installation, operation, and maintenance of its warning signals and protective systems. The amount of care that is reasonable depends on the particular characteristics of each crossing.

New September 2003

Directions for Use

This instruction may not be appropriate in certain cases. Claims alleging inadequate warning devices are preempted where federally funded grade crossing improvements have been installed. (*Norfolk Southern Railway Co. v. Shanklin* (2000) 529 U.S. 344, 353 [120 S.Ct. 1467, 146 L.Ed.2d 374].)

Sources and Authority

- "[O]nce the [Federal Highway Administration] has funded the crossing improvement and the warning devices are actually installed and operating, the regulation 'displace[s] state and private decision-making authority by establishing a federal-law requirement that certain devices be installed or federal approval obtained.' " (*Norfolk Southern Railway Co., supra,* 529 U.S. at p. 354, internal citation omitted.)
- "It should be noted that nothing prevents a State from revisiting the adequacy of devices installed using federal funds. States are free to install more protective devices at such crossings with their own funds or with additional funding from the FHWA. What States cannot do—once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices." (*Norfolk Southern Railway Co., supra,* 529 U.S. at p. 358.)
- "If the peculiar characteristics of a crossing call for the installation of automatic protection—or the upgrading of existing automatic protection—the railroad may be guilty of negligence in failing to provide such protection." (*Romo v. Southern Pacific Transportation Co.* (1977) 71 Cal.App.3d 909, 916 [139 Cal.Rptr. 787], internal citation omitted.)
- "Whether a railroad is negligent in the design and maintenance of the crossing is a question of fact for the jury." (*Wilkinson v. Southern Pacific Co.* (1964) 224 Cal.App.2d 478, 487–488 [36 Cal.Rptr. 689], internal citation omitted.)
- "The defendant, having undertaken to warn travelers of the approach of its trains by the use of a wigwag, was under a duty to use reasonable care in the construction and maintenance of the signal system lest the appearance of safety

created by the presence of the device constitute a trap for persons relying upon it for protection." (*Startup v. Pacific Electric Ry. Co.* (1947) 29 Cal.2d 866, 869 [180 P.2d 896].)

- "Whatever may be the purpose of maintaining an automatic wig-wag signal at a railroad crossing, even though it be intended to merely warn travelers of the approach of trains, common justice demands that it shall be so constructed and maintained that it will not lure travelers on the highway into danger. It follows that a company which does maintain such a defective system will be held liable for injuries sustained as the result of those imperfections, regardless of whether the system was designed to warn travelers of the approach of trains rather than to inform them of the danger from stationary cars which block the crossings." (*Mallett v. Southern Pacific Co.* (1937) 20 Cal.App.2d 500, 509 [68 P.2d 281].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1039, 1239, 1240, 1479

California Tort Guide (Cont.Ed.Bar 3d ed.) Railroad Crossings, §§ 12.8–12.9

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.25[4] (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.64 (Matthew Bender)

806. Comparative Fault—Duty to Approach Crossing With Care

A driver approaching a railroad crossing is required to use reasonable care to discover whether a train is approaching. The amount of care that is reasonable will depend on the circumstances. A railroad track is itself a warning of danger. If the driver's view of approaching trains is blocked, the driver must use greater care than when the view is clear.

If a bell or signal has been placed to warn drivers of danger, a driver is not required to use as much care as when there are no such warnings. However, even if the warning devices are not activated, a driver must use reasonable care in looking and listening for approaching trains.

New September 2003; Revised December 2009, May 2020

Directions for Use

For an instruction regarding the prima facie speed limits set by Vehicle Code section 22352, see CACI No. 707, *Speed Limit.* For an instruction on the duty of care of a passenger, see CACI No. 711, *The Passenger's Duty of Care for Own Safety.* For instructions on negligence per se, see CACI Nos. 418 to 421.

Sources and Authority

- Vehicle Proceeding at Railroad Crossing. Vehicle Code section 22451.
- Speed Limit at Railroad Crossing. Vehicle Code section 22352(a)(1).
- "[T]hat the driver's view is somewhat obstructed does not make him contributorily negligent as a matter of law; whether his failure to stop, the place from which he looks and the character and extent of the obstruction to his view are such that a reasonably prudent person would not have so conducted himself are questions for the jury in determining whether he was guilty of contributory negligence." (*Lucas v. Southern Pacific Co.* (1971) 19 Cal.App.3d 124, 139 [96 Cal.Rptr. 356].)
- "A railroad track is itself a warning of danger and a driver intending to cross must avail himself of every opportunity to look and listen; if there are obstructions to the view, he is required to take greater care." (*Wilkinson v. Southern Pacific Co.* (1964) 224 Cal.App.2d 478, 488 [36 Cal.Rptr. 689], internal citation omitted.)
- "A railroad company will not be permitted to encourage persons to relax their vigil concerning the dangers that lurk in railroad crossings by assuring them, through the erection of safety devices, that the danger has been removed or minimized, and, at the same time, to hold them to the same degree of care as would be required if those devices had not been provided." (*Will v. Southern Pacific Co.* (1941) 18 Cal.2d 468, 474 [116 P.2d 44], internal citation omitted.)
- "[A] driver may not cross tracks in reliance upon the safety appliances installed

by the railroad with complete disregard for his own safety and recover damages for injuries sustained by reason of his own failure to use reasonable care." (*Will, supra,* 18 Cal.2d at p. 475.)

- "Violation of the railroad's statutory duty to sound bell and whistle at a highway crossing does not absolve a driver from his failure to look and listen and, if necessitated by circumstances such as obstructed vision, even to stop." (*Wilkinson, supra,* 224 Cal.App.2d at p. 489.)
- "It is settled that a railroad may not encourage persons traveling on highways to rely on safety devices and then hold them to the same degree of care as if the devices were not present." (*Startup v. Pacific Electric Ry. Co.* (1947) 29 Cal.2d 866, 871 [180 P.2d 896].)
- "When a flagman or mechanical warning device has been provided at a railroad crossing, the driver of an automobile is thereby encouraged to relax his vigilance, and, in using other means to discover whether there is danger of approaching trains, he is not required to exercise the same quantum of care as would otherwise be necessary." (*Spendlove v. Pacific Electric Ry. Co.* (1947) 30 Cal.2d 632, 634 [184 P.2d 873], internal citations omitted.)
- "When the case before us was tried January 30, 1958, the stop, look and listen instruction was included in BAJI as instruction Number 203-B. Since the trial, the editors of BAJI have concluded that the instruction does not conform to the standards of negligence which prevail in California." (*Anello v. Southern Pacific Co.* (1959) 174 Cal.App.2d 317, 322 [344 P.2d 843].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts §§ 1039, 1239, 1240, 1479

California Tort Guide (Cont.Ed.Bar 3d ed.) Railroad Crossings, §§ 12.10–12.12

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.27 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads* § 485.67 (Matthew Bender)

807–899. Reserved for Future Use

COMMON CARRIERS

900. Introductory Instruction

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed by [*name of defendant*]'s negligence while [he/she/*nonbinary pronoun*] was a passenger on [*name of defendant*]'s [*insert type of carrier, e.g., train*].

[In this case, [*name of defendant*] was a common carrier at the time of the incident. A common carrier provides transportation to the general public.]

[or]

[[*Name of plaintiff*] also claims that [*name of defendant*] was a common carrier at the time of the incident.]

New September 2003

Directions for Use

Give either one of the bracketed sentences, depending on whether the defendant's status as a common carrier is contested or not.

This instruction is intended as an introductory instruction to frame the issues. CACI No. 400, *Negligence—Essential Factual Elements*, would still be given to set forth the elements that plaintiff has to prove in order to recover (i.e., negligence, harm, and causation).

Sources and Authority

- "Common Carrier" Defined. Civil Code section 2168.
- "Carriage" Defined. Civil Code section 2085.
- "[A] common carrier within the meaning of Civil Code section 2168 is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit." (*Squaw Valley Ski Corporation v. Superior Court* (1992) 2 Cal.App.4th 1499, 1508 [3 Cal.Rptr.2d 897].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1055–1064

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers*, § 109.32 et seq. (Matthew Bender)

California Civil Practice: Torts § 28:1 (Thomson Reuters)

901. Status of Common Carrier Disputed

To prove that [*name of defendant*] was a common carrier, [*name of plaintiff*] must prove that it was in the business of transporting [the property of] the general public.

In deciding this issue, you may consider whether any of the following factors apply. These factors suggest that a carrier is a common carrier:

(a) The carrier maintains a regular place of business for the purpose of transporting passengers [or property].

(b) The carrier advertises its services to the general public.

(c) The carrier charges standard fees for its services.

(d) [*Insert other applicable factor(s).*]

A carrier can be a common carrier even if it does not have a regular schedule of departures, a fixed route, or a transportation license.

If you find that [*name of defendant*] was not a common carrier, then [*name of defendant*] did not have the duty of a common carrier, only a duty of ordinary care.

New September 2003

Directions for Use

The court should give the ordinary negligence instructions in conjunction with this one. Ordinary negligence is the standard applicable to private carriers.

Sources and Authority

- "Common Carrier" Defined. Civil Code section 2168.
- Contract of Carriage. Civil Code section 2085.
- "[A] common carrier within the meaning of Civil Code section 2168 is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit." (*Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499, 1508 [3 Cal.Rptr.2d 897], internal citations omitted.)
- "Whether a party is a common carrier for reward may be decided as a matter of law when the material facts are not in dispute. When the material facts are disputed, it is a question of fact for the jury." (*Huang v. The Bicycle Casino, Inc.* (2016) 4 Cal.App.5th 329, 339 [208 Cal.Rptr.3d 591 [citing this instruction].)
- "Factors bearing on a party's common carrier status include (1) whether the party maintained an established place of business for the purpose of transporting passengers; (2) whether the party engaged in transportation as a regular business

and not as a casual or occasional undertaking; (3) whether the party advertised its transportation services to the general public; and (4) whether the party charged standard rates for its service. The party need not have a regular schedule or a fixed route to be a common carrier, nor need the party have a transportation license. [¶] Not all these factors need be present for the party to be a common carrier subject to the heightened duty of care." (*Huang, supra*, 4 Cal.App.5th at p. 339, internal citations omitted; see also *Gradus v. Hanson Aviation, Inc.* (1984) 158 Cal.App.3d 1038, 1047–1048 [205 Cal.Rptr. 211] [approving jury instruction].)

- "In deciding whether [defendant] is a common carrier, a court may properly consider whether (1) the defendant maintains a regular place of business for the purpose of transportation; (2) the defendant advertises its services to the general public; and (3) the defendant charges standard fees for its services." (*Martine v. Heavenly Valley Limited Partnership* (2018) 27 Cal.App.5th 715, 725 [238 Cal.Rptr.3d 237, citing this instruction].)
- "Common carrier status emerged in California in the mid-19th century as a narrow concept involving stagecoaches hired purely for transportation. Over time, however, the concept expanded to include a wide array of recreational transport like scenic airplane and railway tours, ski lifts, and roller coasters. This expansion reflects the policy determination that a passenger's purpose, be it recreation, thrill-seeking, or simply conveyance from point A to B, should not control whether the operator should bear a higher duty to protect the passenger." (*Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1294 [222 Cal.Rptr.3d 633], internal citations omitted.)
- "[T]he key inquiry in the common carrier analysis is whether passengers expect the transportation to be safe because the operator is reasonably capable of controlling the risk of injury." (*Grotheer*, *supra*, 14 Cal.App.5th at p. 1295 [hot air balloon is not a common carrier].)
- "A private carrier . . . is bound only to accept carriage pursuant to special agreement." (*Webster v. Ebright* (1992) 3 Cal.App.4th 784, 787 [4 Cal.Rptr.2d 714].) Private carriers " 'make no public profession that they will carry for all who apply, but . . . occasionally or upon the particular occasion undertake for compensation to carry the goods of others upon such terms as may be agreed upon.' " (*Id.* at p. 788, internal citations omitted.)
- " '[T]he law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it.' " (*Samuelson v. Public Utilities Com.* (1951) 36 Cal.2d 722, 730 [227 P.2d 256], internal citation omitted.)
- "To be a common carrier, the entity merely must be of the character that members of the general public may, if they choose, avail themselves of it." (*Squaw Valley Ski Corp., supra*, 2 Cal.App.4th at pp. 1509–1510, internal citation omitted.)

- "Given the fact [defendant] indiscriminately offers its Shirley Lake chair lift to the public to carry skiers at a fixed rate from the bottom to the top of the Shirley Lake run, it logically comes within the Civil Code section 2168 definition of a common carrier." (*Squaw Valley Ski Corp., supra*, 2 Cal.App.4th at p. 1508.)
- "[T]he 'reward' contemplated by the statutory scheme need not be a fee charged for the transportation service. The reward may be the profit generated indirectly by easing customers' way through the carriers' premises." (*Huang, supra*, 4 Cal.App.5th at p. 339, internal citation omitted.)
- " '[T]he "public" does not mean everyone all of the time; naturally, passengers are restricted by the type of transportation the carrier affords. [Citations.] "One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population." . . . To be a common carrier, the entity merely must be of the character that members of the general public may, if they choose, avail themselves of it.' " (*Huang, supra*, 4 Cal.App.5th at p. 339, internal citation omitted.)
- "Plaintiff also argues the public policy of protecting passengers of a common carrier for reward, as expressed in Civil Code section 2100, precludes limiting defendant's duty to riders on [bumper cars]. In *Gomez v. Superior Court* [(2005) 35 Cal.4th 1125, 1136, fn. 5 [29 Cal. Rptr. 3d 352, 113 P.3d 41]], we held that an operator of a 'roller coaster or similar amusement park ride can be a carrier of persons for reward' for purposes of Civil Code section 2100. At the same time, however, we expressed no opinion 'whether other, dissimilar, amusement rides or attractions can be carriers of persons for reward.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1160 [150 Cal.Rptr.3d 551, 290 P.3d 1158] [bumper car ride is not common carrier].)
- "In the situation at bar, [defendant]'s motor cars were customarily and daily cruising the streets for patronage or awaiting calls of the public. It was a common carrier in transporting such patrons. But when it agreed to act as carrier of handicapped school children under agreement for its operators to escort the pupils to and from their schools and homes to the cab and to render such service exclusively for them at designated hours, the company ceased to be a common carrier while transporting the specified children during such hours." (*Hopkins v. Yellow Cab Co.* (1952) 114 Cal.App.2d 394, 398 [250 P.2d 330].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1056

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers*, § 109.14 (Matthew Bender)

3 California Points and Authorities, Ch. 33, *Carriers*, § 33.29 (Matthew Bender)

California Civil Practice: Torts §§ 28:1–28:2 (Thomson Reuters)

902. Duty of Common Carrier

Common carriers must carry passengers [or property] safely. Common carriers must use the highest care and the vigilance of a very cautious person. They must do all that human care, vigilance, and foresight reasonably can do under the circumstances to avoid harm to passengers [or property].

While a common carrier does not guarantee the safety of its passengers [or property that it transports], it must use reasonable skill to provide everything necessary for safe transportation, in view of the transportation used and the practical operation of the business.

New September 2003

Sources and Authority

- Duty of Common Carrier. Civil Code section 2100.
- "Common carriers bind themselves to carry safely those whom they take into their vehicles, and owe both a duty of utmost care and the vigilance of a very cautious person towards their passengers. Such carriers are responsible for any, even the slightest, negligence and are required to do all that human care, vigilance, and foresight reasonably can do under all the circumstances." (*Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 27 [84 Cal.Rptr. 184, 465 P.2d 72], internal citations omitted.)
- "The Civil Code treats common carriers differently depending on whether they act gratuitously or for reward. 'A carrier of persons without reward must use ordinary care and diligence for their safe carriage.' But '[c]arriers of persons for reward have long been subject to a heightened duty of care.' Such carriers 'must use the utmost care and diligence for [passengers'] safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.' While these carriers are not insurers of their passengers' safety, '[t]his standard of care requires common carriers 'to do all that human care, vigilance, and foresight reasonably can do under the circumstances.' " (*Huang v. The Bicycle Casino, Inc.* (2016) 4 Cal.App.5th 329, 338 [208 Cal.Rptr.3d 591], internal citations omitted.)
- "This elevated standard of care for common carriers has its origin in English common law. It is based on a recognition that the privilege of serving the public as a common carrier necessarily entails great responsibility, requiring common carriers to exercise a high duty of care towards their customers." (*Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499, 1507 [3 Cal.Rptr.2d 897], internal citations omitted.)
- "Common carriers are not, however, insurers of their passengers' safety. Rather, the degree of care and diligence which they must exercise is only such as can

reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of the business of the carrier." (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 785 [221 Cal.Rptr. 840, 710 P.2d 907], internal citations omitted.)

- "[I]f a passenger injures herself when encountering minor commonplace hazards that one expects in a station or terminal, the heightened duty does not apply." (*Churchman v. Bay Area Rapid Transit Dist.* (2019) 39 Cal.App.5th 246, 251 [252 Cal.Rptr.3d 167].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1055, 1057

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers*, § 109.32 et seq. (Matthew Bender)

2A California Points and Authorities, Ch. 33, *Carriers*, § 33.22 (Matthew Bender)

22 California Legal Forms, Ch. 54, *Shipment of Property*, § 54.32 (Matthew Bender)

California Civil Practice: Torts §§ 28:6–28:9 (Thomson Reuters)

903. Duty to Provide and Maintain Safe Equipment

Common carriers must use the highest care in constructing, servicing, inspecting, and maintaining their vehicles and equipment for transporting passengers [or property].

A common carrier is responsible for a defect in its vehicles and equipment used for transporting passengers [or property] if the common carrier:

(a) Created the defect; or

(b) Knew of the defect; or

(c) Would have known of the defect if it had used the highest care.

Common carriers must keep up with modern improvements in transportation. While they are not required to seek out and use every new invention, they must adopt commonly accepted safety designs and devices in the vehicles and equipment they use for transporting passengers [or property].

New September 2003

Directions for Use

To correct the impression that a carrier is absolutely liable for unsafe equipment, this instruction should be given together with instructions stating that a common carrier does not guarantee the safety of its passengers and that the level of care is the highest that reasonably can be exercised consistent with the mode of transportation used and the practical operation of its business as a carrier (see CACI No. 902, *Duty of Common Carrier*). (*Gradus v. Hanson Aviation, Inc.* (1984) 158 Cal.App.3d 1038, 1049–1050 [205 Cal.Rptr. 211].)

Sources and Authority

- Duty of Common Carrier. Civil Code section 2101.
- "The duty of care imposed on a common carrier of passengers includes the duty to furnish safe facilities for their passage." (*Cooper v. National Railroad Passenger Corporation* (1975) 45 Cal.App.3d 389, 395 [119 Cal.Rptr. 541], internal citations omitted, disapproved on other grounds in *Ewing v. Cloverleaf Bowl* (1978) 20 Cal.3d 389, 401 [143 Cal.Rptr. 13, 572 P.2d 1155].)
- Failure to give an instruction on Civil Code section 2101 may not be error where an instruction on the "utmost care" standard is given. (*Powell v. Dell-Air Aviation, Inc.* (1968) 268 Cal.App.2d 451, 457–458 [74 Cal.Rptr. 3].)
- The Supreme Court found error where an instruction omitted the duty to inspect: "An owner is bound to use the utmost care and diligence in the maintenance of

elevators. In the fulfillment of this obligation something more than regular and frequent inspections is required. Perfunctory inspections, although regularly and frequently made, would not meet the obligation appellant owed to respondents. In order to fulfill the duty imposed upon it by law appellant was required to use due care in servicing, inspecting and maintaining the elevator and all the appliances appurtenant thereto. The instruction erroneously failed to include this requirement." (*Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 261 [143 P.2d 929], internal citations omitted.)

- "The [equipment] must, therefore, under the standard of utmost care required of a carrier, be constructed, maintained and operated with the purpose and design to prevent injury . . . ." (*Vandagriff v. J.C. Penney* (1964) 228 Cal.App.2d 579, 582 [39 Cal.Rptr. 671].)
- Notice of defect is required where the carrier did not create dangerous condition: "In our view, the high degree of care required of a common carrier might impose a greater duty to inspect and thus make notice or knowledge more easily established, but the concept of the carrier's legal responsibility does not exclude the factor of notice or knowledge. The weight of authority supports the proposition that, in cases such as the instant one, actual or constructive notice is a prerequisite to the carrier's liability." (*Gray v. City and County of San Francisco* (1962) 202 Cal.App.2d 319, 330–331 [20 Cal.Rptr. 894].)
- Common carriers "must keep pace with science and art and modern improvement in their application to the carriage of passengers." (*Greyhound Lines, Inc. v. Superior Court* (1970) 3 Cal.App.3d 356, 359 [83 Cal.Rptr. 343], citing *Treadwell v. Whittier* (1889) 80 Cal. 574, 592, 600 [22 P. 266].)
- In *Treadwell,* the court approved of a jury instruction stating that while elevator operators "were not required to seek and apply every new invention, they must adopt such as are found by experience to combine the greater safety with practical use." The court said the instruction "is but a fair deduction from the rule that the defendants must use the utmost care and diligence to carry safely those who ride in their [conveyance] . . . ." (*Treadwell, supra,* 80 Cal. at pp. 599–600.) The court held that common carriers "are bound for defects in the vehicles which they furnish, which might have been discovered by the most careful examination . . . ." (*Id.* at p. 595.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1055, 1057

2 Levy et al., California Torts, Ch 23, *Carriers*, § 23.03[5] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

California Civil Practice: Torts § 28:15 (Thomson Reuters)

904. Duty of Common Carrier Toward Passengers With Illness or Disability

If a common carrier voluntarily accepts a person with an illness or a disability as a passenger and is aware of that person's condition, it must use as much additional care as is reasonably necessary to ensure the passenger's safety.

New September 2003; Revised May 2023

Sources and Authority

- "[I]f the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition. This is a duty required by law as well as the dictates of humanity." (*McBride v. Atchison, Topeka & Santa Fe Ry. Co.* (1955) 44 Cal.2d 113, 119–120 [279 P.2d 966], internal citation omitted.)

Secondary Sources

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02[6] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers*, § 109.33[1] (Matthew Bender)

2A California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)

California Civil Practice: Torts § 28:6 (Thomson Reuters)

905. Duty of Common Carrier Toward Minor Passengers

If a common carrier voluntarily accepts a child as a passenger, it must use as much additional care as is reasonably necessary to ensure the child's safety.

New September 2003

Sources and Authority

- A common carrier owes a greater duty of care to minor passengers: "It is settled law that a carrier owes a greater quantum of care to a child of tender years accepted by it as a passenger than it would to an adult." (*Brizzolari v. Market Street Ry. Co.* (1935) 7 Cal.App.2d 246, 248 [46 P.2d 783].)
- "In this instruction, the court admonished the jury that a carrier of passengers owes to children who are passengers on its cars a greater degree of care than it owes to adults. Such an instruction is proper." (*Mudrick v. Market Street Ry. Co.* (1938) 11 Cal.2d 724, 734 [81 P.2d 950].)

Secondary Sources

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02[6] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

California Civil Practice: Torts § 28:6 (Thomson Reuters)

906. Duty of Passenger for Own Safety

While a common carrier must use the highest care for its passengers' safety, passengers need only use reasonable care for their own safety.

New September 2003; Revised May 2017

Directions for Use

This instruction is intended to clarify that passengers and common carriers have different standards of care.

Sources and Authority

- "As applied to the standard of care imposed upon the common carrier as compared to the standard imposed on the passenger it is both erroneous and misleading to tell the jury, as was done here, that there are no degrees of negligence or contributory negligence in California, since the common carrier is in fact held to a higher degree of care than is the passenger. To follow this erroneous and misleading statement with the instruction, in the identical language used in another instruction concerning the defendant carrier's duty of care, that 'any negligence, however slight,' of the decedent proximately contributing to her death would bar a recovery, was to inform the jury that in determining negligence and contributory negligence they must apply the same standard of care." (*Wilson v. City and County of San Francisco* (1959) 174 Cal.App.2d 273, 276 [344 P.2d 828].)
- 'Whether unidentified passengers might be primarily or partially responsible for [plaintiff]'s injury, or whether she bears some responsibility for it herself, are questions for the trier of fact in considering causation." (*Huang v. The Bicycle Casino, Inc.* (2016) 4 Cal.App.5th 329, 346 [208 Cal.Rptr.3d 591].)

Secondary Sources

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.07[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2 California Civil Practice: Torts § 28:32 (Thomson Reuters)

907. Status of Passenger Disputed

A common carrier owes the highest care and vigilance to persons only while they are passengers. [*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was [***name of defendant***]'s passenger at the time of the incident.**

To establish that [*name of plaintiff***] was a passenger, [he/she/***nonbinary pronoun***] must prove all of the following:**

1. **That [***name of plaintiff***] intended to become a passenger;**
2. **That [***name of plaintiff***] was accepted as a passenger by [***name of defendant***]; and**
3. **That [***name of plaintiff***] placed [himself/herself/***nonbinary pronoun***] under the control of [***name of defendant***].**

To be a passenger, it is not necessary for the person to actually enter the carrier's vehicle [*or name mode of travel, e.g., bus, train***]; however, the carrier must have taken some action indicating acceptance of the person as a passenger. A person continues to be a passenger until the person safely leaves the carrier's vehicle [or equipment].**

A common carrier must use the highest care and vigilance in providing its passengers with a safe place to get on and off its vehicles [or equipment].

New September 2003; Revised May 2020

Sources and Authority

- The heightened degree of care for common carriers is owed only while "passengers are *in transitu*, and until they have safely departed the carrier's vehicle." (*Marshall v. United Airlines* (1973) 35 Cal.App.3d 84, 86 [110 Cal.Rptr. 416].)
- The relationship of carrier and passenger is "created when one offers to become a passenger, and is accepted as a passenger after he has placed himself under the control of the carrier." (*Grier v. Ferrant* (1944) 62 Cal.App.2d 306, 310 [144 P.2d 631].)
- It is not necessary that the passenger have entered the vehicle for the relationship to exist: " 'The relation is in force when one, intending in good faith to become a passenger, goes to the place designated as the site of departure at the appropriate time and the carrier takes some action indicating acceptance of the passenger as a traveler.' " (*Orr v. Pacific Southwest Airlines* (1989) 208 Cal.App.3d 1467, 1473 [257 Cal.Rptr. 18], internal citations omitted.)
- The carrier-passenger relationship terminates once the passenger has disembarked

and entered a place of relative safety. (*McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1018 [67 Cal.Rptr.2d 516].)

- Carriers must exercise utmost care " '[u]ntil the passenger reaches a place outside the sphere of any activity of the carrier which might reasonably constitute a mobile or animated hazard to the passenger.' " (*Brandelius v. City and County of San Francisco* (1957) 47 Cal.2d 729, 735 [306 P.2d 432], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1058, 1059

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers*, § 109.36 (Matthew Bender)

2A California Points and Authorities, Ch. 33, *Carriers*, § 33.22 (Matthew Bender)

2 California Civil Practice: Torts § 28:7 (Thomson Reuters)

908. Duty to Protect Passengers From Assault

[*Name of plaintiff*] claims that [*name of defendant*] was negligent in failing to prevent an attack by another. To establish this claim, [*name of plaintiff*] must prove both of the following:

1. **That [*name of defendant*] knew or, by using the highest care, should have known that a passenger was reasonably likely to attack another passenger; and**
2. **That by using the highest care, [*name of defendant*] could have prevented or reduced the harm from the attack.**

New September 2003

Directions for Use

This instruction must be used in conjunction with the instructions in the negligence series.

Sources and Authority

- Restatement Second of Torts, section 315 states:

  As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct. Such a duty may arise, however, if

  (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

  (b) a special relation exists between the actor and the other which gives the other a right of protection.

- The Supreme Court has held that "[t]he relationship between a common carrier and its passengers is . . . a special relationship." (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 789 [221 Cal.Rptr. 840, 710 P.2d 907].)
- The common carrier standard of "utmost care" applies to the duty of a carrier to protect a passenger from assaults by fellow passengers. (*Terrell v. Key System* (1945) 69 Cal.App.2d 682, 686 [159 P.2d 704].) However, the duty can only arise if "in the exercise of the required degree of care the carrier has or should have knowledge of conditions from which it may reasonably be apprehended that an assault on a passenger may occur, and has the ability in the exercise of that degree of care to prevent the injury." (*Ibid.*, internal citations omitted.)
- The *Lopez* court stated the standard of care as follows: "[C]arriers are not insurers of their passenger's safety and will not automatically be liable, regardless of the circumstances, for any injury suffered by a passenger at the hands of a fellow passenger. Rather, a carrier is liable for injuries resulting from an assault by one passenger upon another only where, in the exercise of the

required degree of care, the carrier has or should have knowledge from which it may reasonably be apprehended that an assault on a passenger may occur, and has the ability in the exercise of that degree of care to prevent the injury." (*Lopez, supra,* 40 Cal.3d at p. 791, internal citation omitted.)

- There is no liability when a sudden assault occurs with no warning. (*City and County of San Francisco v. Superior Court* (1994) 31 Cal.App.4th 45, 49 [36 Cal.Rptr.2d 372].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1062, 1063

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.03[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2A California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)

California Civil Practice: Torts § 28:16 (Thomson Reuters)

909–999. Reserved for Future Use

PREMISES LIABILITY

1000. Premises Liability—Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed because of the way [*name of defendant*] managed [his/her/*nonbinary pronoun*/its] property. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [owned/leased/occupied/controlled] the property;**
2. **That [*name of defendant*] was negligent in the use or maintenance of the property;**
3. **That [*name of plaintiff*] was harmed; and**
4. **That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised June 2005, December 2011

Directions for Use

For cases involving public entity defendants, see instructions on dangerous conditions of public property (CACI No. 1100 et seq.).

Sources and Authority

- General Duty to Exercise Due Care. Civil Code section 1714(a).
- "The elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury. Premises liability ' "is grounded in the possession of the premises and the attendant right to control and manage the premises" '; accordingly, ' "mere possession with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty to act." ' But the duty arising from possession and control of property is adherence to the same standard of care that applies in negligence cases. In determining whether a premises owner owes a duty to persons on its property, we apply the *Rowland* [*Rowland v. Christian* (1968) 69 Cal.2d 108 [70 Cal.Rptr. 97, 443 P.2d 561]] factors. Indeed, *Rowland* itself involved premises liability.' " (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1159 [210 Cal.Rptr.3d 283, 384 P.3d 283], internal citations omitted.)
- "The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence." (*Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1619 [264 Cal.Rptr. 756].)
- " '[P]roperty owners are liable for injuries on land they own, possess, or

control.' But . . . the phrase 'own, possess, *or* control' is stated in the alternative. A defendant need not own, possess and control property in order to be held liable; control alone is sufficient." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162 [60 Cal.Rptr.2d 448, 929 P.2d 1239], original italics, internal citations omitted.)

- " ' "[A] landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner." ' 'Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite.' " (*Kesner, supra*, 5 Cal.5th at p. 1159, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1224–1228

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.01 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, §§ 170.01, 170.20 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.01 (Matthew Bender)

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

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

California Civil Practice: Torts §§ 16:1–16:3 (Thomson Reuters)

1001. Basic Duty of Care

A person who [owns/leases/occupies/controls] property is negligent if that person fails to use reasonable care to keep the property in a reasonably safe condition. A person who [owns/leases/occupies/controls] property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others.

In deciding whether [*name of defendant***] used reasonable care, you may consider, among other factors, the following:**

(a) The location of the property;

(b) The likelihood that someone would come on to the property in the same manner as [*name of plaintiff***] did;**

(c) The likelihood of harm;

(d) The probable seriousness of such harm;

(e) Whether [*name of defendant***] knew or should have known of the condition that created the risk of harm;**

(f) The difficulty of protecting against the risk of such harm; [and]

(g) The extent of [*name of defendant***]'s control over the condition that created the risk of harm; [and]**

(h) [*Other relevant factor(s)***.]**

New September 2003; Revised June 2010, May 2020

Directions for Use

Not all of these factors will apply to every case. Select those that are appropriate to the facts of the case.

Under the doctrine of nondelegable duty, a property owner cannot escape liability for failure to maintain property in a safe condition by delegating the duty to an independent contractor. (*Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 260 [143 P.2d 929].) For an instruction for use with regard to a landowner's liability for the acts of an independent contractor, see CACI No. 3713, *Nondelegable Duty*.

Sources and Authority

- "Broadly speaking, premises liability alleges a defendant property owner allowed a dangerous condition on its property or failed to take reasonable steps to secure its property against criminal acts by third parties." (*Delgado v. American Multi-*

Cinema, Inc. (1999) 72 Cal.App.4th 1403, 1406, fn. 1 [85 Cal.Rptr.2d 838], internal citation omitted.)

- "It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207], internal citations omitted.)
- "To comply with this duty, a person who controls property must ' " ' "inspect [the premises] or take other proper means to ascertain their condition" ' " ' and, if a dangerous condition exists that would have been discovered by the exercise of reasonable care, has a duty to give adequate warning of or remedy it." (*Staats v. Vintner's Golf Club, LLC* (2018) 25 Cal.App.5th 826, 833 [236 Cal.Rptr.3d 236].)
- "[T]he measures an operator must take to comply with the duty to keep the premises in a reasonably safe condition depend on the circumstances, and the issue is a question for the jury unless the facts of the case are not reasonably in dispute." (*Staats*, *supra*, 25 Cal.App.5th at p. 840.)
- "An owner of real property is 'not the insurer of [a] visitor's personal safety . . . .' However, an owner is responsible ' "for an injury occasioned to another by [the owner's] want of ordinary care or skill in the management of his or her property. . . ." ' Accordingly, landowners are required 'to maintain land in their possession and control in a reasonably safe condition', and to use due care to eliminate dangerous conditions on their property." (*Taylor v. Trimble* (2017) 13 Cal.App.5th 934, 943–944 [220 Cal.Rptr.3d 741], internal citations omitted.)
- "[T]he issue concerning a landlord's duty is not the *existence* of the duty, but rather the *scope* of the duty under the particular facts of the case. Reference to the *scope* of the landlord's duty 'is intended to describe the specific steps a landlord must take in a given specific circumstance to maintain the property's safety to protect a tenant from a specific class of risk.' " (*Lawrence v. La Jolla Beach & Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 23 [179 Cal.Rptr.3d 758], original italics, internal citation omitted.)
- "The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others . . . ." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97, 443 P.2d 561].)
- " ' "[A] property owner is not liable for damages caused by a minor, trivial, or insignificant defect' on its property." The so-called 'trivial defect doctrine' recognizes that ' "persons who maintain walkways, whether public or private, are not required to maintain them in an absolutely perfect condition. The duty of care imposed on a property owner, even one with actual notice, does not require the repair of minor defects." ' " (*Fajardo v. Dailey* (2022) 85 Cal.App.5th 221, 226 [300 Cal.Rptr.3d 707], internal citation omitted.)
- In this state, duties are no longer imposed on an occupier of land solely on the

basis of rigid classifications of trespasser, licensee, and invitee. The purpose of plaintiff's presence on the land is not determinative. We have recognized, however, that this purpose may have some bearing upon the liability issue. This purpose therefore must be considered along with other factors weighing for and against the imposition of a duty on the landowner." (*Ann M., supra*, 6 Cal.4th at pp. 674–675, internal citations omitted.)

- "As stated in *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 25 [77 Cal.Rptr. 914], '[t]he term "invitee" has not been abandoned, nor have "trespasser" and "licensee." In the minds of the jury, whether a possessor of the premises has acted as a reasonable man toward a plaintiff, in view of the probability of injury to him, will tend to involve the circumstances under which he came upon defendant's land; and the probability of exposure of plaintiff and others of his class to the risk of injury; as well as whether the condition itself presented an unreasonable risk of harm, in view of the foreseeable use of the property.' Thus, the court concluded, and we agree, *Rowland* 'does not generally abrogate the decisions declaring the substantive duties of the possessor of land to invitees nor those establishing the correlative rights and duties of invitees.' (*Id.*, at p. 27.)" (*Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 486–487 [227 Cal.Rptr. 465], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)
- "The distinction between artificial and natural conditions [has been] rejected." (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 371 [178 Cal.Rptr. 783, 636 P.2d 1121].)
- "It must also be emphasized that the liability imposed is for negligence. The question is whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances. The likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor's degree of control over the risk-creating condition are among the factors to be considered by the trier of fact in evaluating the reasonableness of a defendant's conduct." (*Sprecher, supra*, 30 Cal.3d at p. 372.)
- "[A] landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite. (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 38 [180 Cal.Rptr.3d 474].)
- "The duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition, irrespective of whether the contractor's negligence lies in his incompetence, carelessness,

inattention or delay." (*Brown, supra*, 23 Cal.2d at p. 260.)

- "[A] defendant property owner's compliance with a law or safety regulation, in and of itself, does not establish that the owner has utilized due care. The owner's compliance with applicable safety regulations, while relevant to show due care, is not dispositive, if there are other circumstances requiring a higher degree of care." (*Lawrence, supra*, 231 Cal.App.4th at p. 31.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1228

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

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-B, *Landlord Liability For Injuries From Acts Of Others*, ¶ 6:48 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.01 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, §§ 170.01, 170.03, 170.20 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.01 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.50 (Matthew Bender)

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

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

1 California Civil Practice: Torts § 16:3 (Thomson Reuters)

1002. Extent of Control Over Premises Area

[*Name of plaintiff*] claims that [*name of defendant*] controlled the property involved in [*name of plaintiff*]'s harm, even though [*name of defendant*] did not own or lease it. A person controls property that the person does not own or lease when the person uses the property as if it were the person's own. A person is responsible for maintaining, in reasonably safe condition, all areas that person controls.

New September 2003; Revised May 2020

Directions for Use

Use this instruction only for property that is not actually owned or leased by the defendant.

Sources and Authority

- "[A] defendant's duty to maintain land in a reasonably safe condition extends to land over which the defendant exercises control, regardless of who owns the land. 'As long as the defendant exercised control over the land, the location of the property line would not affect the defendant's potential liability.' " (*University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 445 [241 Cal.Rptr.3d 616], internal citation omitted.)
- "Even if a hazard located on publicly owned property is created by a third party, an abutting owner or occupier of private property will be held liable for injuries caused by that hazard if the owner or occupier has ' "dramati[cally] assert[ed]" ' any of the ' "right[s] normally associated with ownership or . . . possession" ' by undertaking affirmative acts that are consistent with being the owner or occupier of the property and that go beyond the 'minimal, neighborly maintenance of property owned by another.' " (*Lopez v. City of Los Angeles* (2020) 55 Cal.App.5th 244, 258 [269 Cal.Rptr.3d 377].)
- "In *Alcaraz* . . . , our Supreme Court held that a landowner who exercises control over an adjoining strip of land has a duty to protect or warn others entering the adjacent land of a known hazard there. This duty arises even if the person does not own or exercise control over the hazard and even if the person does not own the abutting property on which the hazard is located. . . . [¶] The *Alcaraz* court concluded that such evidence was 'sufficient to raise a triable issue of fact as to whether defendants exercised control over the strip of land containing the meter box and thus owed a duty of care to protect or warn plaintiff of the allegedly dangerous condition of the property.' " (*Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 197–198 [69 Cal.Rptr.2d 69], footnote and internal citations omitted.)
- " '[A] defendant cannot be held liable for the defective or dangerous condition of property which it [does] not own, possess, or control.' Thus, ' "[a] tenant

ordinarily is not liable for injuries to his invitees occurring outside the leased premises on common passageways over which he has no control. [Citations.] Responsibility in such cases rests on the owner, who has the right of control and the duty to maintain that part of the premises in a safe condition. It is clear, however, that if the tenant exercises control over a common passageway outside the leased premises, he may become liable to his business invitees if he fails to warn them of a dangerous condition existing thereon." ' The ' "crucial element is control." ' " (*Moses v. Roger-McKeever* (2023) 91 Cal.App.5th 172, 179 [308 Cal.Rptr.3d 149], internal citation omited.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1225, 1226

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.03 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, §§ 381.03–381.04 (Matthew Bender)

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

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.60 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 16:2 (Thomson Reuters)

1003. Unsafe Conditions

[*Name of defendant*] was negligent in the use or maintenance of the property if:

1. **A condition on the property created an unreasonable risk of harm;**
2. **[*Name of defendant*] knew or, through the exercise of reasonable care, should have known about it; and**
3. **[*Name of defendant*] failed to repair the condition, protect against harm from the condition, or give adequate warning of the condition.**

New September 2003; Revised April 2007, October 2008

Directions for Use

Read this instruction with CACI No. 1000, *Premises Liability—Essential Factual Elements,* in a premises liability case involving an unsafe condition on property. If there is an issue as to the owner's constructive knowledge of the condition (element 2), also give CACI No. 1011, *Constructive Notice Regarding Dangerous Conditions on Property*.

Sources and Authority

- "Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence. Whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97, 443 P.2d 561].)
- " '[T]he proprietor of a store who knows of, or by the exercise of reasonable care could discover, an artificial condition upon his premises which he should foresee exposes his business visitors to an unreasonable risk, and who has no basis for believing that they will discover the condition or realize the risk involved, is under a duty to exercise ordinary care either to make the condition reasonably safe for their use or to give a warning adequate to enable them to avoid the harm. . . .' [Plaintiff] was entitled to have the jury so instructed." (*Williams v. Carl Karcher Enters., Inc.* (1986) 182 Cal.App.3d 479, 488 [227 Cal.Rptr. 465], internal citations omitted, disapproved on other grounds in *Soule*

v. GM Corp. (1994) 8 Cal.4th 548, 574, 580 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "Because the owner is not the insurer of the visitor's personal safety, the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability. Although the owner's lack of knowledge is not a defense, '[t]o impose liability for injuries suffered by an invitee due to [a] defective condition of the premises, the owner or occupier "must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. . . ." ' " (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1206 [114 Cal.Rptr.2d 470, 36 P.3d 11], internal citation omitted.)
- "By inviting the public to its store, an owner or possessor has the duty 'to exercise ordinary care and prudence to keep the aisles and passageways of the premises in and through which, by their location and arrangement, a customer in making purchases is induced to go, in a reasonably safe condition so as not unnecessarily to expose the customer to danger or accident.' " (*Hassaine v. Club Demonstration Services, Inc.* (2022) 77 Cal.App.5th 843, 852 [293 Cal.Rptr.3d 20], internal citation omitted.)
- "Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances knowledge thereof is imputed to him. Where the dangerous condition is brought about by natural wear and tear, or third persons, or acts of God or by other causes which are not due to the negligence of the owner, or his employees, then to impose liability the owner must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it or as a man of ordinary prudence should have discovered it." (*Hatfield v. Levy Bros.* (1941) 18 Cal.2d 798, 806 [117 P.2d 841], internal citation omitted.)
- "Generally speaking, a property owner must have actual or constructive knowledge of a dangerous condition before liability will be imposed. In the ordinary slip-and-fall case, . . . the cause of the dangerous condition is not necessarily linked to an employee. Consequently, there is no issue of respondeat superior. Where, however, 'the evidence is such that a reasonable inference can be drawn that the condition was created by employees of the [defendant], then [the defendant] is charged with notice of the dangerous condition.' " (*Getchell v.*

Rogers Jewelry (2012) 203 Cal.App.4th 381, 385 [136 Cal.Rptr.3d 641], internal citation omitted.)

- "[U]nder current California law, a store owner's choice of a particular 'mode of operation' does not eliminate a slip-and-fall plaintiff's burden of proving the owner had knowledge of the dangerous condition that caused the accident. Moreover, it would not be prudent to hold otherwise. Without this knowledge requirement, certain store owners would essentially incur strict liability for slip-and-fall injuries, i.e., they would be insurers of the safety of their patrons. For example, whether the french fry was dropped 10 seconds or 10 hours before the accident would be of no consequence to the liability finding. However, this is not to say that a store owner's business choices do not impact the negligence analysis. If the store owner's practices create a higher risk that dangerous conditions will exist, ordinary care will require a corresponding increase in precautions." (*Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 479 [3 Cal.Rptr. 3d 813].)
- "Although liability might easily be found where the landowner has actual knowledge of the dangerous condition, '[the] landowner's lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable.' " (*Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325, 330 [203 Cal.Rptr. 701], internal citation omitted.)
- "[A] real estate agent has a duty to notify visitors of marketed property of concealed dangerous conditions of which the agent has actual or constructive knowledge. The agent's actual or constructive knowledge of a dangerous condition is imputed to his or her principal, the property owner, who shares with the agent liability for damages proximately caused by a breach of this duty." (*Hall v. Rockcliff Realtors* (2013) 215 Cal.App.4th 1134, 1141 [155 Cal.Rptr.3d 739].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1261–1265

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

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.02 (Matthew Bender)

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

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.51 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability,* § 421.14 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability,* § 178.23 et seq. (Matthew Bender)

California Civil Practice: Torts § 16:4 (Thomson Reuters)

1004. Obviously Unsafe Conditions

If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the [owner/occupier/one who controls the property] does not have to warn others about the dangerous condition.

However, the [owner/occupier/one who controls the property] still must use reasonable care to protect against the risk of harm if it is foreseeable that the condition may cause injury to someone who because of necessity encounters the condition.

New September 2003; Revised May 2018, December 2022

Directions for Use

Give this instruction with CACI No. 1001, *Basic Duty of Care*, if it is alleged that the condition causing injury was obvious. The first paragraph addresses the lack of a duty to warn of an obviously unsafe condition. (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 447 [221 Cal.Rptr.3d 701].)

The second paragraph addresses when there may be a duty to take some remedial action. Landowners may have a duty to take precautions to protect against the risk of harm from an obviously unsafe condition, even if they do not have a duty to warn. (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121–122 [273 Cal.Rptr. 457].)

Sources and Authority

- "Foreseeability of harm is typically absent when a dangerous condition is open and obvious. 'Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition.' In that situation, owners and possessors of land are entitled to assume others will 'perceive the obvious' and take action to avoid the dangerous condition." (*Jacobs*, *supra*, 14 Cal.App.5th at p. 447, internal citations omitted.)
- "[T]here may be situations 'in which an obvious hazard, for which no warning is necessary, nonetheless gives rise to a duty on a landowner's part to remedy the hazard because knowledge of the hazard is inadequate to prevent injury.' This is so when, for example, the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that, under the circumstances, a person might choose to encounter the danger." (*Johnson v. The Raytheon Co., Inc.* (2019) 33 Cal.App.5th 617, 632 [245 Cal.Rptr.3d 282], internal citation omitted.)
- "There may be a duty of care owed even where a dangerous condition is open and obvious, when 'it is foreseeable that the danger may cause injury despite the

fact that it is obvious (e.g., when necessity requires persons to encounter it).' In other words, 'the obviousness of the condition and its dangerousness . . . will not negate a duty of care when it is foreseeable that, *because of necessity or other circumstances, a person may choose to encounter the condition*.' " (*Montes v. Young Men's Christian Assn. of Glendale, California* (2022) 81 Cal.App.5th 1134, 1140 [297 Cal.Rptr.3d 791], internal citations omitted, original italics.)

- "[I]t is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger. The foreseeability of injury, in turn, when considered along with various other policy considerations such as the extent of the burden to the defendant and consequences to the community of imposing a duty to remedy such danger may lead to the legal conclusion that the defendant 'owes a duty of due care "to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." ' " (*Osborn, supra,* 224 Cal.App.3d at p. 121, internal citation omitted.)
- "[W]hen a worker, whose work requires him or her to encounter a danger which is obvious or observable, is injured, '*[t]he jury [is] entitled to balance the [plaintiff's] necessity against the danger, even if it be assumed that it was an apparent one. This [is] a factual issue.* [Citations.]' In other words, under certain circumstances, an obvious or apparent risk of danger does not automatically absolve a defendant of liability for injury caused thereby." (*Osborn*, *supra*, 224 Cal.App.3d at p. 118, original italics, internal citations omitted.)
- "[T]he obvious nature of a danger is not, in and of itself, sufficient to establish that the owner of the premises on which the danger is located is not liable for injuries caused thereby, and that although obviousness of danger may negate any duty to warn, it does not necessarily negate the duty to remedy." (*Osborn*, *supra*, 224 Cal.App.3d at p. 119.)
- "The issue is whether there is any evidence from which a trier of fact could find that, as a practical necessity, [plaintiff] was foreseeably required to expose himself to the danger of falling into the empty pool." (*Jacobs*, *supra*, 14 Cal.App.5th at p. 447.)
- "It is incorrect to instruct a jury categorically that a business owner cannot be held liable for an injury resulting from an obvious danger. There may be a duty to remedy a dangerous condition, even though there is no duty to warn thereof, if the condition is foreseeable. [¶] . . . The jury was free to consider whether [the business owner] was directly negligent in failing to correct any foreseeable, dangerous condition of the cables which may have contributed to the cause of [the plaintiff's] injuries." (*Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1040 [43 Cal.Rptr.2d 158], internal citation omitted.)
- "[T]he 'obvious danger' exception to a landowner's ordinary duty of care is in reality a recharacterization of the former assumption of the risk doctrine, i.e., where the condition is so apparent that the plaintiff must have realized the

danger involved, he assumes the risk of injury even if the defendant was negligent. . . . [T]his type of assumption of the risk has now been merged into comparative negligence." (*Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, 665 [20 Cal.Rptr.2d 148], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1233, 1267–1269

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

11 California Real Estate Law & Practice, Ch. 381, *Tort Liability of Property Owners*, §§ 381.20, 381.32 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.14 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.25 et seq. (Matthew Bender)

1005. Business Proprietor's or Property Owner's Liability for the Criminal Conduct of Others

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[An owner of a business that is open to the public/A landlord] must use reasonable care to protect [patrons/guests/tenants] from another person's criminal conduct on [his/her/*nonbinary pronoun*/its] property if the [owner/landlord] can reasonably anticipate that conduct.

You must decide whether the steps taken by [*name of defendant*] to protect persons such as [*name of plaintiff*] were adequate and reasonable under the circumstances.

New September 2003; Revised May 2018

Directions for Use

A business owner or a landlord has a duty to take affirmative steps to protect against the criminal acts of a third party if the conduct can be reasonably anticipated. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676 [25 Cal.Rptr.2d 137, 863 P.2d 207], disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5 [113 Cal.Rptr.3d 327, 235 P.3d 988].) Whether there is a duty as defined in the first paragraph is a question of law for the court. The jury then decides whether the defendant's remedial measures were reasonable and adequate under the circumstances (second paragraph). (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 131 [211 Cal.Rptr. 356, 695 P.2d 653].)

Sources and Authority

- "A landlord generally owes a tenant the duty, arising out of their special relationship, to take reasonable measures to secure areas under the landlord's control against foreseeable criminal acts of third parties." (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213 [63 Cal.Rptr.3d 99, 162 P.3d 610].)
- "[B]road language used in *Isaacs* has tended to confuse duty analysis generally in that the opinion can be read to hold that foreseeability in the context of determining duty is normally a question of fact reserved for the jury. Any such reading of *Isaacs* is in error. Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court." (*Ann M.*, *supra*, 6 Cal.4th at p. 678, internal citation omitted.)
- "[T]he decision to impose a duty of care to protect against criminal assaults requires 'balancing the foreseeability of the harm against the burden of the duty to be imposed. [Citation.] " '[I]n cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. [Citation.] On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required.' [Citation.]" [Citation.] Or, as one appellate court

has accurately explained, duty in such circumstances is determined by a balancing of "foreseeability" of the criminal acts against the "burdensomeness, vagueness, and efficacy" of the proposed security measures.' " (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1146–1147 [12 Cal.Rptr.3d 615, 88 P.3d 517].)

- " 'A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.' " (*Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114, 124 [52 Cal.Rptr. 561, 416 P.2d 793], quoting Restatement of Torts, § 344.)
- "[T]he property holder only 'has a duty to protect against types of crimes of which he has notice and which are likely to recur if the common areas are not secure.' The court's focus in determining duty ' " 'is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.' [Citation.]" ' " (*Janice H. v. 696 North Robertson, LLC* (2016) 1 Cal.App.5th 586, 594 [205 Cal.Rptr.3d 103], internal citation omitted.)
- "[O]nly when 'heightened' foreseeability of third party criminal activity on the premises exists—shown by prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location—does the scope of a business proprietor's special-relationship-based duty *include an obligation to provide guards* to protect the safety of patrons." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 240 [30 Cal.Rptr.3d 145, 113 P.3d 1159], internal citations and footnote omitted, original italics.)
- "[F]oreseeability, whether heightened or reduced, is tested by what the defendant knows, not what the defendant could have or should have learned." (*Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 158 [42 Cal.Rptr.3d 519].)
- "Here [defendant] argues it has no duty unless and until it experiences a similar criminal incident. We disagree. While a property holder generally has a duty to protect against types of crimes of which he is on notice, the absence of previous occurrences does not end the duty inquiry. We look to all of the factual circumstances to assess foreseeability." (*Janice H., supra*, 1 Cal.App.5th at p. 595, internal citation omitted.)
- "Knowing there is a general potential for rowdy or troublesome conduct by bar patrons, however, does not make the category of aggressive parking lot assaults reasonably foreseeable, any more so than the presumed awareness of previous assaults and robberies or problems with transients on the property establishes the

foreseeability of a violent sexual assault." (*Williams v. Fremont Corners, Inc.* (2019) 37 Cal.App.5th 654, 671–672 [250 Cal.Rptr.3d 46].)

- "Even when proprietors . . . have no duty . . . to provide a security guard or undertake other similarly burdensome preventative measures, the proprietor is not necessarily insulated from liability under the special relationship doctrine. A proprietor that has no duty . . . to hire a security guard or to undertake other similarly burdensome preventative measures still owes a duty of due care to a patron or invitee by virtue of the special relationship, and there are circumstances (apart from the failure to provide a security guard or undertake other similarly burdensome preventative measures) that may give rise to liability based upon the proprietor's special relationship." (*Delgado, supra*, 36 Cal.4th at pp. 240–241.)
- A business proprietor is not an insurer of the safety of his invitees, "but he is required to exercise reasonable care for their safety and is liable for injuries resulting from a breach of this duty. The general duty includes not only the duty to inspect the premises in order to uncover dangerous conditions, but, as well, the duty to take affirmative action to control the wrongful acts of third persons which threaten invitees where the occupant has reasonable cause to anticipate such acts and the probability of injury resulting therefrom." (*Taylor*, *supra*, 65 Cal.2d at p. 121, internal citations omitted.)
- "In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Ann M., supra*, 6 Cal.4th at p. 674, internal citation omitted.) (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 499–501 [229 Cal.Rptr. 456, 723 P.2d 573].)
- "[Restatement Second of Torts] Section 314A identifies 'special relations' which give rise to a duty to protect another. Section 344 of the Restatement Second of Torts expands on that duty as it applies to business operators." (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 823 [59 Cal.Rptr.2d 756, 927 P.2d 1260].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1271–1291

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.06 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.05 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.21 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.12, 334.23, 334.57 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.30 et seq. (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.60 et seq. (Matthew Bender)

California Civil Practice: Torts § 16:5 (Thomson Reuters)

1006. Landlord's Duty

A landlord must conduct reasonable periodic inspections of rental property whenever the landlord has the legal right of possession. Before giving possession of leased property to a tenant [or on renewal of a lease] [or after retaking possession from a tenant], a landlord must conduct a reasonable inspection of the property for unsafe conditions and must take reasonable precautions to prevent injury due to the conditions that were or reasonably should have been discovered in the process. The inspection must include common areas under the landlord's control.

After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the landlord's control if the landlord knows or reasonably should have known about it.

[After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the tenant's control if the landlord has actual knowledge of the condition and the right and ability to correct it.]

New September 2003; Revised April 2008, April 2009, December 2009, June 2010

Directions for Use

Give this instruction with CACI No. 1000, *Premises Liability—Essential Factual Elements*, CACI No. 1001, *Basic Duty of Care*, and CACI No. 1003, *Unsafe Conditions,* if the injury occurred on rental property and the landlord is alleged to be liable. Include the last paragraph if the property is not within the landlord's immediate control.

Include "or on renewal of a lease" for commercial tenancies. (See *Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781 [258 Cal.Rptr. 669].) While no case appears to have specifically addressed a landlord's duty to inspect on renewal of a residential lease, it would seem impossible to impose such a duty with regard to a month-to-month tenancy. Whether there might be a duty to inspect on renewal of a long-term residential lease appears to be unresolved.

Under the doctrine of nondelegable duty, a landlord cannot escape liability for failure to maintain property in a safe condition by delegating the duty to an independent contractor. (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726 [28 Cal.Rptr.2d 672].) For an instruction for use with regard to a landlord's liability for the acts of an independent contractor, see CACI No. 3713, *Nondelegable Duty*.

Sources and Authority

- "A landlord owes a duty of care to a tenant to provide and maintain safe

conditions on the leased premises. This duty of care also extends to the general public. 'A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is transferred so as to prevent any unreasonable risk of harm to the public who may enter. An agreement to renew a lease or relet the premises . . . cannot relieve the lessor of his duty to see that the premises are reasonably safe at that time.' [¶] Where there is a duty to exercise reasonable care in the inspection of premises for dangerous conditions, the lack of awareness of the dangerous condition does not generally preclude liability. 'Although liability might easily be found where the landowner has actual knowledge of the dangerous condition "[t]he landowner's lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable." ' " (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134 [32 Cal.Rptr.2d 755], internal citations omitted.)

- "Public policy precludes landlord liability for a dangerous condition on the premises which came into existence after possession has passed to a tenant. This is based on the principle that the landlord has surrendered possession and control of the land to the tenant and has no right even to enter without permission. It would not be reasonable to hold a lessor liable if the lessor did not have the power, opportunity, and ability to eliminate the dangerous condition." (*Garcia v. Holt* (2015) 242 Cal.App.4th 600, 604 [195 Cal.Rptr.3d 47], internal citations omitted.)
- "The rationale for this rule has been that property law regards a lease as equivalent to a sale of the land for the term of the lease. As stated by Prosser: 'In the absence of agreement to the contrary, the lessor surrenders both possession and control of the land to the lessee, retaining only a reversionary interest; and he has no right even to enter without the permission of the lessee. Consequently, it is the general rule that he is under no obligation to anyone to look after the premises or keep them in repair, and is not responsible, either to persons injured on the land or to those outside of it, for conditions which develop or are created by the tenant after possession has been transferred. Neither is he responsible, in general, for the activities which the tenant carries on upon the land after such transfer, even when they create a nuisance.' " (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510–511 [118 Cal.Rptr. 741], internal citations omitted.)
- "To this general rule of nonliability, the law has developed a number of exceptions, such as where the landlord covenants or volunteers to repair a defective condition on the premises, where the landlord has actual knowledge of defects which are unknown and not apparent to the tenant and he fails to disclose them to the tenant, where there is a nuisance existing on the property at

the time the lease is made or renewed, when a safety law has been violated, or where the injury occurs on a part of the premises over which the landlord retains control, such as common hallways, stairs, elevators, or roof. [¶] A common element in these exceptions is that either at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury. In these situations, the law imposes on the landlord a duty to use ordinary care to eliminate the condition with resulting liability for injuries caused by his failure so to act." (*Uccello, supra,* 44 Cal.App.3d at p. 511, internal citations omitted.)

- "With regard to landlords, 'reasonable care ordinarily involves making sure the property is safe at the beginning of the tenancy, and repairing any hazards the landlord learns about later.' ' "Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition." ' " (*Day v. Lupo Vine Street, L.P.* (2018) 22 Cal.App.5th 62, 69 [231 Cal.Rptr.3d 193], internal citations omitted.)
- "Limiting a landlord's obligations releases it from needing to engage in potentially intrusive oversight of the property, thus permitting the tenant to enjoy its tenancy unmolested." (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412 [82 Cal.Rptr.3d 735], internal citations omitted.)
- "[A] commercial landowner cannot totally abrogate its landowner responsibilities merely by signing a lease. As the owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as to unknown third persons. At the time the lease is executed and upon renewal a landlord has a right to reenter the property, has control of the property, and must inspect the premises to make the premises reasonably safe from dangerous conditions. Even if the commercial landlord executes a contract which requires the tenant to maintain the property in a certain condition, the landlord is obligated at the time the lease is executed to take reasonable precautions to avoid unnecessary danger." (*Mora*, *supra*, 210 Cal.App.3d at p. 781, internal citations omitted.)
- "[T]he landlord's responsibility to inspect is limited. Like a residential landlord, the duty to inspect charges the lessor 'only with those matters which would have been disclosed by a reasonable inspection.' The burden of reducing or avoiding the risk and the likelihood of injury will affect the determination of what constitutes a reasonable inspection. The landlord's obligation is only to do what is reasonable under the circumstances. The landlord need not take extraordinary measures or make unreasonable expenditures of time and money in trying to discover hazards unless the circumstances so warrant. When there is a potential serious danger, which is foreseeable, a landlord should anticipate the danger and

conduct a reasonable inspection before passing possession to the tenant. However, if no such inspection is warranted, the landlord has no such obligation." (*Mora, supra,* 210 Cal.App.3d at p. 782, internal citations and footnote omitted.)

- "It is one thing for a landlord to leave a tenant alone who is complying with its lease. It is entirely different, however, for a landlord to ignore a defaulting tenant's possible neglect of property. Neglected property endangers the public, and a landlord's detachment frustrates the public policy of keeping property in good repair and safe. To strike the right balance between safety and disfavored self-help, we hold that [the landlord]'s duty to inspect attached upon entry of the judgment of possession in the unlawful detainer action and included reasonable periodic inspections thereafter." (*Stone v. Center Trust Retail Properties, Inc.* (2008) 163 Cal.App.4th 608, 613 [77 Cal.Rptr.3d 556].)
- "[I]t is established that a landlord owes a duty of care to its tenants to take reasonable steps to secure the common areas under its control." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 675 [25 Cal.Rptr.2d 137, 863 P.2d 207].)
- "The existence of the landlord's duty to others to maintain the property in a reasonably safe condition is a question of law for the court." (*Johnson v. Prasad* (2014) 224 Cal.App.4th 74, 79 [168 Cal.Rptr.3d 196].)
- "The reasonableness of a landlord's conduct under all the circumstances is for the jury. A triable issue of fact exists as to whether the defendants' maintenance of a low, open, unguarded window in a common hallway where they knew young children were likely to play constituted a breach of their duty to take reasonable precautions to prevent children falling out of the window." (*Amos v. Alpha Prop. Mgmt.* (1999) 73 Cal.App.4th 895, 904 [87 Cal.Rptr.2d 34], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1284, 1285

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.02 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.03 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.53 (Matthew Bender)

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

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.23 (Matthew Bender)

California Civil Practice: Torts §§ 16:12–16:16 (Thomson Reuters)

1007. Sidewalk Abutting Property

[An owner of/An occupier of/One who controls] property must avoid creating an unsafe condition on the surrounding public streets or sidewalks.

New September 2003; Revised December 2022

Sources and Authority

- "It is the general rule that in the absence of a statute a landowner is under no duty to maintain in a safe condition a public street abutting upon his property. There is, however, an exception to this rule . . . . It has been held that an abutting owner is liable for the condition of portions of the public sidewalk which he has altered or constructed for the benefit of his property and which serve a use independent of and apart from the ordinary and accustomed use for which sidewalks are designed." (*Sexton v. Brooks* (1952) 39 Cal.2d 153, 157 [245 P.2d 496], internal citation omitted.)
- "An abutting owner has always had a duty to refrain from doing an affirmative act which would render the sidewalk dangerous to the public." (*Selger v. Steven Brothers, Inc.* (1990) 222 Cal.App.3d 1585, 1592 [272 Cal.Rptr. 544], internal citations omitted.)
- "[A] landowner may face liability for injury to another, incurred outside of the former's property (on an adjacent street), if the injury is found to be caused by a traffic obstruction in the form of shrubbery growing from the property." (*Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325, 330 [203 Cal.Rptr. 701].)
- "The occupier of real property owes a duty to exercise ordinary care in the use and management of his or her land. The occupier must maintain such land in a manner as to not injure the users of an abutting street or sidewalk." (*Lompoc Unified School Dist. v. Superior Court* (1993) 20 Cal.App.4th 1688, 1693 [26 Cal.Rptr.2d 122], internal citations omitted.)
- "An ordinance requiring the abutting landowner to maintain the sidewalk would be construed to create a duty of care to third persons only if the ordinance clearly and unambiguously so provided." (*Selger, supra,* 222 Cal.App.3d at p. 1590, internal citations omitted.)
- "Persons who maintain walkways—whether public or private—are not required to maintain them in absolutely perfect condition. 'The duty of care imposed on a property owner, even one with actual notice, does not require the repair of minor defects.' The rule is no less applicable in a privately owned townhome development. Moreover, what constitutes a minor defect may be a question of law." (*Cadam v. Somerset Gardens Townhouse HOA* (2011) 200 Cal.App.4th 383, 388–389 [132 Cal.Rptr.3d 617], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1231–1234

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

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-B, *Landlord Liability For Injuries From Acts Of Others*, ¶ 6:48 et seq. (The Rutter Group)

1 Neil M. Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.03[4] (Matthew Bender, Rev. Ed.)

11 California Real Estate Law & Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.03 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.29 (Matthew Bender)

1008. Liability for Adjacent Altered Sidewalk—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed because [***name of defendant***] was negligent in constructing and maintaining an altered portion of the sidewalk next to [his/her/***nonbinary pronoun***/its] property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [or a previous owner] altered [or requested the city to alter] the portion of the sidewalk that caused the harm;**
2. **That the alteration provided a benefit solely to [***name of defendant***]'s property;**
3. **That the alteration served a purpose different from ordinary sidewalk use;**
4. **That [***name of defendant***] failed to use reasonable care in creating or maintaining the altered portion of the sidewalk;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s negligence was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Sources and Authority

- An abutting landowner who has altered an adjacent sidewalk for the benefit of his property apart from the ordinary use for which it was designed has a duty to employ ordinary care in making such alteration and in maintaining that portion of the sidewalk in a reasonably safe condition. (*Peters v. City & County of San Francisco* (1953) 41 Cal.2d 419, 423 [260 P.2d 55]; see *Selger v. Steven Brothers, Inc.* (1990) 222 Cal.App.3d 1585, 1594 [272 Cal.Rptr. 544].)
- The duty of care regarding altered sidewalks usually arises in cases "involving traps on sidewalks, including ' "coal holes, meter boxes, and other devices of similar character located in the sidewalk which benefit the abutting owner and are located where the general public is likely to walk . . . ." ' " (*Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 202 [69 Cal.Rptr.2d 69], internal citation omitted.)
- Liability depends on findings of (1) special benefit to the owner's property, (2) alteration of sidewalk for a nontypical purpose, and (3) the degree of exclusivity of benefit. (*Contreras, supra,* 59 Cal.App.4th at p. 202.)
- "The significance of the degree of exclusivity is that proportionately, the greater

the exclusivity of use, the more an improvement benefits solely the adjoining property and the more reasonable it is to impose upon the landowner a duty to maintain the improvement in a reasonably safe condition." (*Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 491 [2 Cal.Rptr.2d 405].)

- The requirement of due care in altering a sidewalk applies only to that portion of the sidewalk that is actually altered: "The rule cited by plaintiff requires the owner to keep the altered portion in reasonably safe condition or be liable for injuries resulting therefrom. Plaintiff did not trip on defendant's floral displays, she slipped on the dog dropping, a hazard which defendant did not create." (*Selger, supra,* 222 Cal.App.3d at p. 1595.)
- "The duty to maintain portions of a sidewalk which have been altered for the benefit of the property runs with the land, and a property owner cannot avoid liability on the ground that the condition was created by or at the request of his predecessors in title." (*Peters, supra,* 41 Cal.2d at p. 423.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1231–1234

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.03[4] (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.29 (Matthew Bender)

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

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

1. **That [***name of defendant***] [owned/leased/occupied/controlled] the property;**
2. **That [***name of defendant***] knew, or reasonably should have known, of a preexisting unsafe concealed condition on the property;**
3. **That [***name of plaintiff's employer***] neither knew nor could be reasonably expected to know of the unsafe concealed condition through a reasonable inspection of the worksite;**
4. **That [***name of defendant***] failed to warn [***name of plaintiff's employer***] of the condition;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

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

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

Directions for Use

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

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

the worksite includes the duty to inspect the means to access the worksite. (*Acosta*, *supra*, 96 Cal.App.5th at p. 662.) When an employee alleges injury due to an unsafe concealed condition encountered while accessing the worksite, the court may wish to modify element 3 to include a description of the means to access the worksite.

Sources and Authority

- "[T]he hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if: (1) it knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 675 [36 Cal.Rptr.3d 495, 123 P.3d 931].)
- "[T]here is no reason to distinguish conceptually between premises liability based on a hazardous substance that is concealed because it is invisible to the contractor and known only to the landowner and premises liability based on a hazardous substance that is visible but is known to be hazardous only to the landowner. If the hazard is not reasonably apparent, and is known only to the landowner, it is a concealed hazard, whether or not the substance creating the hazard is visible." (*Kinsman, supra*, 37 Cal.4th at p. 678.)
- "A landowner's duty generally includes a duty to inspect for concealed hazards. But the responsibility for job safety delegated to independent contractors may and generally does include explicitly or implicitly a limited duty to inspect the premises as well. Therefore, . . . the landowner would not be liable when the contractor has failed to engage in inspections of the premises implicitly or explicitly delegated to it. Thus, for example, an employee of a roofing contractor sent to repair a defective roof would generally not be able to sue the hirer if injured when he fell through the same roof due to a structural defect, inasmuch as inspection for such defects could reasonably be implied to be within the scope of the contractor's employment. On the other hand, if the same employee fell from a ladder because the wall on which the ladder was propped collapsed, assuming that this defect was not related to the roof under repair, the employee may be able to sustain a suit against the hirer. Put in other terms, the contractor was not being paid to inspect the premises generally, and therefore the duty of general inspection could not be said to have been delegated to it. Under those circumstances, the landowner's failure to reasonably inspect the premises, when a hidden hazard leads directly to the employee's injury, may well result in liability." (*Kinsman, supra*, 37 Cal.4th at pp. 677–678, internal citations omitted.)
- "[A]n independent contractor does not have a duty to inspect all of the landowner's property or to identify hazards wholly outside his area of expertise. But a landowner who hires an independent contractor 'presumptively delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees,' and thus the independent contractor has a duty to determine whether its employees can safely perform the work they have been hired to do. That includes a duty to inspect not only the worksite itself, but the

'means to access the worksite.' " (*Acosta*, *supra*, 96 Cal.App.5th at pp. 661–662, internal citations omitted.)

- "Horizon, as the independent contractor hired by defendants, had a duty to ensure a safe workplace for its employees and is deemed to have been aware of any hazards that a reasonable inspection of the workplace would have revealed. Whether the independent contractor *actually* inspected, or whether an employee of the independent contractor *actually* communicated an unsafe condition to the contractor, is irrelevant—what matters is whether the hazard would have been revealed by a reasonable inspection." (*Acosta*, *supra*, 96 Cal.App.5th at p. 663, original italics.)
- "We emphasize that our holding applies only to hazards on the premises of which the independent contractor is aware or should reasonably detect. Although we recognized in *Kinsman* that the delegation of responsibility for workplace safety to independent contractors may include a limited duty to inspect the premises, it would not be reasonable to expect [an independent contractor] to identify every conceivable dangerous condition on the roof given that he is not a licensed roofer and was not hired to repair the roof." (*Gonzalez, supra,* 12 Cal.5th at p. 54, internal citations omitted.)
- "[T]he initial formulation of the *Kinsman* test asks whether the independent contractor could reasonably have discovered the latent hazardous condition; the gloss on the test for obvious hazards asks whether knowledge of the hazard is inadequate to prevent injury. Both of these tests are defeated where, as here, there is undisputed evidence that the hazard could reasonably have been discovered (by inspecting the ladder) and, once discovered, avoided (by getting another ladder)." (*Johnson v. Raytheon Co.* (2019) 33 Cal.App.5th 617, 632 [245 Cal.Rptr.3d 282].)
- "The court also told the jury that [defendant] was liable if its negligent use or maintenance of the property was a substantial factor in harming [plaintiff] (see CACI Nos. 1000, 1001, 1003 & 1011). These instructions were erroneous because they did not say that these principles would only apply to [defendant] if the hazard was concealed." (*Alaniz v. Sun Pacific Shippers, L.P.* (2020) 48 Cal.App.5th 332, 338–339 [261 Cal.Rptr.3d 702].)

Secondary Sources

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

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

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

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

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

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

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

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

1. **That [***name of defendant***] retained some control over [***name of contractor***]'s manner of performance of [***specify nature of contracted work***];**
2. **That [***name of defendant***] actually exercised [his/her/***nonbinary pronoun***/its] retained control over that work by [***specify alleged negligence of defendant***];**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s negligent exercise of [his/her/***nonbinary pronoun***/its] retained control affirmatively contributed to [***name of plaintiff***]'s harm.**

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

Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant retained control over the manner of performance of some part of the work entrusted to the contractor. (*Sandoval v. Qualcomm Inc.* (2021) 12 Cal.5th 256, 273 [283 Cal.Rptr.3d 519, 494 P.3d 487].) Both retaining control and actually exercising control over some aspect of the work is required because hirers who fully and effectively delegate work to a contractor owe no tort duty to that contractor's workers. (See *Ibid.*) If there is a question of fact regarding whether the defendant entrusted the work to the contractor, the instruction should be modified. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on unsafe conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on the property owner's providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

The hirer's exercise of retained control must have "affirmatively contributed" to the plaintiff's injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 [115 Cal.Rptr.2d 853, 38 P.3d 1081]; see *Sandoval, supra,* 12 Cal.5th at p. 277.)

However, the affirmative contribution need not be active conduct but may be a failure to act. (*Hooker, supra,* 27 Cal.4th at p. 212, fn. 3; see *Sandoval, supra,* 12 Cal.5th at p. 277.) "Affirmative contribution" means that there must be causation between the hirer's exercising retained control and the plaintiff's injury. Modification may be required if the defendant's failure to act is alleged pursuant to *Hooker*.

Sources and Authority

- "A hirer 'retains control' where it retains a sufficient degree of authority over the manner of performance of the work entrusted to the contractor. . . . So 'retained control' refers specifically to a hirer's authority over work entrusted to the contractor, i.e., work the contractor has agreed to perform. For simplicity we will often call this the 'contracted work'—irrespective of whether it's set out in a written contract or arises from an informal agreement. A hirer's authority over noncontract work—although potentially giving rise to other tort duties—thus does not give rise to a retained control duty unless it has the effect of creating authority over the contracted work." (*Sandoval, supra,* 12 Cal.5th at pp. 274–275.)
- "We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker, supra*, 27 Cal.4th at p. 202, original italics.)
- "Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette* [*v. Superior Court* (1993) 5 Cal.4th 689], *Toland* [*v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253] and *Camargo* [*v. Tjaarda Dairy* (2001) 25 Cal.4th 1235] because the liability of the hirer in such a case is not ' "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." ' To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term." (*Hooker, supra*, 27 Cal.4th at pp. 211–212, original italics, internal citations and footnote omitted.)
- "Contract workers must prove that the hirer *both* retained control *and* actually exercised that retained control in such a way as to affirmatively contribute to the injury." (*Sandoval, supra,* 12 Cal.5th at p. 276, original italics.)
- "Such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker, supra*, 27 Cal.4th at p. 212, fn. 3.)
- " 'Affirmative contribution' means that the hirer's exercise of retained control contributes to the injury in a way that isn't merely derivative of the contractor's contribution to the injury. Where the contractor's conduct is the immediate cause

of injury, the affirmative contribution requirement can be satisfied only if the hirer in some respect induced—not just failed to prevent—the contractor's injury-causing conduct." (*Sandoval, supra,* 12 Cal.5th at p. 277, internal citation omitted.)

- "If a hirer entrusts work to an independent contractor, but retains control over safety conditions at a jobsite and then negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, the hirer is liable for those injuries, based on its own negligent exercise of that retained control." (*Tverberg v. Fillner Constr., Inc.* (2012) 202 Cal.App.4th 1439, 1446 [136 Cal.Rptr.3d 521].)
- "[A]ffirmative contribution is a different sort of inquiry than substantial factor causation. For instance, a fact finder might reasonably conclude that a hirer's negligent hiring of the contractor was a substantial factor in bringing about a contract worker's injury, and yet negligent hiring is not affirmative contribution because the hirer's liability is essentially derivative of the contractor's conduct. Conversely, affirmative contribution does not itself require that the hirer's contribution to the injury be substantial." (*Sandoval, supra,* 12 Cal.5th at p. 278, internal citations omitted.)
- "A hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution." (*Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 [208 Cal.Rptr.3d 699].)
- "On facts [showing a contractor's awareness of a hazard], then, it is the contractor's responsibility, not the hirer's responsibility, to take the necessary precautions to protect its employees from a known workplace hazard. And should the contractor fail to take the necessary precautions, . . . its employees cannot fault the hirer for the contractor's own failure." (*McCullar v. SMC Contracting, Inc.* (2022) 83 Cal.App.5th 1005, 1017 [298 Cal.Rptr.3d 785].)
- "When the employer directs that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work, an affirmative contribution occurs. When the hirer does not fully delegate the task of providing a safe working environment but in some manner actively participates in how the job is done, the hirer may be held liable to the employee if its participation affirmatively contributed to the employee's injury. [¶] By contrast, passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution. The failure to institute specific safety measures is not actionable unless there is some evidence that the hirer or the contractor had agreed to implement these measures. Thus, the failure to exercise retained control does not constitute an affirmative contribution to an injury. Such affirmative contribution must be based on a negligent exercise of control. In order for a worker to recover on a retained control theory, the hirer must engage in some active participation." (*Tverberg, supra*, 202 Cal.App.4th at p. 1446, internal citations omitted.)
- "Although plaintiffs concede that [contractor] had exclusive control over how the

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

- "[U]nder Government Code section 815.4, a public entity can be held liable under the retained control doctrine, provided a private person would be liable under the same circumstances. This means that the public entity must *negligently* exercise its retained control so as to affirmatively contribute to the injuries of the employee of the independent contractor." (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 985 [79 Cal.Rptr.3d 777], original italics.)
- "The *Privette* line of decisions establishes a presumption that an independent contractor's hirer 'delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees.' . . . [T]he *Privette* presumption affects the burden of producing evidence." (*Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 642 [221 Cal.Rptr.3d 119], internal citations omitted.)

Secondary Sources

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

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

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

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

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

1009C. Reserved for Future Use

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

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

1. **That [***name of defendant***] [owned/leased/occupied/controlled] the property;**
2. **That [***name of defendant***] negligently provided unsafe equipment that contributed to [***name of plaintiff***]'s injuries;**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

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

Directions for Use

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

Sources and Authority

- "[W]hen a hirer of an independent contractor, by negligently furnishing unsafe equipment to the contractor, affirmatively contributes to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequences of the hirer's own negligence." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 937 [22 Cal.Rptr.3d 530, 102 P.3d 915].)
- " '[W]here the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party's own negligence that renders it liable, not that of the contractor.' " (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225 [115 Cal.Rptr.2d 868, 38 P.3d 1094], internal citation omitted.)

Secondary Sources

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

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

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

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

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

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

[*Name of defendant***] is not responsible for [***name of plaintiff***]'s harm if [***name of defendant***] proves that [***name of plaintiff***]'s harm resulted from [his/her/***nonbinary pronoun/name of person causing injury's***] entry on or use of [***name of defendant***]'s property for a recreational purpose. However, [***name of defendant***] may be still responsible for [***name of plaintiff***]'s harm if [***name of plaintiff***] proves that**

[*Choose one or more of the following three options*:]

[[*name of defendant***] willfully or maliciously failed to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property.]**

[**or**]

[a charge or fee was paid to [*name of defendant***/the owner] for permission to enter the property for a recreational purpose.]**

[**or**]

[[*name of defendant***] expressly invited [***name of plaintiff***] to enter the property.]**

If you find that [*name of plaintiff***] has proven one or more of these three exceptions to immunity, then you must still decide whether [***name of defendant***] is liable in light of the other instructions that I will give you.**

New September 2003; Revised October 2008, December 2014, May 2017, November 2017, May 2021, May 2023

Directions for Use

This instruction sets forth the statutory exceptions to recreational immunity. (See Civ. Code, § 846.) In the opening paragraph, if the plaintiff was not the recreational user of the property, insert the name of the person whose conduct on the property is alleged to have caused plaintiff's injury. Immunity extends to injuries to persons who are neither on the property nor engaged in a recreational purpose if the injury was caused by a recreational user of the property. (See *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 17 [208 Cal.Rptr.3d 461], disapproved on other grounds in *Hoffmann v. Young* (2022) 13 Cal.5th 1257, 1270, fn. 13 [297 Cal.Rptr.3d 607, 515 P.3d 635].)

Choose one or more of the optional exceptions according to the facts. Depending on the facts, the court could instruct that the activity involved was a "recreational purpose" as a matter of law. For a nonexhaustive list of "recreational purposes," refer to Civil Code section 846.

Whether the term "willful or malicious failure" has a unique meaning under this

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

For the second exception involving payment of a fee, insert the name of the defendant if the defendant is the landowner. If the defendant is someone who is alleged to have created a dangerous condition on the property other than the landowner, select "the owner." (See *Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal.App.5th 563, 566 [216 Cal.Rptr.3d 426].)

For the third exception involving an express invitation onto the property, "a qualifying invitation under [Civil Code] section 846(d)(3) may be made by a landowner's authorized agent who issued the invitation on the landowner's behalf." (*Hoffmann, supra,* 13 Cal.5th at pp. 1276–1277.) The plaintiff bears the burden of proving the invitation was made by a properly authorized agent or otherwise making "the showing that a nonlandowner's invitation operates as an invitation by the landowner." (*Id.* at pp. 1275, 1277, fn. 16.) In some cases, it may be necessary to modify the third exception to identify the person who extended the invitation on behalf of the defendant. California law, however, does not require a "direct, personal request" from the landowner to the injured entrant. (*Id.* at p. 1270, fn. 13.)

Sources and Authority

- Recreational Immunity. Civil Code section 846.
- "[A]n owner of . . . real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come upon the premises." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1099–1100 [17 Cal.Rptr.2d 594, 847 P.2d 560].)
- "Generally, whether one has entered property for a recreational purpose within the meaning of the statute is a question of fact, to be determined through a consideration of the 'totality of the facts and circumstances, including . . . the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose.' " (*Ornelas, supra*, 4 Cal.4th at p. 1102, internal citation omitted.)
- "To the extent plaintiff suggests that 'jogging' is not an activity with a recreational purpose because it is not specifically enumerated in section 846, subdivision (b), her suggestion is plainly without merit, as section 846, subdivision (b) is an illustrative, not exhaustive, list." (*Rucker v. WINCAL, LLC* (2022) 74 Cal.App.5th 883, 889 [290 Cal.Rptr.3d 56].)

- "The phrase 'interest in real property' should not be given a narrow or technical interpretation that would frustrate the Legislature's intention in passing and amending section 846." (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 196 [266 Cal.Rptr. 491, 785 P.2d 1183].)
- "[D]efendants' status as business invitees of the landowner does not satisfy the prerequisite that the party seeking to invoke the immunity provisions of section 846 be '[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory.' Although such invitee may be entitled to be present on the property during such time as the work is being performed, such presence does not convey any estate or interest in the property." (*Jenson v. Kenneth I. Mullen, Consulting Engineers, Inc.* (1989) 211 Cal.App.3d 653, 658 [259 Cal.Rptr. 552].)
- "Subpart (c) of the third paragraph of section 846 is not limited to injuries to persons on the premises and therefore on its face encompasses persons off-premises such as [plaintiff] and her husband. It is not limited to injuries to recreational participants. Had the Legislature wanted to narrow the third paragraph's immunity to injured recreational users, it could have done so, as it did in the first paragraph." (*Wang, supra*, 4 Cal.App.5th at p. 17.)
- "The concept of willful misconduct has a well-established, well-defined meaning in California law. 'Willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results.' " (*New, supra*, 171 Cal.App.3d at p. 689, internal citations omitted.)
- "Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that charge admission fees and a consideration in this or a similar context was intended." (*Moore v. City of Torrance* (1979) 101 Cal.App.3d 66, 72 [166 Cal.Rptr. 192], disapproved of on other grounds in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707 [190 Cal.Rptr. 494, 660 P.2d 1168].)
- "We conclude that the consideration exception to recreational use immunity does apply to [defendant] even though [plaintiff]'s fee for recreational access to the campground was not paid to it . . . . We hold that the payment of consideration in exchange for permission to enter a premises for a recreational purpose abrogates the section 846 immunity of any nonpossessory interest holder who is potentially responsible for the plaintiff's injuries, including a licensee or easement holder who possesses only a limited right to enter and use a premises on specified terms but no right to control third party access to the premises. The contrary interpretation urged by [defendant], making immunity contingent not on payment of consideration but its receipt, is supported neither by the statutory text nor the Legislature's purpose in enacting section 846, which was to encourage free public access to property for recreational use. It also would lead to troubling, anomalous results we do not think the Legislature intended. At bottom, construing this exception as applying only to defendants who receive or benefit

from the consideration paid loses sight of the fact that recreational immunity is merely a tool. It is the Legislature's chosen means, not an end unto itself." (*Pacific Gas & Electric Co., supra,* 10 Cal.App.5th at p. 566.)

- "A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under section 846 comes into play." (*Johnson, supra,* 21 Cal.App.4th at p. 317, disapproved on other grounds in *Hoffmann, supra,* 13 Cal.5th at p. 1270, fn. 13.)
- "The purpose of section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. The trial court should therefore construe the exceptions for consideration and express invitees narrowly. (*Johnson, supra,* 21 Cal.App.4th at p. 315, disapproved on other grounds in *Hoffmann, supra,* 13 Cal.5th at p. 1270, fn. 13.)
- "The language of section 846, item (c), which refers to '*any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner*' does not say a person must be invited for a *recreational* purpose. The exception instead defines a person who is 'expressly invited' by distinguishing this person from one who is 'merely permitted' to come onto the land." (*Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 114 [96 Cal.Rptr.2d 394], original italics.)
- "Civil Code section 846's liability shield does not extend to acts of vehicular negligence by a landowner or by the landowner's employee while acting within the course of the employment. We base this conclusion on section 846's plain language. The statutory phrase 'keep the premises safe' is an apt description of the property-based duties underlying premises liability, a liability category that does not include vehicular negligence. Furthermore, a broad construction of that statutory phrase would render superfluous another provision of section 846 shielding landowners from liability for failure to warn recreational users about hazardous conditions or activities on the land." (*Klein v. United States of America* (2010) 50 Cal.4th 68, 72 [112 Cal.Rptr.3d 722, 235 P.3d 42].)
- "[W]e hold that a plaintiff may rely on the exception and impose liability if there is a showing that a landowner, or an agent acting on his or her behalf, extended an express invitation to come onto the property. (*Hoffmann, supra,* 13 Cal.5th at p. 1263.)
- "[T]he general rule of section 846(a) relieves a landowner of any duty to keep his or her premises safe for recreational users. Section 846(d)(3) creates an exception to the rule of section 846(a) for those persons who are expressly invited to come upon the premises by the landowner. Plaintiff seeks the shelter of this exception. Accordingly, she should bear the burden of persuasion on the point." (*Hoffmann, supra,* 13 Cal.5th at p. 1275.)
- "[W]e do not foreclose other ways that a plaintiff might 'make the showing that a nonlandowner's invitation operates as an invitation by the landowner.' Rather,

we 'conclude that *one way* for a plaintiff invoking section 846(d)(3) to meet [the burden of showing the exception applies] would be to rely on agency principles.' " (*Hoffmann, supra,* 13 Cal.5th at p. 1277, fn. 16, original italics, second alteration original, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1245–1253

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

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

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, §§ 421.20–421.23 (Matthew Bender)

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

California Civil Practice: Torts § 16:34 (Thomson Reuters)

1011. Constructive Notice Regarding Dangerous Conditions on Property

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In determining whether [*name of defendant*] should have known of the condition that created the risk of harm, you must decide whether, under all the circumstances, the condition was of such a nature and existed long enough that [*name of defendant*] had sufficient time to discover it and, using reasonable care:

1. **Repair the condition; or**
2. **Protect against harm from the condition; or**
3. **Adequately warn of the condition.**

[[*Name of defendant*] must make reasonable inspections of the property to discover unsafe conditions. If an inspection was not made within a reasonable time before the accident, this may show that the condition existed long enough so that [a store/[a/an] [*insert other commercial enterprise*]] owner using reasonable care would have discovered it.]

New September 2003; Revised February 2007, October 2008

Directions for Use

This instruction is intended for use if there is an issue concerning the owner's constructive knowledge of a dangerous condition. It should be given with CACI No. 1003, *Unsafe Conditions*.

The bracketed second paragraph of this instruction is based on *Ortega v. Kmart* (2001) 26 Cal.4th 1200 [114 Cal.Rptr.2d 470, 36 P.3d 11]. *Ortega* involved a store. The court should determine whether the bracketed portion of this instruction applies to other types of property.

Sources and Authority

- "It is well established in California that although a store owner is not an insurer of the safety of its patrons, the owner does owe them a duty to exercise reasonable care in keeping the premises reasonably safe." (*Ortega, supra,* 26 Cal.4th at p. 1205, internal citation omitted.)
- "We conclude that a plaintiff may prove a dangerous condition existed for an unreasonable time with circumstantial evidence, and that . . . 'evidence that an inspection had not been made within a particular period of time prior to an accident may warrant an inference that the defective condition existed long enough so that a person exercising reasonable care would have discovered it.' " (*Ortega, supra,* 26 Cal.4th at p. 1210, internal citation omitted.)
- "A store owner exercises ordinary care by making reasonable inspections of the portions of the premises open to customers, and the care required is

commensurate with the risks involved." (*Ortega, supra,* 26 Cal.4th at p. 1205, internal citation omitted.)

- "Because the owner is not the insurer of the visitor's personal safety, the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)
- "Courts have also held that where the plaintiff relies on the failure to correct a dangerous condition to prove the owner's negligence, the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)
- "The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)
- "We emphasize that allowing the inference does not change the rule that if a store owner has taken care in the discharge of its duty, by inspecting its premises in a reasonable manner, then no breach will be found even if a plaintiff does suffer injury." (*Ortega, supra,* 26 Cal.4th at p. 1211, internal citations omitted.)
- "We conclude that plaintiffs still have the burden of producing evidence that the dangerous condition existed for at least a sufficient time to support a finding that the defendant had constructive notice of the hazardous condition. We also conclude, however, that plaintiffs may demonstrate the storekeeper had constructive notice of the dangerous condition if they can show that the site had not been inspected within a reasonable period of time so that a person exercising due care would have discovered and corrected the hazard. In other words, if the plaintiffs can show an inspection was not made within a particular period of time prior to an accident, they may raise an inference the condition did exist long enough for the owner to have discovered it. It remains a question of fact for the jury whether, under all the circumstances, the defective condition existed long enough so that it would have been discovered and remedied by an owner in the exercise of reasonable care." (*Ortega, supra,* at pp. 1212–1213, internal citations omitted.)
- "To comply with this duty, a person who controls property must ' " ' "inspect [the premises] or take other proper means to ascertain their condition" ' " ' and, if a dangerous condition exists that would have been discovered by the exercise of reasonable care, has a duty to give adequate warning of or remedy it." (*Staats v. Vintner's Golf Club, LLC* (2018) 25 Cal.App.5th 826, 833 [236 Cal.Rptr.3d 236].)
- "Generally speaking, a property owner must have actual or constructive knowledge of a dangerous condition before liability will be imposed. In the ordinary slip and fall case, . . . the cause of the dangerous condition is not necessarily linked to an employee. Consequently, there is no issue of respondeat superior. Where, however, 'the evidence is such that a reasonable inference can

be drawn that the condition was created by employees of the [defendant], then [the defendant] is charged with notice of the dangerous condition.' " (*Getchell v. Rogers Jewelry* (2012) 203 Cal.App.4th 381, 385 [136 Cal.Rptr.3d 641], internal citation omitted.)

- "Although no two accidents happen in the same way, to be admissible for showing notice to a landowner of a dangerous condition, evidence of another similar accident must have occurred under substantially the same circumstances." (*Howard v. Omni Hotels Mgmt. Corp.* (2012) 203 Cal.App.4th 403, 432 [136 Cal.Rptr.3d 739].)

Secondary Sources

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

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-B, *Landlord Liability For Injuries From Acts Of Others*, ¶ 6:48 et seq. (The Rutter Group)

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

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

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.14 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.23 et seq. (Matthew Bender)

1012. Knowledge of Employee Imputed to Owner

If you find that the condition causing the risk of harm was created by [*name of defendant*] or [his/her/*nonbinary pronoun*/its] employee acting within the scope of [his/her/*nonbinary pronoun*] employment, then you must conclude that [*name of defendant*] knew of this condition.

New October 2004

Sources and Authority

- "Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances knowledge thereof is imputed to him." (*Hatfield v. Levy Bros*. (1941) 18 Cal.2d 798, 806 [117 P.2d 841], internal citation omitted.)
- "When an unsafe condition which causes injury to an invitee has been created by the owner of the property himself or by an employee within the scope of his employment, the invitee need not prove the owner's notice or knowledge of the dangerous condition; the knowledge is imputed to the owner." (*Sanders v. MacFarlane's Candies* (1953) 119 Cal.App.2d 497, 501 [259 P.2d 1010], internal citation omitted.)
- "Where the evidence shows, as it does in this case, that the condition which caused the injury was created by the employees of the respondent, or the evidence is such that a reasonable inference can be drawn that the condition was created by employees of the respondent, then respondent is charged with notice of the dangerous condition." (*Oldham v. Atchison, T. & S.F. Ry. Co*. (1948) 85 Cal.App.2d 214, 218–219 [192 P.2d 516].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1262

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, §§ 15.04[5], 15.08 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.20[1] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.11 et seq. (Matthew Bender)

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

1013–1099. Reserved for Future Use

VF-1000. Premises Liability—Comparative Negligence of Others Not at Issue

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We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [own/lease/occupy/control] the property?**

   _____ Yes _____ No

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

2. **Was [*name of defendant*] negligent in the use or maintenance of the property?**

   _____ Yes _____ No

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

3. **Was [*name of defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

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

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

   Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1000, *Premises Liability—Essential Factual Elements.*

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

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

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

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

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

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We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [own/lease/occupy/control] the property?**

   _____ Yes _____ No

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

2. **Was [*name of defendant*] negligent in the [use/maintenance] of the property?**

   _____ Yes _____ No

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

3. **Was [*name of defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

4. **Did [*name of plaintiff/name of person causing injury*] enter on or use [*name of defendant*]'s property for a recreational purpose?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. **Did [*name of defendant*] willfully or maliciously fail to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property?**

   _____ Yes _____ No

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

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

   [a. Past economic loss

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

Total Past Economic Damages: $ _____]

[b. Future economic loss

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

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]
TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, October 2008, December 2010, December 2014, December 2016, May 2017, May 2024

Directions for Use

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

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

If either of the other two exceptions to recreational immunity from Civil Code section 846 is at issue, question 5 should be replaced with appropriate language for the applicable exception. (See CACI No. 1010.)

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

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

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

VF-1002. Premises Liability—Comparative Fault of Plaintiff at Issue

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We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [own/lease/occupy/control] the property?**

   _____ Yes _____ No

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

2. **Was [*name of defendant*] negligent in the use or maintenance of the property?**

   _____ Yes _____ No

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

3. **Was [*name of defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

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

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

   Total Future Economic Damages: $_____]

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

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

TOTAL $_____

If [*name of plaintiff*] has proved any damages, then answer question 5. If [*name of plaintiff*] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of plaintiff*] also negligent?

_____ Yes _____ No

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

6. Was [*name of plaintiff*]'s negligence a substantial factor in causing [his/her/*nonbinary pronoun*] harm?

_____ Yes _____ No

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

7. What percentage of responsibility for [*name of plaintiff*]'s harm do you assign to the following?

[*Name of defendant*]:	**_____ %**
[*Name of plaintiff*]:	**_____ %**
TOTAL	**100 %**

Signed: _____
Presiding Juror

Dated: _____

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

New February 2005; Revised April 2007, December 2009, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1000, *Premises Liability—Essential Factual Elements*, CACI No. 405, *Comparative Fault of Plaintiff*, and CACI No. 406, *Apportionment of Responsibility*.

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

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

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

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

VF-1003–VF-1099. Reserved for Future Use

DANGEROUS CONDITION OF PUBLIC PROPERTY

1100. Dangerous Condition on Public Property—Essential Factual Elements (Gov. Code, § 835)

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed by a dangerous condition of [*name of defendant*]'s property. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] owned [or controlled] the property;**
2. **That the property was in a dangerous condition at the time of the injury;**
3. **That the dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred;**
4. **[That negligent or wrongful conduct of [*name of defendant*]'s employee acting within the scope of employment created the dangerous condition;]**

   [or]

   [That [*name of defendant*] had notice of the dangerous condition for a long enough time to have protected against it;]
5. **That [*name of plaintiff*] was harmed; and**
6. **That the dangerous condition was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised October 2008, December 2015, June 2016, May 2020

Directions for Use

For element 4, choose either or both options depending on whether liability is alleged under Government Code section 835(a), 835(b), or both.

See also CACI No. 1102, *Definition of "Dangerous Condition,"* and CACI No. 1103, *Notice*.

Sources and Authority

- Liability of Public Entity for Dangerous Condition of Property. Government Code section 835.
- Actual Notice. Government Code section 835.2(a).
- Constructive Notice. Government Code section 835.2(b).
- Definitions. Government Code section 830.
- "The Government Claims Act (§ 810 et seq.; the Act) 'is a comprehensive statutory scheme that sets forth the liabilities and immunities of public entities and public employees for torts.' Section 835 . . . prescribes the conditions under

which a public entity may be held liable for injuries caused by a dangerous condition of public property. Section 835 provides that a public entity may be held liable for such injuries 'if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, [and] that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.' In addition, the plaintiff must establish that either: (a) '[a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition,' or (b) '[t]he public entity had . . . notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.' " (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1104 [190 Cal.Rptr.3d 850, 353 P.3d 773], internal citations omitted.)

- "Under the Government Claims Act (Gov. Code, § 810 et seq.), a public entity can be held liable for either creating a dangerous condition on its property or failing to protect against such a condition when the entity had notice of the danger and sufficient time to remedy the situation." (*Tansavatdi v. City of Rancho Palos Verdes* (2023) 14 Cal.5th 639, 647 [307 Cal.Rptr.3d 346, 527 P.3d 873], internal citations omitted.)
- "[A] public entity may be liable for a dangerous condition of public property even when the immediate cause of a plaintiff's injury is a third party's negligent or illegal act (such as a motorist's negligent driving), if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality. Public entity liability lies under section 835 when some feature of the property increased or intensified the danger to users from third party conduct." (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1457–1458 [192 Cal.Rptr.3d 376], internal citation omitted.)
- "Subdivisions (a) and (b) of section 835 obviously address two different types of cases. However, what distinguishes the two types of cases is not simply whether the public entity has notice of the dangerous condition. Instead, what distinguishes the two cases in practice is who created the dangerous condition. Because an entity must act through its employees, virtually all suits brought on account of dangerous conditions created by the entity will be brought under subdivision (a). In contrast, subdivision (b) can also support suits based on dangerous conditions not created by the entity or its employees." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 836 [15 Cal.Rptr.2d 679, 843 P.2d 624].)
- "[T]he res ipsa loquitur presumption does not satisfy the requirements for holding a public entity liable under section 835, subdivision (a). Res ipsa loquitur requires the plaintiff to show only (1) that the accident was of a kind which ordinarily does not occur in the absence of negligence, (2) that the instrumentality of harm was within the defendant's exclusive control, and (3) that the plaintiff did not voluntarily contribute to his or her own injuries. Subdivision (a), in contrast, requires the plaintiff to show that an employee of

the public entity 'created' the dangerous condition; in view of the legislative history . . . , the term 'created' must be defined as the sort of involvement by an employee that would justify a presumption of notice on the entity's part." (*Brown, supra,* 4 Cal.4th at p. 836.)

- "Focusing on the language in *Pritchard, supra,* 178 Cal.App.2d at page 256, stating that where the public entity 'has itself created the dangerous condition it is *per se* culpable,' plaintiff argues that the negligence that section 835, subdivision (a), refers to is not common law negligence, but something that exists *whenever* the public entity creates the dangerous condition of property. We disagree. If the Legislature had wanted to impose liability whenever a public entity created a dangerous condition, it would merely have required plaintiff to establish that an act or omission of an employee of the public entity within the scope of his employment created the dangerous condition. Instead, section 835, subdivision (a), requires the plaintiff to establish that a '*negligent or wrongful* act or omission of an employee of the public entity within the scope of his employment created the dangerous condition.' (Italics added.) Plaintiff's interpretation would transform the highly meaningful words 'negligent or wrongful' into meaningless surplusage, contrary to the rule of statutory interpretation that courts should avoid a construction that makes any word surplusage." (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135 [72 Cal.Rptr.3d 382, 176 P.2d 654], original italics, internal citation omitted.)
- "In order to recover under Government Code section 835, it is not necessary for plaintiff to prove a negligent act *and* notice; either negligence or notice will suffice." (*Curtis v. State of California* (1982) 128 Cal.App.3d 668, 693 [180 Cal.Rptr. 843], original italics.)
- "A public entity may not be held liable under section 835 for a dangerous condition of property that it does not own or control." (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 359 [196 Cal.Rptr.3d 625].)
- "For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. Therefore, the crucial element is not ownership, but rather control." (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788 [156 Cal.Rptr. 614], internal citation omitted.)
- "Liability for injury caused by a dangerous condition of property has been imposed when an unreasonable risk of harm is created by a combination of defect in the property and acts of third parties. However, courts have consistently refused to characterize harmful third party conduct as a dangerous condition—absent some concurrent contributing defect in the property itself." (*Hayes v. State of California* (1974) 11 Cal.3d 469, 472 [113 Cal.Rptr. 599, 521 P.2d 855], internal citations omitted.)
- "[P]laintiffs in this case must show that a dangerous condition of property—that is, a condition that creates a substantial risk of injury to the public—proximately caused the fatal injuries their decedents suffered as a result of the collision with

[third party]'s car. But nothing in the statute requires plaintiffs to show that the allegedly dangerous condition also caused the third party conduct that precipitated the accident." (*Cordova, supra*, 61 Cal.4th at p. 1106.)

- "Although generally a question of fact, a property defect is not a dangerous condition as a matter of law if the court determines, 'viewing the evidence most favorably to the plaintiff, . . . that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury . . . .' " (*Nunez v. City of Redondo Beach* (2022) 81 Cal.App.5th 749, 757 [297 Cal.Rptr.3d 461].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 425–426

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-C, *Immunity From Liability*, ¶ 6:91 et seq. (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, Liability For *"Dangerous Conditions" of Public Property*, ¶ 2:2785 et seq. (The Rutter Group)

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.9–12.55

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, §§ 61.01–61.03 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, §§ 464.80–464.86 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.210–196.214 (Matthew Bender)

1101. Control

[*Name of plaintiff*] claims that [*name of defendant*] controlled the property at the time of the incident. In deciding whether [*name of defendant*] controlled the property, you should consider whether it had the power to prevent, fix, or guard against the dangerous condition. You should also consider whether [*name of defendant*] treated the property as if it were its property.

New September 2003

Directions for Use

This instruction will not be necessary in most cases. Ownership of public property is generally established as a matter of law by evidence of holding title or other similar evidence.

The power to regulate privately owned facilities is not enough, in and of itself, to impose liability on a public entity (i.e., it is not "control"). (*Aaitui v. Grande Properties* (1994) 29 Cal.App.4th 1369, 1377–1378 [35 Cal.Rptr.2d 123].)

Sources and Authority

- "Public Property" Defined. Government Code section 830(c).
- " '[C]ontrol exists if the public entity has the "power to prevent, remedy or guard against the dangerous condition." ' " (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 364 [196 Cal.Rptr.3d 625].)
- "Where the public entity's relationship to the dangerous property is not clear, aid may be sought by inquiring whether the particular defendant had control, in the sense of power to prevent, remedy or guard against the dangerous condition; whether his ownership is a naked title or whether it is coupled with control; and whether a private defendant, having a similar relationship to the property, would be responsible for its safe condition." (*Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 833–834 [87 Cal.Rptr. 173] [city and county jointly liable for defect in parking strip fronting county hospital].)
- "The *Low*-type inquiry and result are only appropriate '. . . [where] the public entity's relationship to the dangerous property is not clear . . . .' " (*Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 800 [223 Cal.Rptr. 206], internal citation omitted.)
- "For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. Therefore, the crucial element is not ownership, but rather control." (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788 [156 Cal.Rptr. 614], internal citation omitted.)
- "[I]n identifying the defendant with whom control resides, location of the power

to correct the dangerous condition is an aid." (*Low, supra,* 7 Cal.App.3d at p. 832.)

- The issue of control may be decided as a matter of law if the facts are uncontroverted. (*Aaitui, supra,* 29 Cal.App.4th at p. 1377; *Low, supra,* 7 Cal.App.3d at p. 834.)
- In *Holmes v. City of Oakland* (1968) 260 Cal.App.2d 378, 385 [67 Cal.Rptr. 197], the court found that the city had control over a railroad right-of-way over a city street where a city ordinance had reserved extensive powers to regulate and inspect the railroad company's easement.
- The requisite ownership or control must exist at the time of the incident. (*Longfellow v. County of San Luis Obispo* (1983) 144 Cal.App.3d 379, 383 [192 Cal.Rptr. 580]; *Tolan v. State of California ex rel. Dept. of Transportation* (1979) 100 Cal.App.3d 980, 983 [161 Cal.Rptr. 307].)
- "[A] public entity can be held liable for an accident caused by a condition that exists on property adjacent to a public highway if the condition ' " 'is so connected with or in such proximity to the traveled portion of the highway as to render it unsafe to those traveling thereon.' " ' " (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 841 [206 Cal.Rptr. 136, 686 P.2d 656], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 302–306

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.9–12.14

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[3][b] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

1102. Definition of "Dangerous Condition" (Gov. Code, § 830(a))

A "dangerous condition" is a condition of public property that creates a substantial risk of injury to members of the general public when the property [or adjacent property] is used with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition. [Whether the property is in a dangerous condition is to be determined without regard to whether [[*name of plaintiff***]/ [or] [***name of third party***]] exercised or failed to exercise reasonable care in [his/her/***nonbinary pronoun***] use of the property.]**

New September 2003; Revised June 2010, May 2020

Directions for Use

Give this instruction if a plaintiff claims that a condition of public property creates a substantial risk of injury to the plaintiff as a user of public or adjacent property when the property was used with reasonable care and in a reasonably foreseeable manner. (Gov. Code, § 830(a).) For claims involving conditions on the adjacent property that are alleged to have contributed to making the public property dangerous, give CACI No. 1125, *Conditions on Adjacent Property*.

Give the last sentence if comparative fault is at issue. It clarifies that comparative fault does not negate the possible existence of a dangerous condition. (See *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131 [231 Cal.Rptr. 598].)

Sources and Authority

- "Dangerous Condition" Defined. Government Code section 830(a).
- No Liability for Minor Risk. Government Code section 830.2.
- "The Act defines a ' "[d]angerous condition" ' as 'a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.' Public property is in a dangerous condition within the meaning of section 835 if it 'is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property itself.' " (*Cordova v. City of L.A.* (2015) 61 Cal.4th 1099, 1105 [190 Cal.Rptr.3d 850, 353 P.3d 773], internal citations omitted.)
- "A public entity is not, without more, liable under section 835 for the harmful conduct of third parties on its property. But if a condition of public property 'creates a substantial risk of injury even when the property is used with due care', a public entity 'gains no immunity from liability simply because, in a particular case, the dangerous condition of its property combines with a third

party's negligent conduct to inflict injury.' " (*Cordova, supra*, 61 Cal.4th at p. 1105, internal citations omitted.)

- "In general, '[whether] a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may only be resolved as a question of law if reasonable minds can come to but one conclusion.' " (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810 [205 Cal.Rptr. 842, 685 P.2d 1193], internal citation omitted.)
- "An initial and essential element of recovery for premises liability under the governing statutes is proof a dangerous condition existed. The law imposes no duty on a landowner—including a public entity—to repair trivial defects, or 'to maintain [its property] in an absolutely perfect condition.' " (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 566 [78 Cal.Rptr.3d 910], internal citations omitted.)
- "The status of a condition as 'dangerous' for purposes of the statutory definition does *not* depend on whether the plaintiff or other persons were actually exercising due care but on whether the condition of the property posed a substantial risk of injury to persons who were exercising due care." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 768 [140 Cal.Rptr.3d 722], original italics.)
- "[T]he fact the particular plaintiff may not have used due care is relevant only to his [or her] comparative fault and not to the issue of the presence of a dangerous condition." (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1459 [192 Cal.Rptr.3d 376].)
- "The negligence of a plaintiff-user of public property . . . is a defense which may be asserted by a public entity; it has no bearing upon the determination of a 'dangerous condition' in the first instance. . . . If, however, it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." (*Fredette, supra,* 187 Cal.App.3d at p. 131, internal citation omitted.)
- "Even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons." (*Fredette, supra,* 187 Cal.App.3d at p. 132, internal citation omitted.)
- "With respect to public streets, courts have observed 'any property can be dangerous if used in a sufficiently improper manner. For this reason, a public entity is only required to provide roads that are safe for reasonably foreseeable careful use. [Citation.] "If [] it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." [Citation.]' " (*Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1183 [83 Cal.Rptr.3d 372], internal citations omitted.)
- "A public entity is not charged with anticipating that a person will use the

property in a criminal way, here, driving with a 'willful or wanton disregard for safety of persons or property . . . .' " (*Fuller v. Department of Transportation* (2019) 38 Cal.App.5th 1034, 1042 [251 Cal.Rptr.3d 549].)

- "[A] prior dangerous condition may require street lighting or other means to lessen the danger but the absence of street lighting is itself not a dangerous condition." (*Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 133 [142 Cal.Rptr.3d 633].)
- "Although public entities may be held liable for injuries occurring to reasonably foreseeable users of the property, even when the property is used for a purpose for which it is not designed or which is illegal, liability may ensue only if the property creates a substantial risk of injury when it is used with due care. Whether a condition creates a substantial risk of harm depends on how the general public would use the property exercising due care, including children who are held to a lower standard of care. (§ 830.) The standard is an objective one; a plaintiff's particular condition . . . , does not alter the standard." (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1466 [72 Cal.Rptr.2d 464], internal citations omitted.)
- "A public entity may be liable for a dangerous condition of public property even where the immediate cause of a plaintiff's injury is a third party's negligence if some physical characteristic of the property exposes its users to increased danger from third party negligence. 'But it is insufficient to show only harmful third party conduct, like the conduct of a motorist. " '[T]hird party conduct, by itself, unrelated to the condition of the property, does not constitute a "dangerous condition" for which a public entity may be held liable.' " . . . There must be a defect in the physical condition of the property and that defect must have some causal relationship to the third party conduct that injures the plaintiff. . . .' " (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1069–1070 [129 Cal.Rptr.3d 690], internal citation omitted.)
- "Nothing in the provisions of section 835, however, specifically precludes a finding that a public entity may be under a duty, given special circumstances, to protect against harmful criminal conduct on its property." (*Peterson, supra,* 36 Cal.3d at pp. 810–811, internal citations omitted.)
- "Two points applicable to this case are . . . well established: first, that the location of public property, by virtue of which users are subjected to hazards on adjacent property, may constitute a 'dangerous condition' under sections 830 and 835; second, that a physical condition of the public property that increases the risk of injury from third party conduct may be a 'dangerous condition' under the statutes." (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 154 [132 Cal.Rptr.2d 341, 65 P.3d 807].)
- "[T]he absence of other similar accidents is 'relevant to the determination of whether a condition is dangerous.' But the city cites no authority for the proposition that the absence of other similar accidents is *dispositive* of whether a condition is dangerous, or that it compels a finding of nondangerousness absent

other evidence." (*Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1346 [107 Cal.Rptr.3d 730], original italics, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 321

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) § 12.15

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[2][a] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

1103. Notice (Gov. Code, § 835.2)

[*Name of plaintiff*] must prove that [*name of defendant*] had notice of the dangerous condition before the incident occurred. To prove that there was notice, [*name of plaintiff*] must prove:

[That [*name of defendant*] knew of the condition and knew or should have known that it was dangerous. A public entity knows of a dangerous condition if an employee knows of the condition and reasonably should have informed the entity about it.]

[or]

[That the condition had existed for enough time before the incident and was so obvious that the [*name of defendant*] reasonably should have discovered the condition and known that it was dangerous.]

New September 2003

Directions for Use

This instruction is intended to be used where the plaintiff relies on Government Code section 835(b). This instruction should be modified if the plaintiff is relying on both section 835(a) and section 835(b) to clarify that proof of notice is not necessary under section 835(a).

For an instruction regarding reasonable inspection systems, see CACI No. 1104, *Inspection System*.

Sources and Authority

- Actual Notice. Government Code section 835.2(a).
- Constructive Notice. Government Code section 835.2(b).
- "[Defendant] asserts that '[t]he absence of any prior accidents or injuries on the gravel shoulder is evidence of lack of notice.' Assuming this to be true, at most it establishes grounds for a finding in [defendant]'s favor, which is hardly enough to sustain a summary judgment. Nor is plaintiff required to prove that [defendant] knew for a fact that accidents of this kind would occur. The test for actual notice was satisfied if [defendant] had 'actual knowledge of the existence of the condition and knew or should have known of its dangerous character.' " (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 779–780 [140 Cal.Rptr.3d 722].)
- "To establish 'actual notice,' it is not enough to show that the state employees had a general knowledge that people do leave hot coals on public beaches. There must be some evidence that the employees had knowledge of the particular dangerous condition in question." (*State v. Superior Court of San Mateo County* (1968) 263 Cal.App.2d 396, 399 [69 Cal.Rptr. 683], internal citations omitted.)

- "Whether the dangerous condition was obvious and whether it existed for a sufficient period of time are threshold elements to establish a claim of constructive notice. Where the plaintiff fails to present direct or circumstantial evidence as to either element, his claim is deficient as a matter of law." (*Heskel v. City of San Diego* (2014) 227 Cal.App.4th 313, 317 [173 Cal.Rptr.3d 768], internal citation omitted.)
- " 'It is well settled that constructive notice can be shown by the long continued existence of the dangerous or defective condition, and it is a question of fact for the jury to determine whether the condition complained of has existed for a sufficient time to give the public agency constructive notice.' " (*Erfurt v. State of California* (1983) 141 Cal.App.3d 837, 844–845 [190 Cal.Rptr 569], internal citations omitted.)
- "Admissible evidence for establishing constructive notice is defined by [Government Code section 835.2(b)] as including whether a reasonably adequate inspection system would have informed the public entity, and whether it maintained and operated such an inspection system with due care." (*Heskel*, *supra*, 227 Cal.App.4th at p. 317.)
- "In the instant case, it can be validly argued that there was a triable issue on the question of inspection, but in determining whether there is constructive notice, the method of inspection has been held to be secondary." (*Superior Court of San Mateo County*, *supra*, 263 Cal.App.2d at p. 400, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 323

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.45–12.51

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[4][b] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

1104. Inspection System (Gov. Code, § 835.2(b)(1) & (2))

In deciding whether [*name of defendant*] should have discovered the dangerous condition, you may consider whether it had a reasonable inspection system and whether a reasonable system would have revealed the dangerous condition.

[In determining whether an inspection system is reasonable, you may consider the practicality and cost of the system and balance those factors against the likelihood and seriousness of the potential danger if no such system existed.]

[*and/or***]**

[If [*name of defendant*] had a reasonable inspection system but did not detect the dangerous condition, you may consider whether it used reasonable care in maintaining and operating the system.]

New September 2003

Directions for Use

Read the first paragraph and one or both of the bracketed paragraphs as appropriate to the facts.

Sources and Authority

- Admissible Evidence of Due Care. Government Code section 835.2(b).
- "Constructive notice may be found where the dangerous condition would have been discovered by a reasonable inspection." (*Straughter v. State of California* (1976) 89 Cal.App.3d 102, 109 [152 Cal.Rptr. 147], citing to *Stanford v. City of Ontario* (1972) 6 Cal.3d 870, 882 [101 Cal.Rptr. 97, 495 P.2d 425].)
- "The questions of whether a dangerous condition could have been discovered by reasonable inspection and whether there was adequate time for preventive measures are properly left to the jury." (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 843 [206 Cal.Rptr. 136, 686 P.2d 656], internal citations omitted.)
- "Although judicial decisions do not always link the issue of constructive notice to the reasonable inspection system . . . , the Tort Claims Act indicates that, absent other persuasive evidence, the relationship between constructive notice and inspection may be crucial." (California Government Tort Liability Practice (Cont.Ed.Bar 3d ed. 1992), § 3.37.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 323

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.)

§§ 12.48–12.50

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[4][b] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

1105–1109. Reserved for Future Use

1110. Affirmative Defense—Natural Conditions (Gov. Code, § 831.2)

A public entity is not responsible for harm caused by a natural condition of an unimproved public property. If [*name of defendant*] proves that [*name of plaintiff*]'s injury was caused by such a condition, then it is not responsible for the injury.

New September 2003

Sources and Authority

- Natural Condition of Unimproved Public Property. Government Code section 831.2.
- Public Beaches. Government Code section 831.21.
- "The immunity provided by section 831.2 is absolute and applies regardless of whether the public entity had knowledge of the dangerous condition or failed to give warning. The legislative purpose in enacting section 831.2 was to ensure that public entities will not prohibit public access to recreational areas due to the burden and expense of defending against personal injury suits and of placing such land in a safe condition." (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 360 [196 Cal.Rptr.3d 625], internal citations omitted.)
- "The natural condition immunity applies even 'where the public entity had knowledge of a dangerous condition which amounted to a hidden trap.' As a consequence, courts have held there is no liability for failure to warn of a known dangerous condition when the danger is a natural condition of unimproved public property." (*Alana M. v. State of California* (2016) 245 Cal.App.4th 1482, 1488 [200 Cal.Rptr.3d 410], internal citation omitted.)
- "The statutory immunity extends to 'an injury *caused* by a natural condition of any unimproved public property.' The use of the term 'caused' is significant. Here, although the injury *occurred* on improved property, that is, the paved parking lot, it was *caused* by the trees, native flora located near—and perhaps superadjacent to—the improved parking lot, but themselves on unimproved property." (*Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170, 177 [162 Cal.Rptr.3d 796], original italics, footnote and internal citations omitted.)
- "[T]he statute presents two fact questions: whether a condition is 'natural' and whether the property is 'unimproved' public property." (*County of San Mateo v. Superior Court* (2017) 13 Cal.App.5th 724, 731 [221 Cal.Rptr.3d 138].)
- "[T]o qualify public property as *improved* so as to take it outside the immunity statute 'some form of physical change in the condition of the property *at the location of the injury*, which justifies the conclusion that the public entity is

responsible for reasonable risk management in that area, [is] required to preclude application of the immunity.' " (*Meddock, supra*, 220 Cal.App.4th at p. 178 [162 Cal.Rptr.3d 796], original italics.)

- "It is also the rule that 'improvement of a portion of a park area does not remove the immunity from the unimproved areas.' 'The reasonableness of this rule is apparent. Otherwise, the immunity as to an entire park area improved in any way would be demolished. [Citation.] This would, in turn, seriously thwart accessibility and enjoyment of public lands by discouraging the construction of such improvements as restrooms, fire rings, campsites, entrance gates, parking areas and maintenance buildings.' " (*Alana M., supra*, 245 Cal.App.4th at pp. 1488–1489.)
- "We express no opinion, however, as to whether proof of a causal link is merely sufficient to defeat immunity or, as *Alana M.* held, necessary. [Plaintiff] contends proof of a causal connection between improvements and the accident is necessary to establish that property is improved and thus accepts the burden of having to prove this. Therefore, for purposes here, we will assume without deciding that proof that human conduct or improvements created, contributed to, or exacerbated the dangerousness of a natural condition is not only a sufficient but necessary, additional element of establishing that property is 'improved.' " (*County of San Mateo*, *supra*, 13 Cal.App.5th at p. 740.)
- "It is now generally settled that human-altered conditions, especially those that have existed for some years, which merely duplicate models common to nature are still 'natural conditions' as a matter of law for the purposes of Government Code section 831.2." (*Tessier v. City of Newport Beach* (1990) 219 Cal.App.3d 310, 314 [268 Cal.Rptr. 233].)
- "Immunity under section 831.2 exists even where the public entity's nearby improvements together with natural forces add to the buildup of sand on a public beach." (*Morin v. County of Los Angeles* (1989) 215 Cal.App.3d 184, 188 [263 Cal.Rptr. 479].)
- "The statutory immunity is fully applicable to manmade lakes and reservoirs. Moreover, section 831.2 has been broadly construed to provide immunity even where a natural condition has been affected in some manner by human activity or nearby improvements." (*Goddard, supra*, 243 Cal.App.4th at p. 361, internal citations omitted.)
- "The mere attachment of a rope on defendant's undeveloped land by an unknown third party did not change the 'natural condition' of the land." (*Kuykendall v. State of California* (1986) 178 Cal.App.3d 563, 566 [223 Cal.Rptr. 763].)
- "Essentially, [plaintiff]'s position is she was entitled to a campsite in the forest safe from falling trees, but this 'is exactly the type of complaint section 831.2 was designed to protect public entities against.' " (*Alana M., supra*, 245 Cal.App.4th at p. 1493.)
- "The courts have generally understood campsites with amenities to be improved,

including the court in *Alana M.*" (*County of San Mateo*, *supra*, 13 Cal.App.5th at p. 736.)

- "Given the intent of the Legislature in enacting section 831.2, we hold that wild animals are a natural part of the condition of unimproved public property within the meaning of the statute." (*Arroyo, supra*, 34 Cal.App.4th at p. 762.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 302, 308

Haning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, *Liability For "Dangerous Conditions" Of Public Property*, ¶ 2:2825 et seq. (The Rutter Group)

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.82–12.87

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

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

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.12, 196.214 (Matthew Bender)

1111. Affirmative Defense—Condition Created by Reasonable Act or Omission (Gov. Code, § 835.4(a))

A public entity is not legally responsible for harm caused by a dangerous condition if the act or omission of its employee that created the dangerous condition was reasonable. If [*name of defendant*] proves that the act or omission that created the dangerous condition was reasonable, then your verdict must be for [*name of defendant*].

In determining whether the employee's conduct was reasonable, you must weigh the likelihood and the seriousness of the potential injury against the practicality and cost of either:

(a) taking alternative action that would not have created the risk of injury; or

(b) protecting against the risk of injury.

New September 2003; Revised April 2007, April 2008

Directions for Use

This instruction states a defense to the theory that the entity created a dangerous condition of public property. (Gov. Code, §§ 835(a), 835.4(a).)

Sources and Authority

- No Public Entity Liability for Reasonable Act or Omission. Government Code section 835.4(a).
- "There are, of course, affirmative defenses pleaded which may require trial as well: such as . . . the special defense under Government Code, section 835.4 of the reasonableness, practicability, and cost of the alternative measures plaintiffs claim should have been taken to protect against a dangerous condition."*Hibbs v. Los Angeles County Flood Control Dist.* (1967) 252 Cal.App.2d 166, 172 [60 Cal.Rptr. 364].)
- "Reasonableness is a question of fact for the trier of fact, and is determined by weighing the probability and gravity of potential injury against the practicability and cost of the action." (*Biron v. City of Redding* (2014) 225 Cal.App.4th 1264, 1281 [170 Cal.Rptr.3d 848].)
- "The Court of Appeal found conceptual difficulties in the interplay between section 835, subdivision (a) (plaintiff must establish negligence) and section 835.4, subdivision (a) (providing a defense if the public entity establishes that the act or omission that created the condition was reasonable). As it noted, normally 'negligence is the absence of reasonableness.' That being the case, the court reasoned, one cannot reasonably act negligently. Because of this conundrum, the Court of Appeal found that section 835.4 does not provide an

affirmative defense. (¶) We disagree. Section 835.4 clearly creates an affirmative defense that the public entity must establish. Moreover, the Legislature created this defense specifically for public entities. The California Law Revision Commission explained, 'Under this section, a public entity may absolve itself from liability for creating or failing to remedy a dangerous condition by showing that it would have been too costly and impractical for the public entity to have done anything else. . . . This defense has been provided public entities in recognition that, despite limited manpower and budgets, there is much that they are required to do. Unlike private enterprise, a public entity often cannot weigh the advantage of engaging in an activity against the cost and decide not to engage in it. Government cannot 'go out of the business' of governing. Therefore, a public entity should not be liable for injuries caused by a dangerous condition if it is able to show that under all the circumstances, including the alternative courses of action available to it and the practicability and cost of pursuing such alternatives, its action in creating or failing to remedy the condition was not unreasonable.' " (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1137–1138 [72 Cal.Rptr.3d 382, 176 P.3d 654], footnote and internal citation omitted.)

- "The reasonableness standard referred to in section 835.4 differs from the reasonableness standard that applies under sections 830 and 835 and ordinary tort principles. Under the latter principles, the reasonableness of the defendant's conduct does not depend upon the existence of other, conflicting claims on the defendant's resources or the political barriers to acting in a reasonable manner." (*Metcalf, supra,* 42 Cal.4th at p. 1138.)
- "In sum, we conclude that negligence under section 835, subdivision (a), is established under ordinary tort principles concerning the reasonableness of a defendant's conduct in light of the foreseeable risk of harm. The plaintiff has the burden to demonstrate that the defendant's conduct was unreasonable under this standard . . . . If the plaintiff carries this burden, the public entity may defend under the provisions of section 835.4—a defense that is unique to public entities." (*Metcalf, supra,* 42 Cal.4th at p. 1139.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 324

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.61–12.62

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

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.86 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.12, 196.300 (Matthew Bender)

1112. Affirmative Defense—Reasonable Act or Omission to Correct (Gov. Code, § 835.4(b))

A public entity is not responsible for harm caused by a dangerous condition if its failure to take sufficient steps to protect against the risk of injury was reasonable. If [*name of defendant*] proves that its conduct was reasonable, then your verdict must be for [*name of defendant*].

In determining whether [*name of defendant*]'s conduct was reasonable, you must consider how much time and opportunity it had to take action. You must also weigh the likelihood and the seriousness of the potential injury against the practicality and cost of protecting against the risk of injury.

New September 2003; Revised April 2007, April 2008

Directions for Use

This instruction states a defense to the theory that the entity had notice of a dangerous condition (that it did not create) and failed to take adequate protective measures. (Gov. Code, §§ 835(b), 835.4(b).)

Sources and Authority

- No Public Entity Liability for Reasonable Act or Omission. Government Code section 835.4(b).
- "There are, of course, affirmative defenses pleaded which may require trial as well: such as . . . the special defense under Government Code, section 835.4 of the reasonableness, practicability, and cost of the alternative measures plaintiffs claim should have been taken to protect against a dangerous condition." (*Hibbs v. Los Angeles County Flood Control Dist.* (1967) 252 Cal.App.2d 166, 172 [60 Cal.Rptr. 364].)
- "Under section 835.4, subdivision (b), however, the question of the reasonableness of the state's action in light of the practicability and cost of the applicable safeguards is a matter for the jury's determination." (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 720 [159 Cal.Rptr. 835, 602 P.2d 755], footnote omitted.)
- "Unlike section 830.6 relating to design immunity, section 835.4 subdivision (b), does not provide that the reasonableness of the action taken shall be determined by the 'trial or appellate court.' " (*De La Rosa v. City of San Bernardino* (1971) 16 Cal.App.3d 739, 749 [94 Cal.Rptr. 175].)
- "The reasonableness standard referred to in section 835.4 differs from the reasonableness standard that applies under sections 830 and 835 and ordinary tort principles. Under the latter principles, the reasonableness of the defendant's conduct does not depend upon the existence of other, conflicting claims on the

defendant's resources or the political barriers to acting in a reasonable manner. But, as the California Law Revision Commission recognized, public entities may also defend against liability on the basis that, because of financial or political constraints, the public entity may not be able to accomplish what reasonably would be expected of a private entity." (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1138 [72 Cal.Rptr.3d 382, 176 P.3d 654].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 324

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.63–12.65

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

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.86 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.12, 196.300 (Matthew Bender)

1113–1119. Reserved for Future Use

1120. Failure to Provide Traffic Control Signals (Gov. Code, § 830.4)

You may not find that [*name of defendant***]'s property was in a dangerous condition just because it did not provide a [***insert device or marking***]. However, you may consider the lack of a [***insert device or marking***], along with other circumstances shown by the evidence, in determining whether [***name of defendant***]'s property was dangerous.**

New September 2003

Sources and Authority

- No Liability for Failure to Provide Traffic Controls. Government Code section 830.4.
- " '[T]he statutory scheme precludes a plaintiff from imposing liability on a public entity for creating a dangerous condition merely because it did not install the described traffic control devices.' In short, '[t]he lack of a traffic signal at the intersection does not constitute proof of a dangerous condition.' " (*Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 135 [142 Cal.Rptr.3d 633], internal citation omitted.)
- "Cases interpreting this statute have held that it provides a shield against liability only in those situations where the alleged dangerous condition exists solely as a result of the public entity's failure to provide a regulatory traffic device or street marking. If a traffic intersection is dangerous for reasons other than the failure to provide regulatory signals or street markings, the statute provides no immunity." (*Washington v. City and County of San Francisco* (1990) 219 Cal.App.3d 1531, 1534–1535 [269 Cal.Rptr. 58].)
- "A public entity does not create a dangerous condition on its property 'merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs . . . .' (§ 830.4.) If, on the other hand, the government installs traffic signals and invites the public to justifiably rely on them, liability will attach if the signals malfunction, confusing or misleading motorists, and causing an accident to occur. The reasoning behind this rule is that the government creates a dangerous condition and a trap when it operates traffic signals that, for example, direct motorists to 'go' in all four directions of an intersection simultaneously, with predictable results." (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1194–1195 [45 Cal.Rptr.2d 657], internal citations omitted.)
- "If the government turns off traffic signals entirely to avoid confusion, liability does not attach. 'When the [traffic] lights were turned off, their defective condition could no longer mislead or misdirect the injured party.' The same result obtains whether the traffic signals are extinguished by design or by

accident." (*Chowdhury, supra,* 38 Cal.App.4th at p. 1195, internal citations omitted.)

- "Although section 830.4 . . . provides that a condition of public property is not a dangerous one merely because of the failure to provide regulatory traffic control signals, the absence of such signals for the protection of pedestrians must be taken into consideration, together with other factors. . . . [T]he lack of crosswalk markings, better illumination and warning signs became important factors in the case when the [pedestrian] subway itself was in a dangerous condition." (*Gardner v. City of San Jose* (1967) 248 Cal.App.2d 798, 803 [57 Cal.Rptr. 176].)
- "In short, a dangerous condition proven to exist, for reasons other than or in addition to the mere failure to provide the controls or markings described in section 830.4, may constitute a proximate cause of injury without regard to whether such condition also constitutes a 'trap,' as described by section 830.8, to one using the public improvement with due care because of the failure to post signs different from those dealt with by section 830.4 warning of that dangerous condition." (*Washington, supra,* 219 Cal.App.3d at p. 1537.)
- "[D]efendant did not cite, nor have we located, any authority to extend this statutory immunity to a private entity alleged to have been negligent. To the contrary, a defendant that 'is not a "public entity" . . . is not entitled to claim the immunity set forth in the Tort Claims Act.' " (*Lichtman v. Siemens Industry Inc.* (2017) 16 Cal.App.5th 914, 930 [224 Cal.Rptr.3d 725].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 316

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) § 12.75

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[4] (Matthew Bender)

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

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.12, 196.210 (Matthew Bender)

1121. Failure to Provide Traffic Warning Signals, Signs, or Markings (Gov. Code, § 830.8)

A public entity is not responsible for harm caused by the lack of a [*insert relevant warning device***] unless a reasonably careful person would not notice or anticipate a dangerous condition of property without the [***insert relevant warning device***].**

New September 2003

Sources and Authority

- No Liability for Failure to Provide Traffic Control. Government Code section 830.8.
- "Section 830.8 provides a limited immunity for public entities exercising their discretion in the placement of warning signs described in the Vehicle Code. 'The broad discretion allowed a public entity in the placement of road control signs is limited, however, by the requirement that there be adequate warning of dangerous conditions not reasonably apparent to motorists.' Thus where the failure to post a warning sign results in a concealed trap for those exercising due care, section 830.8 immunity does not apply." (*Kessler v. State of California* (1988) 206 Cal.App.3d 317, 321–322 [253 Cal.Rptr. 537], internal citations omitted.)
- "[A] concealed dangerous condition that is a trap to motorists or pedestrians may require the posting of a warning sign but the absence of a warning sign itself is not a dangerous condition." (*Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 136 [142 Cal.Rptr.3d 633].)
- "A public entity may be liable for accidents proximately caused by its failure to provide a signal, sign, marking or device to warn of a dangerous condition which endangers the safe movement of traffic 'and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.' This 'concealed trap' statute applies to accidents proximately caused when, for example, the public entity fails to post signs warning of a sharp or poorly banked curve ahead on its road or of a hidden intersection behind a promontory, or where a design defect in the roadway causes moisture to freeze and create an icy road surface, a fact known to the public entity but not to unsuspecting motorists, or where road work is being performed on a highway." (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196–1197 [45 Cal.Rptr.2d 657], internal citations omitted.)
- "[W]arning devices are required under Government Code section 830.8 and 830 (fog) only if a dangerous condition exists." (*Callahan v. City and County of San Francisco* (1971) 15 Cal.App.3d 374, 380 [93 Cal.Rptr. 122].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 316, 317

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.76–12.79

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[4] (Matthew Bender)

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

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.12, 196.304 (Matthew Bender)

1122. Affirmative Defense—Weather Conditions Affecting Streets and Highways (Gov. Code, § 831)

[*Name of defendant***] claims it cannot be held responsible for [***name of plaintiff***]'s harm because the harm was caused by [***insert weather condition, e.g., fog, wind, rain, flood, ice, or snow***] affecting the use of a public street or highway. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***insert weather condition, e.g., fog, wind, rain, flood, ice, or snow***] affecting the use of a public street or highway was the cause of [***name of plaintiff***]'s harm; and**
2. **That a reasonably careful person using the public streets and highways would have noticed the [***insert weather condition, e.g., fog, wind, rain, flood, ice, or snow***] and anticipated its effect on the use of the street or highway.**

New September 2003

Directions for Use

The immunity provided by Government Code section 831 does not apply to: (1) effects that would not be reasonably apparent to and anticipated by a person exercising reasonable care, (2) situations where the weather effect combines with other factors that make the road dangerous, (3) sunlight that blinds drivers, or (4) where the weather conditions resulted in physical damage to or deterioration of the street or highway. (*Erfurt v. State of California* (1983) 141 Cal.App.3d 837, 845–846 [190 Cal.Rptr. 569]; see *Flournoy v. State of California* (1969) 275 Cal.App.2d 806, 814 [80 Cal.Rptr. 485].)

Sources and Authority

- No Liability for Weather Conditions. Government Code section 831.
- Weather immunity is an affirmative defense. (*Bossi v. State of California* (1981) 119 Cal.App.3d 313, 321 [174 Cal.Rptr. 93] [jury properly instructed regarding section 831, but issue was moot because jury did not reach it]; see also *Allyson v. Department of Transportation* (1997) 53 Cal.App.4th 1304, 1319 [62 Cal.Rptr.2d 490].)
- CalTrans's duty regarding transitory conditions affecting road surface and highway safety is discretionary, not mandatory. (*Allyson, supra,* 53 Cal.App.4th at p. 1319.) Accordingly, section 831 immunity is available to CalTrans in appropriate circumstances. (*Id.* at pp. 1320–1321.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 333

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.80–12.81

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

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

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.12, 196.301 (Matthew Bender)

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

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

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

New December 2014; Revised June 2016

Directions for Use

Give this instruction to present the affirmative defense of design immunity to a claim for liability caused by a dangerous condition on public property. (Gov. Code, § 830.6; see *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364, 369 [169 Cal.Rptr.3d 880] [design immunity is an affirmative defense that the public entity must plead and prove].)

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

In element 1, select "its" if it is the governing body that has exercised its discretionary authority. Select "specifically delegated" if it is some other body or employee.

The discretionary authority to approve the plan or design must be "vested," which means that the body or employee actually had the express authority to approve it. This authority cannot be implied from the circumstances. (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1457 [192 Cal.Rptr.3d 376].)

Sources and Authority

- Design Immunity. Government Code section 830.6.
- "The statutory defense of design immunity, however, precludes liability for injuries that were allegedly caused by a defect in the design of a public improvement when certain conditions are met. To obtain design immunity, a public entity must establish that the challenged design was discretionarily approved by authorized personnel and that substantial evidence supported the reasonableness of the plan." (*Tansavatdi v. City of Rancho Palos Verdes* (2023) 14 Cal.5th 639, 647 [307 Cal.Rptr.3d 346, 527 P.3d 873], internal citation omitted.)
- "The purpose of design immunity 'is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design. [Citation.]' ' "[T]o permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested." ' " (*Martinez*, *supra*, 225 Cal.App.4th at p. 369, internal citations omitted.)
- "Section 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether 'there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.' " (*Cornette*, *supra*, 26 Cal.4th at p. 66.)
- "To prove [the discretionary approval element of design immunity], the entity must show that the design was approved 'in advance' of the construction 'by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved . . . .' 'Approval . . . is a vital precondition of the design immunity.' " (*Martinez*, *supra*, 225 Cal.App.4th at p. 369, internal citations omitted.)
- "A detailed plan, drawn up by a competent engineering firm, and approved by a city engineer in the exercise of his or her discretionary authority, is persuasive evidence of the element of prior approval." (*Rodriguez v. Department of Transportation* (2018) 21 Cal.App.5th 947, 955 [230 Cal.Rptr.3d 852].)
- "In many cases, the evidence of discretionary authority to approve a design decision is clear, or even undisputed. . . . When the discretionary approval issue is disputed, however, as it was here, we must determine whether the person who approved the construction had the discretionary authority to do so." (*Martinez*, *supra*, 225 Cal.App.4th at pp. 370–371, internal citations omitted.)
- "Discretionary approval need not be established with testimony of the individual

who approved the project. A former employee may testify to the entity's 'discretionary approval custom and practice' even if the employee was not involved in the approval process at the time the challenged plan was approved." (*Gonzales v. City of Atwater* (2016) 6 Cal.App.5th 929, 947 [212 Cal.Rptr.3d 137], internal citation omitted.)

- "[T]he focus of discretional authority to approve a plan or design is fixed by law and will not be implied. '[T]he public entity claiming design immunity must prove that the person or entity who made the decision is vested with the authority to do so. Recognizing "implied" discretionary approval would vitiate this requirement and provide public entities with a blanket release from liability that finds no support in section 830.6.' " (*Castro, supra*, 239 Cal.App.4th at p. 1457.)
- "We conclude that the discretionary approval element of section 830.6 does not implicate the question whether the employee who approved the plans was aware of design standards or was aware that the design deviated from those standards. The issue of the adequacy of the deliberative process with respect to design standards may be considered in connection with the court's determination whether there is substantial evidence that the design was reasonable. In addition, the discretionary approval element does not require the entity to demonstrate in its prima facie case that the employee who had authority to and did approve the plans also had authority to disregard applicable standards." (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 343 [195 Cal.Rptr.3d 773, 362 P.3d 417].)
- "[A] case involving design immunity does not function as a typical summary judgment case would. The court's role in evaluating the third element of the design immunity is not to provide a de novo interpretation of the design, but instead to decide whether there is 'any substantial evidence' supporting its reasonableness." (*Menges v. Dept. of Transportation* (2020) 59 Cal.App.5th 13, 21 [273 Cal.Rptr.3d 231].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 243 et seq.

Haning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, Liability For "Dangerous Conditions" Of Public Property, ¶ 2:2855 et seq. (The Rutter Group)

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

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.85[2] (Matthew Bender)

19A California Points and Authorities, Ch. 196, Public Entities, § 196.12[1] (Matthew Bender)

1124. Loss of Design Immunity (*Cornette*)

[*Name of defendant***] is responsible for harm to [***name of plaintiff***] caused by the plan or design of the [***insert type of property, e.g., "highway"***] if [***name of plaintiff***] proves all of the following:**

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

   [or]

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

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

Directions for Use

Give this instruction if the plaintiff claims that the public entity defendant has lost its design immunity because of changed conditions since the design or plan was originally adopted. Read either or both options for element 3 depending on the facts of the case.

If the applicability of design immunity in the first instance is disputed, give CACI No. 1123, *Affirmative Defense—Design Immunity*. Also in this case, the introductory paragraph might begin with "Even if [*name of defendant*] proves both of these elements" (from CACI No. 1123).

Users should include CACI No. 1102, *Definition of "Dangerous Condition,"* and CACI No. 1103, *Notice,* to define "dangerous condition" and "notice" in connection with this instruction. Additionally, the meaning and legal requirements for a "change of physical condition" have been the subject of numerous decisions involving specific contexts. Appropriate additional instructions to account for these decisions may be necessary.

Sources and Authority

- Design Immunity. Government Code section 830.6.

- "[W]here a plan or design of a construction of, or improvement to, public property, although shown to have been reasonably approved in advance or prepared in conformity with standards previously so approved, as being safe, nevertheless in its actual operation under *changed physical conditions* produces a dangerous condition of public property and causes injury, the public entity does not retain the statutory immunity from liability conferred on it by section 830.6." (*Dammann v. Golden Gate Bridge, Highway & Transportation Dist.* (2012) 212 Cal.App.4th 335, 343 [150 Cal.Rptr.3d 829], quoting *Baldwin v. State* (1972) 6 Cal.3d 424, 438 [99 Cal.Rptr. 145, 491 P.2d 1121], original italics.)
- "Design immunity does not necessarily continue in perpetuity. To demonstrate loss of design immunity a plaintiff must also establish three elements: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings." (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1, 26 P.3d 332], internal citations omitted.)
- "The rationale for design immunity is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design." (*Cornette, supra,* 26 Cal.4th at p. 69, internal citation omitted.)
- "Section 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether 'there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.' The question presented by this case is whether the Legislature intended that the three issues involved in determining whether a public entity has lost its design immunity should also be tried by the court. Our examination of the text of section 830.6, the legislative history of that section, and our prior decisions leads us to the conclusion that, where triable issues of material fact are presented, as they were here, a plaintiff has a right to a jury trial as to the issues involved in loss of design immunity." (*Cornette, supra,* 26 Cal.4th at pp. 66–67.)
- "[T]echnological advances . . . do not constitute the 'changed physical conditions' necessary to defeat the [defendant]'s defense of design immunity under *Baldwin and Cornette*." (*Dammann*, *supra*, 22 Cal.App.4th at p. 351.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 338 et seq.

Haning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, *Liability For "Dangerous Conditions" Of Public Property*, ¶ 2:2865 et seq. (The Rutter Group)

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

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

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

1125. Conditions on Adjacent Property

[*Name of public entity defendant*]'s property may be considered dangerous if [a] condition[s] on adjacent property contribute[s] to exposing those using [*name of public entity defendant*]'s property to a substantial risk of injury.

[*Name of plaintiff*] claims that the following condition[s] on adjacent property contributed to making [*name of public entity defendant*]'s property dangerous: [*specify*]. You should consider [this/these] condition[s] in deciding whether [*name of public entity defendant*]'s property was in a dangerous condition.

New November 2019

Directions for Use

Give this instruction if the plaintiff claims that conditions on property adjacent to the public property that is alleged to be dangerous contributed to making the public property dangerous. This instruction should be given with, and not instead of, the applicable basic instructions for dangerous conditions on public property (see CACI Nos. 1100 through 1103).

This instruction is for use when a plaintiff's claim involves conditions on property adjacent to the public property. A different instruction will be required if a dangerous condition on public property creates a substantial risk of injury to one using adjacent property.

Sources and Authority

- "A California Law Revision Commission comment accompanying the statute's 1963 enactment expands on the relationship between public property and adjacent property with regard to dangerous conditions: ' "Adjacent property" as used in the definition of "dangerous condition" refers to the area that is exposed to the risk created by a dangerous condition of the public property. . . . [¶] . . . A public entity may be liable only for dangerous conditions of its own property. But its own property may be considered dangerous if it creates a substantial risk of injury to adjacent property or to persons on adjacent property; and its own property may be considered dangerous if a condition on the adjacent property exposes those using the public property to a substantial risk of injury.' " (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 147–148 [132 Cal.Rptr.2d 341, 65 P.3d 807].)
- "The third and fourth sentences of the City's '[d]esign of the [d]riveway' instruction improperly told the jury that it could not 'rely on' elements of the driveway, including 'the placement of the stop sign, the left turn pocket, and the presence of the pink cement' in deciding whether 'a dangerous condition existed.' This was legally incorrect, and it directly conflicted with another

instruction given to the jury, which told it that the City's 'property may be considered dangerous if a condition on adjacent property, such as the pink stamped concrete or the location of the stop sign, exposes those using the public property to a substantial risk of injury in conjunction with the adjacent property.' Giving the jury these two conflicting instructions could not have been anything but hopelessly confusing to the jury." (*Guernsey v. City of Salinas* (2018) 30 Cal.App.5th 269, 281–282 [241 Cal.Rptr.3d 335].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 311, 321 et seq.

5 Levy et al., California Torts, Ch. 61, Tort Claims Against Public Entities and Employees, § 61.01 et seq. (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, Public Entities and Officers, § 464.84 (Matthew Bender)

19A California Points and Authorities, Ch. 196, Public Entities, § 196.213 (Matthew Bender)

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

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

1. **That [***name of defendant***] had notice that its approved design created a dangerous condition;**
2. **That [***name of defendant***] failed to warn of the dangerous condition;**
3. **That the dangerous condition would not have been reasonably apparent to or anticipated by a person exercising due care;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That the absence of a warning was a substantial factor in causing [***name of plaintiff***]'s harm.**

New November 2024

Directions for Use

Give this instruction if the plaintiff claims that the public entity defendant failed to warn of a dangerous roadway condition resulting from an approved design, even if the approved design would otherwise be covered by design immunity. Whether this instruction should be given when a public entity produces evidence that it considered whether to provide a warning, in other words whether design immunity might affect a failure to warn claim, is unsettled. (*Tansavatdi v. City of Rancho Palos Verdes* (2023) 14 Cal.5th 639, 661 [307 Cal.Rptr.3d 346, 527 P.3d 873] [expressing no view on the issue]; but cf. *Stufkosky v. Department of Transportation* (2023) 97 Cal.App.5th 492, 501 [315 Cal.Rptr.3d 331] [affirming summary judgment in favor of public entity on failure to warn claim].) For an instruction on design immunity, see CACI No. 1123, *Affirmative Defense—Design Immunity*.

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

Sources and Authority

- Liability of Public Entity for Dangerous Condition of Property. Government Code section 835.
- Actual Notice. Government Code section 835.2(a).

- Constructive Notice. Government Code section 835.2(b).
- Definitions. Government Code section 830.
- "[W]e conclude that where the state is immune from liability for injuries caused by a dangerous condition of its property because the dangerous condition was created as a result of a plan or design which conferred immunity under section 830.6, the state may nevertheless be liable for failure to warn of this dangerous condition where the failure to warn is negligent and is an independent, separate, concurring cause of the accident." (*Cameron v. State of California* (1972) 7 Cal.3d 318, 329 [102 Cal.Rptr. 305, 497 P.2d 777].)
- "[W]hile *Cameron* [*v. State of California*] generally permits claims for failure to warn of a dangerous traffic condition that is subject to design immunity, a plaintiff pursuing such a claim must nonetheless prove various elements that are not present when pursuing a claim alleging a public entity *created* that dangerous condition: (1) the public entity had actual or constructive notice that the approved design resulted in a dangerous condition; (2) the dangerous condition qualified as a concealed trap, i.e., 'would not [have been] reasonably apparent to, and would not have been anticipated by, a person exercising due care'; and (3) the absence of a warning was a substantial factor in bringing about the injury." (*Tansavatdi, supra,* 14 Cal.5th at pp. 661–662, original italics.)
- "In sum, we find nothing illogical about interpreting sections 830.6 and 835 in a manner that compels government entities to provide a warning when they know (or should know) that an approved roadway design presents concealed dangers to the public." (*Tansavatdi*, *supra*, 14 Cal.5th at p. 668.)
- "Finally, we note that while *Cameron* concluded a public entity can be held liable for failing to warn of a dangerous roadway feature that was the result of a properly approved design, our decision did not address whether design immunity might apply if the public entity is able to show that the presence or absence of warning signs was part of the approved design. The plaintiffs in *Cameron* specifically alleged that the state's failure to warn was not part of any approved plan, and they acknowledged in their petition for review that section 830.6 might apply 'where the presence or absence of signs was a considered element of the plan or design.' In this case, the City's summary judgment motion argued only that section 830.6 shields public entities from failure to warn claims involving an approved feature of the roadway; the City did not argue that the evidence offered in support of its design immunity defense showed city officials had considered whether to provide a warning about the discontinuance of the bike lane. Thus, as in *Cameron*, we have no occasion to consider, and express no view on, how design immunity might affect a failure to warn claim when a public entity does produce evidence that it considered whether to provide a warning." (*Tansavatdi*, *supra*, 14 Cal.5th at p. 661, internal citation and footnote omitted].)

Secondary Sources

5 Witkin, Summary of California Law (12th ed. 2018), Ch. 9, *Torts*, §§ 316, 323, 335

California Causes of Action, Ch. 18, Government Tort Liability, §§ 3:00, 3.60

Haning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, *Government Entity Liability and Immunity* (The Rutter Group)

California Civil Practice: Torts § 31:20 (Thomson Reuters)

1127–1199. Reserved for Future Use

VF-1100. Dangerous Condition of Public Property

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] own [or control] the property?**

   _____ **Yes** _____ **No**

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

2. **Was the property in a dangerous condition at the time of the injury?**

   _____ **Yes** _____ **No**

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

3. **Did the dangerous condition create a reasonably foreseeable risk that this kind of injury would occur?**

   _____ **Yes** _____ **No**

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

4. **[Did the negligent or wrongful conduct of [*name of defendant*]'s employee acting within the scope of employment create the dangerous condition?]**

   [or]

   [Did [*name of defendant*] have notice of the dangerous condition for a long enough time for [*name of defendant*] to have protected against it?]

   _____ **Yes** _____ **No**

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

5. **Was the dangerous condition a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have

the presiding juror sign and date this form.

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

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 1100, *Dangerous Condition on Public Property—Essential Factual Elements*.

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

If specificity is not required, users do not have to itemize all the damages listed in

question 6. The breakdown is optional depending on the circumstances.

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

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

VF-1101. Dangerous Condition of Public Property—Affirmative Defense—Reasonable Act or Omission (Gov. Code, § 835.4)

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] own [or control] the property?**

   _____ Yes _____ No

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

2. **Was the property in a dangerous condition at the time of the incident?**

   _____ Yes _____ No

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

3. **Did the dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?**

   _____ Yes _____ No

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

4. **[Did negligent or wrongful conduct of [*name of defendant*]'s employee acting within the scope of the employee's employment create the dangerous condition?]**

   _____ Yes _____ No

   [or]

   [Did [*name of defendant*] have notice of the dangerous condition for a long enough time to have protected against it?]

   _____ Yes _____ No

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

5. **Was the dangerous condition a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

6. [Answer if you answered yes to the first option for question 4: When you consider the likelihood and seriousness of potential injury, compared with the practicality and cost of either (a) taking alternative action that would not have created the risk of injury, or (b) protecting against the risk of injury, was [*name of defendant***]'s [act/***specify failure to act***] that created the dangerous condition reasonable under the circumstances?]**

_____ Yes _____ No

[or]

[Answer if you answered yes to the second option for question 4: When you consider the likelihood and seriousness of potential injury, compared with (a) how much time and opportunity [*name of defendant***] had to take action, and (b) the practicality and cost of protecting against the risk of injury, was [***name of defendant***]'s failure to take sufficient steps to protect against the risk of injury created by the dangerous condition reasonable under the circumstances?]**

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008, October 2008, June 2010, December 2010, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 1100, *Dangerous Condition on Public Property—Essential Factual Elements*, CACI No. 1111, *Affirmative Defense—Condition Created by Reasonable Act or Omission*, and CACI No. 1112, *Affirmative Defense—Reasonable Act or Omission to Correct*.

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

For questions 4 and 6, choose the first bracketed options if liability is alleged because of an employee's negligent conduct under Government Code section 835(a). Use the second bracketed options if liability is alleged for failure to act after actual or constructive notice under Government Code section 835(b). Both options may be given if the plaintiff is proceeding under both theories of liability.

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

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

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*.

This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1102–VF-1199. Reserved for Future Use

PRODUCTS LIABILITY

1200. Strict Liability—Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed by a product [distributed/manufactured/sold] by [*name of defendant*] that:

[contained a manufacturing defect;] [or]

[was defectively designed;] [or]

[did not include sufficient [instructions] [or] [warning of potential safety hazards].]

New September 2003

Sources and Authority

- "Products liability is the name currently given to the area of the law involving the liability of those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 30 [192 Cal.Rptr.3d 158].)
- "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. GM Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298], internal citations omitted.)
- "Strict liability has been invoked for three types of defects—manufacturing defects, design defects, and 'warning defects,' i.e., inadequate warnings or failures to warn." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 995 [281 Cal.Rptr. 528, 810 P.2d 549].)
- "Under the Restatement [Rest.3d Torts, Products Liability, § 2], a product is defective if it: '(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product; [¶] (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe; [¶] (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.' " (*Brady v. Calsol, Inc.* (2015) 241 Cal.App.4th 1212, 1218–1219 [194 Cal.Rptr.3d 243].)
- "A manufacturer is strictly liable in tort when an article he places on the market,

knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . . The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62–63 [27 Cal.Rptr. 697, 377 P.2d 897].)

- "[S]trict products liability causes of action need not be pled in terms of classic negligence elements (duty, breach, causation and damages)." (*Elsheref v. Applied Materials, Inc.* (2014) 223 Cal.App.4th 451, 464 [167 Cal.Rptr.3d 257].)
- "[S]trict liability has never been, and is not now, absolute liability. As has been repeatedly expressed, under strict liability the manufacturer does not thereby become the insurer of the safety of the product's user." (*Sanchez v. Hitachi Koki, Co.* (2013) 217 Cal.App.4th 948, 956 [158 Cal.Rptr.3d 907].)
- "Beyond manufacturers, anyone identifiable as 'an integral part of the overall producing and marketing enterprise' is subject to strict liability." (*Arriaga v. CitiCapital Commercial Corp.* (2008) 167 Cal.App.4th 1527, 1534 [85 Cal.Rptr.3d 143].)
- "Generally, the imposition of strict liability hinges on the extent to which a party was 'responsible for placing products in the stream of commerce.' When the purchase of a product 'is the primary objective or essence of the transaction, strict liability applies even to those who are mere conduits in distributing the product to the consumer.' In contrast, the doctrine of strict liability is ordinarily inapplicable to transactions 'whose primary objective is obtaining services,' and to transactions in which the 'service aspect predominates and any product sale is merely incidental to the provision of the service.' Thus, '[i]n a given transaction involving both products and services, liability will often depend upon the defendant's role.' " (*Hernandezcueva v. E.F. Brady Co., Inc.* (2015) 243 Cal.App.4th 249, 258 [196 Cal.Rptr.3d 594], internal citations omitted.)
- "[U]nder the stream-of-commerce approach to strict liability[,] no precise legal relationship to the member of the enterprise causing the defect to be manufactured or to the member most closely connected with the customer is required before the courts will impose strict liability. It is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product (and not the defendant's legal relationship (such as agency) with the manufacturer or other entities involved in the manufacturing-marketing system) which calls for imposition of strict liability." (*Hernandezcueva, supra*, 243 Cal.App.4th at pp. 257–258.)
- " '[S]trict liability is not imposed even if the defendant is technically a "link in the chain" in getting the product to the consumer market if the judicially perceived policy considerations are not satisfied. Thus, a defendant will not be held strictly liable unless doing so will enhance product safety, maximize protection to the injured plaintiff, and apportion costs among the defendants.

[Citations.]' " (*Hernandezcueva, supra*, 234 Cal.App.4th at p. 258.)

- "California cases have found that a defendant involved in the marketing/distribution process may be held strictly liable 'if three factors are present: (1) the defendant received a direct financial benefit from its activities and from the sale of the product; (2) the defendant's role was integral to the business enterprise such that the defendant's conduct was a necessary factor in bringing the product to the initial consumer market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process. [Citation.]' . . . 'The application of strict liability in any particular factual setting is determined largely by the policies that underlie the doctrine.' " (*Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 270 [220 Cal.Rptr.3d 185], internal citation omitted.)
- "The component parts doctrine provides that the manufacturer of a component part is not liable for injuries caused by the finished product into which the component has been incorporated unless the component itself was defective and caused harm." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 355 [135 Cal.Rptr.3d 288, 266 P.3d 987].)
- "The only exceptions to this rule [that a product manufacturer generally may not be held strictly liable for harm caused by another manufacturer's product] arise when the defendant bears some direct responsibility for the harm, either because the defendant's own product contributed substantially to the harm, or because the defendant participated substantially in creating a harmful combined use of the products." (*O'Neil, supra*, 53 Cal.4th at p. 362, internal citation omitted.)
- "[T]o hold a defendant strictly liable under a marketing/distribution theory, the plaintiff must demonstrate that: '(1) the defendant received a direct financial benefit from its activities and from the sale of the product; (2) the defendant's role was integral to the business enterprise such that the defendant's conduct was a necessary factor in bringing the product to the initial consumer market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process.' " (*Arriaga, supra,* 167 Cal.App.4th at p. 1535.)
- "[T]he doctrine of strict liability may not be restricted on a theory of privity of contract. Since the doctrine applies even where the manufacturer has attempted to limit liability, they further make it clear that the doctrine may not be limited on the theory that no representation of safety is made to the bystander. [¶¶] If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders." (*Elmore v.*

American Motors Corp. (1969) 70 Cal.2d 578, 586 [75 Cal.Rptr. 652, 451 P.2d 84].)

- "Engineers who do not participate in bringing a product to market and simply design a product are not subject to strict products liability." (*Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1008 [169 Cal.Rptr.3d 208].)
- "As a provider of services rather than a seller of a product, the hospital is not subject to strict liability for a defective product provided to the patient during the course of his or her treatment." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 316 [213 Cal.Rptr.3d 82] [however, causes of action based in negligence are not affected].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1591–1601

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1207, 2:1215 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.10 (Matthew Bender)

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

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.20 et seq. (Matthew Bender)

1201. Strict Liability—Manufacturing Defect—Essential Factual Elements

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[*Name of plaintiff*] claims that the [*product*] contained a manufacturing defect. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**
2. **That the [*product*] contained a manufacturing defect when it left [*name of defendant*]'s possession;**
3. **That [*name of plaintiff*] was harmed; and**
4. **That the [*product*]'s defect was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised April 2009, December 2009, June 2011, May 2020

Directions for Use

To make a prima facie case, the plaintiff has the initial burden of producing evidence that the plaintiff was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590] [risk-benefit design defect case]; *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 125–126 [104 Cal.Rptr. 433, 501 P.2d 1153] [product misuse asserted as a defense to manufacturing defect]; see also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.) Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

- "[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.3d 158].)
- "A manufacturing defect occurs when an item is manufactured in a substandard

condition." (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 792 [64 Cal.Rptr.3d 908].)

- "A product has a manufacturing defect if it differs from the manufacturer's intended result or from other ostensibly identical units of the same product line. In other words, a product has a manufacturing defect if the product as manufactured does not conform to the manufacturer's design." (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 190 [153 Cal.Rptr.3d 693].)
- " 'Regardless of the theory which liability is predicated upon . . . it is obvious that to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product . . . .' " (*Garcia v. Joseph Vince Co.* (1978) 84 Cal.App.3d 868, 874 [148 Cal.Rptr. 843], internal citation omitted.)
- "[W]here a plaintiff alleges a product is defective, proof that the product has malfunctioned is essential to establish liability for an injury *caused by the defect*." (*Khan v. Shiley Inc.* (1990) 217 Cal.App.3d 848, 855 [266 Cal.Rptr. 106], original italics.)
- "We think that a requirement that a plaintiff also prove that the defect made the product 'unreasonably dangerous' places upon him a significantly increased burden and represents a step backward in the area pioneered by this court." (*Cronin, supra,* 8 Cal.3d at pp. 134–135.)
- "[T]he policy underlying the doctrine of strict liability compels the conclusion that recovery should not be limited to cases involving latent defects." (*Luque v. McLean* (1972) 8 Cal.3d 136, 145 [104 Cal.Rptr. 443, 501 P.2d 1163].)
- "A manufacturer is liable only when a defect in its product was a legal cause of injury. A tort is a legal cause of injury only when it is a substantial factor in producing the injury." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 [34 Cal.Rptr.2d 607, 882 P.2d 298], internal citations omitted.)
- "[Plaintiff] argues whether the alleged defects in the cup were a cause of her injuries is a question for the jury. ' "Ordinarily, proximate cause is a question of fact which cannot be decided as a matter of law. . . . Nevertheless, where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact." ' " (*Shih v. Starbucks Corp.* (2020) 53 Cal.App.5th 1063, 1071 [267 Cal.Rptr.3d 919], internal citation omitted.)
- "[S]trict liability should not be imposed upon a manufacturer when injury results from a use of its product that is not reasonably foreseeable." (*Cronin, supra*, 8 Cal.3d at p. 126.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1591

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1215, 2:1216 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.30 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.140 (Matthew Bender)

1202. Strict Liability—"Manufacturing Defect" Explained

A product contains a manufacturing defect if the product differs from the manufacturer's design or specifications or from other typical units of the same product line.

New September 2003

Sources and Authority

- The Supreme Court has defined a manufacturing defect as follows: "In general, a manufacturing or production defect is readily identifiable because a defective product is one that differs from the manufacturer's intended result or from other ostensibly identical units of the same product line." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 429 [143 Cal.Rptr. 225, 573 P.2d 443].)
- "[A] defective product is viewed as one which fails to match the quality of most like products, and the manufacturer is then liable for injuries resulting from deviations from the norm . . . ." (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 383 [93 Cal.Rptr. 769, 482 P.2d 681].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1644 et seq.

1203. Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements

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[*Name of plaintiff*] claims the [*product*]'s design was defective because the [*product*] did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**
2. **That the [*product*] did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way;**
3. **That [*name of plaintiff*] was harmed; and**
4. **That the [*product*]'s failure to perform safely was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised December 2005, April 2009, December 2009, June 2011, January 2018, May 2020

Directions for Use

The consumer expectation test and the risk-benefit test for design defect are not mutually exclusive, and depending on the facts and circumstances of the case, both may be presented to the trier of fact in the same case. (*Demara v. The Raymond Corp.* (2017) 13 Cal.App.5th 545, 554 [221 Cal.Rptr.3d 102].) If both tests are asserted by the plaintiff, the burden-of-proof instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431].)

The court must make an initial determination as to whether the consumer expectation test applies to the product. In some cases, the court may determine that the product is one to which the test may, but not necessarily does, apply, leaving the determination to the jury. (See *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233–1234 [115 Cal.Rptr.3d 151].) In such a case, modify the instruction to advise the jury that it must first determine whether the product is one about which an ordinary consumer can form reasonable minimum safety expectations.

To make a prima facie case, the plaintiff has the initial burden of producing evidence that the plaintiff was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590] [risk-benefit case]; see also CACI No. 1245, *Affirmative*

Defense—Product Misuse or Modification.) Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

- "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298].)
- "[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.3d 158].)
- "[A] product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors . . . , the benefits of the challenged design do not outweigh the risk of danger inherent in such design." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 418 [143 Cal.Rptr. 225, 573 P.2d 443].)
- "The [consumer-expectation and risk-benefit] tests provide alternative means for a plaintiff to prove design defect and do not serve as defenses to one another. A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks. [Citation.] On the other hand, a product may be defective if it satisfies consumer expectations but contains an excessively preventable danger in that the risks of the design outweigh its benefits." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1303 [144 Cal.Rptr.3d 326].)
- "In order to establish a design defect under the consumer expectation test when a ' " 'product is one within the common experience of ordinary consumers,' " ' the plaintiff must ' " 'provide[] evidence concerning (1) his or her use of the product; (2) the circumstances surrounding the injury; and (3) the objective features of the product which are relevant to an evaluation of its safety.' [Citation.] The test is that of a hypothetical reasonable consumer, not the expectation of the particular plaintiff in the case." ' " (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 157 [220 Cal.Rptr.3d 127].)
- "The rationale of the consumer expectations test is that '[t]he purposes, behaviors, and dangers of certain products are commonly understood by those who ordinarily use them.' Therefore, in some cases, ordinary knowledge of the product's characteristics may permit an inference that the product did not

perform as safely as it should. '*If* the facts permit such a conclusion, and *if* the failure resulted from the product's design, a finding of defect is warranted without any further proof,' and the manufacturer may not defend by presenting expert evidence of a risk/benefit analysis. . . . Nonetheless, the inherent complexity of the product itself is not controlling on the issue of whether the consumer expectations test applies; a complex product 'may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers.' " (*Saller, supra*, 187 Cal.App.4th at p. 1232, original italics, internal citations omitted.)

- "The critical question, in assessing the applicability of the consumer expectation test, is not whether the product, when considered in isolation, is beyond the ordinary knowledge of the consumer, but whether the product, *in the context of the facts and circumstances of its failure*, is one about which the ordinary consumers can form minimum safety expectations." (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1311–1312 [120 Cal.Rptr.3d 605].)
- "Whether the jury should be instructed on either the consumer expectations test or the risk/benefit test depends upon the particular facts of the case. In a jury case, the trial court must initially determine as a question of foundation, within the context of the facts and circumstances of the particular case, whether the product is one about which the ordinary consumer can form reasonable minimum safety expectations. 'If the court concludes it is not, no consumer expectation instruction should be given. . . . If, on the other hand, the trial court finds there is sufficient evidence to support a finding that the ordinary consumer can form reasonable minimum safety expectations, the court should instruct the jury, consistent with Evidence Code section 403, subdivision (c), to determine whether the consumer expectation test applies to the product at issue in the circumstances of the case [or] to disregard the evidence about consumer expectations unless the jury finds that the test is applicable. If it finds the test applicable, the jury then must decide whether the product failed to perform as safely as an ordinary consumer would expect when the product is used in an intended or reasonably foreseeable manner.' " (*Saller, supra*, 187 Cal.App.4th at pp. 1233–1234, internal citations omitted.)
- "[The] dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety or that, on balance, are not as safely designed as they should be." (*Barker, supra,* 20 Cal.3d at p. 418.)
- The consumer expectation test "acknowledges the relationship between strict tort liability for a defective product and the common law doctrine of warranty, which holds that a product's presence on the market includes an implied representation 'that it [will] safely do the jobs for which it was built.' " (*Soule, supra*, 8 Cal.4th at p. 562, internal citations omitted.)
- "[T]he jury may not be left free to find a violation of ordinary consumer expectations whenever it chooses. Unless the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of

its ordinary users, the jury must engage in the balancing of risks and benefits required by the second prong of *Barker*. Accordingly, as *Barker* indicated, instructions are misleading and incorrect if they allow a jury to avoid this risk-benefit analysis in a case where it is required." (*Soule, supra,* 8 Cal.4th at p. 568.)

- "[T]he consumer expectation test does not apply merely because the consumer states that he or she did not expect to be injured by the product." (*Trejo, supra,* 13 Cal.App.5th at p. 159.)
- "[T]he consumer expectation test is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*." (*Soule, supra,* 8 Cal.4th at p. 567, original italics.)
- "[A] product's users include anyone whose injury was 'reasonably foreseeable.' " (*Demara, supra,* 13 Cal.App.5th at p. 559.)
- "If the facts permit an inference that the product at issue is one about which consumers may form minimum safety assumptions in the context of a particular accident, then it is enough for a plaintiff, proceeding under the consumer expectation test, to show the circumstances of the accident and 'the objective features of the product which are relevant to an evaluation of its safety' [citation], leaving it to the fact finder to 'employ "[its] own sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence." ' [Citations.] Expert testimony as to what consumers ordinarily 'expect' is generally improper." (*Chavez, supra*, 207 Cal.App.4th at p. 1303.)
- "That causation for a plaintiff's injuries was proved through expert testimony does not mean that an ordinary consumer would be unable to form assumptions about the product's safety. Accordingly, the trial court properly instructed the jury on the consumer expectations test." (*Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1004 [169 Cal.Rptr.3d 208], internal citations omitted.)
- "Generally, ' "[e]xpert witnesses may not be used to demonstrate what an ordinary consumer would or should expect," because the idea behind the consumer expectations test is that the lay jurors have common knowledge about the product's basic safety.' However, 'where the product is in specialized use with a limited group of consumers[,] . . . '. . . expert testimony on the limited subject of what the product's actual consumers *do expect* may be proper" ' because ' "the expectations of the product's limited group of ordinary consumers are beyond the lay experience common to all jurors." ' " (*Verrazono v. Gehl Co.* (2020) 50 Cal.App.5th 636, 646–647 [263 Cal.Rptr.3d 663], original italics, internal citation omitted.)
- "In determining whether a product's safety satisfies [the consumer expectation test], the jury considers the expectations of a hypothetical reasonable consumer,

rather than those of the particular plaintiff in the case." (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126, fn. 6 [184 Cal.Rptr. 891, 649 P.2d 224].)

- "[E]vidence as to what the scientific community knew about the dangers . . . and when they knew it is not relevant to show what the ordinary consumer of [defendant]'s product reasonably expected in terms of safety at the time of [plaintiff]'s exposure. It is the knowledge and reasonable expectations of the consumer, not the scientific community, that is relevant under the consumer expectations test." (*Morton v. Owens-Corning Fiberglas Corp.* (1995) 33 Cal.App.4th 1529, 1536 [40 Cal.Rptr.2d 22].)
- "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [79 Cal.Rptr.2d 657].)
- " '[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse. . . . [T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact.' " (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1235 [63 Cal.Rptr.2d 422].)
- "[T]he plaintiff bears an initial burden of making 'a prima facie showing that the injury was proximately caused by the product's design.' This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff's prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product." (*Perez, supra*, 188 Cal.App.4th at p. 678, original italics, internal citations omitted.)
- "The use of asbestos insulation is a product that is within the understanding of ordinary lay consumers." (*Saller, supra*, 187 Cal.App.4th at p. 1236.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1615–1631

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1220–2:1222 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.02 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.11

(Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.116 (Matthew Bender)

1204. Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof

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[*Name of plaintiff*] claims that the [*product*]'s design caused harm to [*name of plaintiff*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**
2. **That [*name of plaintiff*] was harmed; and**
3. **That the [*product*]'s design was a substantial factor in causing harm to [*name of plaintiff*].**

If [*name of plaintiff*] has proved these three facts, then your decision on this claim must be for [*name of plaintiff*] unless [*name of defendant*] proves that the benefits of the [*product*]'s design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following:

(a) The gravity of the potential harm resulting from the use of the [*product*];

(b) The likelihood that this harm would occur;

(c) The feasibility of an alternative safer design at the time of manufacture;

(d) The cost of an alternative design; [and]

(e) The disadvantages of an alternative design; [and]

[(f) [*Other relevant factor(s)*].]

New September 2003; Revised February 2007, April 2009, December 2009, December 2010, June 2011, January 2018, May 2019, May 2020

Directions for Use

The consumer expectation test and the risk-benefit test for design defect are not mutually exclusive, and depending on the facts and circumstances of the case, both may be presented to the trier of fact in the same case. (*Demara v. The Raymond Corp.* (2017) 13 Cal.App.5th 545, 554 [221 Cal.Rptr.3d 102].) If the plaintiff asserts both tests, the instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431].) Risk-benefit weighing is not a formal part of, nor may it serve as a defense to, the consumer expectations test. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1303 [144 Cal.Rptr.3d 326].)

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

If evidence of industry custom and practice has been admitted for a limited purpose, at the timely request of a party opposing this evidence, the jury must be given a limiting instruction on how this evidence may and may not be considered under the risk-benefit test. (See *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 30, 38 [237 Cal.Rptr.3d 205, 424 P.3d 290].)

Aesthetics might be an additional factor to be considered in an appropriate case in which there is evidence that appearance is important in the marketability of the product. (*See Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1131 [105 Cal.Rptr.3d 485].)

Sources and Authority

- "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298].)
- "[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.3d 158].)
- "The risk-benefit test requires the plaintiff to first 'demonstrate[] that the product's design proximately caused his injury.' If the plaintiff makes this initial showing, the defendant must then 'establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.' " (*Kim, supra*, 6 Cal.5th at p. 30, internal citation omitted.)
- "Appellants are therefore correct in asserting that it was not their burden to show that the risks involved in the loader's design—the lack of mechanical safety devices, or of a warning—outweighed the benefits of these aspects of its designs. The trial court's instruction to the jury, which quite likely would have been understood to place this burden on appellants, was therefore an error." (*Lunghi v.*

Clark Equipment Co., Inc. (1984) 153 Cal.App.3d 485, 497–498 [200 Cal.Rptr. 387], internal citations omitted.)

- "[U]nder the risk/benefit test, the plaintiff may establish the product is defective by showing that its design proximately caused his injury and the defendant then fails to establish that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design. In such case, the jury must evaluate the product's design by considering the gravity of the danger posed by the design, the likelihood such danger would occur, the feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the consumer resulting from an alternative design. 'In such cases, the jury must consider the manufacturer's evidence of competing design considerations . . . , and the issue of design defect cannot fairly be resolved by standardless reference to the "expectations" of an "ordinary consumer." ' " (*Saller v. Crown Cork & Seal Co., Inc*. (2010) 187 Cal.App.4th 1220, 1233 [115 Cal.Rptr.3d 151], internal citations omitted.)
- "[T]he defendant's burden is one 'affecting the burden of proof, rather than simply the burden of producing evidence.' " (*Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487].)
- "The [consumer-expectation and risk-benefit] tests provide alternative means for a plaintiff to prove design defect and do not serve as defenses to one another. A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks. [Citation.] On the other hand, a product may be defective if it satisfies consumer expectations but contains an excessively preventable danger in that the risks of the design outweigh its benefits." (*Chavez, supra*, 207 Cal.App.4th at p. 1303.)
- "Under *Barker*, in short, the plaintiff bears an initial burden of making 'a prima facie showing that the injury was proximately caused by the product's design.' This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff's prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product." (*Perez, supra,* 188 Cal.App.4th at p. 678, original italics, internal citations omitted.)
- " '[I]n evaluating the adequacy of a product's design pursuant to [the risk-benefit] standard, a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to

the consumer that would result from an alternative design.' " (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 786–787 [64 Cal.Rptr.3d 908], internal citations omitted.)

- "[E]xpert evidence about compliance with industry standards can be considered on the issue of defective design, in light of all other relevant circumstances, even if such compliance is not a complete defense. An action on a design defect theory can be prosecuted and defended through expert testimony that is addressed to the elements of such a claim, including risk-benefit considerations." (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 426 [136 Cal.Rptr.3d 739].)
- "In some defective design cases, 'the feasibility of a reasonable alternative design is obvious and understandable to laypersons and therefore expert testimony is unnecessary to support a finding that the product should have been designed differently and more safely. For example, when a manufacturer sells a soft stuffed toy with hard plastic buttons that are easily removable and likely to choke and suffocate a small child who foreseeably attempts to swallow them, the plaintiff should be able to reach the trier of fact . . . without hiring an expert to demonstrate the feasibility of an alternative safer design.' " (*Camacho v. JLG Industries Inc.* (2023) 93 Cal.App.5th 809, 816 [311 Cal.Rptr.3d 372], internal citation omitted.)
- "We stress that while industry custom and practice evidence is not categorically inadmissible, neither is it categorically admissible; its admissibility will depend on application of the ordinary rules of evidence in the circumstances of the case. . . . First, the party seeking admission of such evidence must establish its relevance to at least one of the elements of the risk-benefit test, either causation or the *Barker* factors. The evidence is relevant to the *Barker* inquiry if it sheds light on whether, objectively speaking, the product was designed as safely as it should have been, given 'the complexity of, and trade-offs implicit in, the design process.' Whether the evidence serves this purpose depends on whether, under the circumstances of the case, it is reasonable to conclude that other manufacturers' choices do, as the Court of Appeal put it, 'reflect legitimate, independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality.' If the proponent of the evidence establishes a sufficient basis for drawing such a conclusion, the evidence is admissible, even though one side or the other may argue it is entitled to little weight because industry participants have weighed the relevant considerations incorrectly. The evidence may not, however, be introduced simply for the purpose of showing the manufacturer was acting no worse than its competitors." (*Kim, supra,* 6 Cal.5th at p. 37, internal citations omitted.)
- "[I]f the party opposing admission of this evidence makes a timely request, the trial court must issue a jury instruction that explains how this evidence may and may not be considered under the risk-benefit test." (*Kim, supra,* 6 Cal.5th at p. 38.)
- "Plaintiffs contend aesthetics is not a proper consideration in the risk-benefit

analysis, and the trial court's ruling to the contrary was an '[e]rror in law.' We disagree. In our view, much of the perceived benefit of a car lies in its appearance. A car is not a strictly utilitarian product. We believe that a jury properly may consider aesthetics in balancing the benefits of a challenged design against the risk of danger inherent in the design. Although consideration of the disadvantages of an alternative design (CACI No. 1204, factor (e)) would encompass any impact on aesthetics, we conclude that there was no error in the trial court's approval of the modification listing aesthetics as a relevant factor." (*Bell*, *supra*, 181 Cal.App.4th at p. 1131, internal citations omitted.)

- "Taken together, section 2, subdivision (b), and section 5 of the Restatement indicate that a component part manufacturer may be held liable for a defect in the component. When viewed in its entirety, the Restatement does not support [defendant]'s argument that '[o]nly if the component part analysis establishes sufficient control over the design of the alleged defect should the component manufacturer be held to the standard of the risk-benefit test.' Instead, the test considering foreseeable risks of harm and alternative designs is applied to the component part manufacturer when the alleged defect is in the component." (*Gonzalez, supra,* 154 Cal.App.4th at pp. 789–790.)
- "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [79 Cal.Rptr.2d 657].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1621–1630

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1223–2:1224 (The Rutter Group)

California Products Liability Actions, Ch. 7, *Proof*, § 7.02 (Matthew Bender)

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

19 California Points and Authorities, Ch. 190, *Products Liability*, §§ 190.111-190.114 (Matthew Bender)

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

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

1. **That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**
2. **That the [*product*] had potential [risks/side effects/allergic reactions] that were [known/ [or] knowable in light of the [scientific/ [and] medical] knowledge that was generally accepted in the scientific community] at the time of [manufacture/distribution/sale];**
3. **That the potential [risks/side effects/allergic reactions] presented a substantial danger when the [*product*] is used or misused in an intended or reasonably foreseeable way;**
4. **That ordinary consumers would not have recognized the potential [risks/side effects/allergic reactions];**
5. **That [*name of defendant*] failed to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions];**
6. **That [*name of plaintiff*] was harmed; and**
7. **That the lack of sufficient [instructions] [or] [warnings] was a substantial factor in causing [*name of plaintiff*]'s harm.**

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

New September 2003; Revised April 2009, December 2009, June 2011, December 2011, May 2020

Directions for Use

With regard to element 2, it has been often stated in the case law that a manufacturer is liable for failure to warn of a risk that is "knowable in light of generally recognized and prevailing best scientific and medical knowledge available." (See, e.g., *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002 [281 Cal.Rptr. 528, 810 P.2d 549]; *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162, 920 P.2d 1347]; *Saller v. Crown Cork & Seal Company* (2010) 187 Cal.App.4th 1220, 1239 [115 Cal.Rptr.3d 151]; *Rosa v. City of Seaside* (N.D. Cal. 2009) 675 F.Supp.2d 1006, 1012.) The advisory committee believes that this standard is captured by the phrase "generally accepted

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

The last bracketed paragraph should be read only in prescription product cases: In the case of *prescription drugs* and *implants*, the physician stands in the shoes of the ordinary user because it is through the physician that a patient learns of the properties and proper use of the drug or implant. Thus, the duty to warn in these cases runs to the physician, not the patient. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App 5th 276, 319 [213 Cal.Rptr.3d 82], original italics.)

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

Sources and Authority

- "Our law recognizes that even ' "a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes 'defective' simply by the absence of a warning." . . .' Thus, manufacturers have a duty to warn consumers about the hazards inherent in their products. The purpose of requiring adequate warnings is to inform consumers about a product's hazards and faults of which they are unaware, so that the consumer may then either refrain from using the product altogether or avoid the danger by careful use." (*Taylor v. Elliott Turbomachinery Co.*, Inc. (2009) 171 Cal.App.4th 564, 577 [90 Cal.Rptr.3d 414], internal citations and footnote omitted.)
- "Negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other because the plaintiff might allege both when a product warning contributes to her injury." (*Conte v.*

Wyeth, Inc. (2008) 168 Cal.App.4th 89, 101 [85 Cal.Rptr.3d 299].)

- "The 'known or knowable' standard arguably derives from negligence principles, and failure to warn claims are generally ' "rooted in negligence" to a greater extent than' manufacturing or design defect claims. Unlike those other defects, a ' "warning defect" relates to a failure extraneous to the product itself' and can only be assessed by examining the manufacturer's conduct. These principles notwithstanding, California law recognizes separate failure to warn claims under both strict liability and negligence theories. In general, a product seller will be *strictly liable* for failure to warn if a warning was feasible and the absence of a warning caused the plaintiff's injury. Reasonableness of the seller's failure to warn is immaterial in the strict liability context. Conversely, to prevail on a claim for *negligent* failure to warn, the plaintiff must prove that the seller's conduct fell below the standard of care. If a prudent seller would have acted reasonably in not giving a warning, the seller will not have been negligent." (*Webb v. Special Electric Co., Inc*. (2016) 63 Cal.4th 167, 181 [202 Cal.Rptr.3d 460, 370 P.3d 1022], original italics, footnote and internal citations omitted.)
- "It is true that the two types of failure to warn claims are not necessarily exclusive: 'No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. . . . [¶] Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other.' Despite the often significant overlap between the theories of negligence and strict liability based on a product defect, a plaintiff is entitled to instructions on both theories if both are supported by the evidence." (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 [99 Cal.Rptr.3d 418].)
- "The actual knowledge of the individual manufacturer, even if reasonably prudent, is not the issue. We view the standard to require that the manufacturer is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances." (*Carlin, supra,* 13 Cal.4th at p. 1113, fn. 3.)
- "[A] defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution." (*Anderson, supra,* 53 Cal.3d at p. 1004.)
- "[T]here can be no liability for failure to warn where the instructions or warnings sufficiently alert the user to the possibility of danger." (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1042 [228 Cal.Rptr. 768], internal citation omitted.)
- "A duty to warn or disclose danger arises when an article is or should be known to be dangerous for its intended use, either inherently or because of defects." (*DeLeon v. Commercial Manufacturing and Supply Co.* (1983) 148 Cal.App.3d

336, 343 [195 Cal.Rptr. 867], internal citation omitted.)

- "California is well settled into the majority view that knowledge, actual or constructive, is a requisite for strict liability for failure to warn . . . ." (*Anderson, supra,* 53 Cal.3d at p. 1000.)
- "[T]he duty to warn is not conditioned upon [actual or constructive] knowledge [of a danger] where the defectiveness of a product depends on the adequacy of instructions furnished by the supplier which are essential to the assembly and use of its product." (*Midgley v. S. S. Kresge Co.* (1976) 55 Cal.App.3d 67, 74 [127 Cal.Rptr. 217].)
- Under *Cronin*, plaintiffs in cases involving manufacturing and design defects do not have to prove that a defect made a product unreasonably dangerous; however, that case "did not preclude weighing the degree of dangerousness in the failure to warn cases." (*Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 343 [157 Cal.Rptr. 142].)
- "Two types of warnings may be given. If the product's dangers may be avoided or mitigated by proper use of the product, 'the manufacturer may be required adequately to instruct the consumer as to how the product should be used.' If the risks involved in the use of the product are unavoidable, as in the case of potential side effects of prescription drugs, the supplier must give an adequate warning to enable the potential user to make an informed choice whether to use the product or abstain." (*Buckner v. Milwaukee Electric Tool Corp.* (2013) 222 Cal.App.4th 522, 532 [166 Cal.Rptr.3d 202], internal citation omitted.)
- "[T]he warning requirement is not limited to unreasonably or unavoidably dangerous products. Rather, directions or warnings are in order where reasonably required *to prevent the use of a product from becoming unreasonably dangerous*. It is the lack of such a warning which renders a product unreasonably dangerous and therefore defective." (*Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987) 192 Cal.App.3d 1143, 1151 [238 Cal.Rptr. 18], original italics.)
- "In most cases, . . . the adequacy of a warning is a question of fact for the jury." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1320 [273 Cal.Rptr. 214].)
- "There is no duty to warn of known risks or obvious dangers." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1304 [144 Cal.Rptr.3d 326].)
- "In the context of prescription drugs, a manufacturer's duty is to warn physicians about the risks known or reasonably known to the manufacturer. The manufacturer has no duty to warn of risks that are 'merely speculative or conjectural, or so remote and insignificant as to be negligible.' " (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 164 [226 Cal.Rptr.3d 336, 407 P.3d 18], internal citations omitted.)
- "[A] pharmaceutical manufacturer may not be required to provide warning of a risk known to the medical community." (*Carlin, supra,* 13 Cal.4th at p. 1116.)
- "To prevail on her failure-to-warn claims, [plaintiff] ' "will ultimately have to

prove that if [defendant] had properly reported the adverse events to the FDA as required under federal law, that information would have reached [her] doctors in time to prevent [her] injuries.' [Citation.]" But at this stage, [plaintiff] need only allege ' "a causal connection" ' between [defendant's] failure to report and her injuries." (*Mize v. Mentor Worldwide LLC* (2020) 51 Cal.App.5th 850, 863–864 [265 Cal.Rptr.3d 468], internal citation omitted.)

- "To be liable in California, even under a strict liability theory, the plaintiff must prove that the defendant's failure to warn was a substantial factor in causing his or her injury. (CACI No. 1205.) The natural corollary to this requirement is that a defendant is not liable to a plaintiff if the injury would have occurred even if the defendant had issued adequate warnings." (*Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, 1604 [116 Cal.Rptr.3d 453].)
- "When a manufacturer or distributor has no effective way to convey a product warning to the ultimate consumer, the manufacturer should be permitted to rely on downstream suppliers to provide the warning. 'Modern life would be intolerable unless one were permitted to rely to a certain extent on others doing what they normally do, particularly if it is their duty to do so.' " (*Persons v. Salomon N. Am.* (1990) 217 Cal.App.3d 168, 178 [265 Cal.Rptr. 773], internal citation omitted.)
- "[A] manufacturer's liability to the ultimate consumer may be extinguished by 'intervening cause' where the manufacturer either provides adequate warnings to a middleman or the middleman alters the product before passing it to the final consumer." (*Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 661 [74 Cal.Rptr.3d 359].)
- " 'A manufacturer's duty to warn is a continuous duty which lasts as long as the product is in use.' [¶] . . . [T]he manufacturer must continue to provide physicians with warnings, at least so long as it is manufacturing and distributing the product." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1482 [81 Cal.Rptr.2d 252].)
- " '[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse. . . . [T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact. . . . [A] manufacturer owes a foreseeable user of its product a duty to warn of risks of using the product.' " (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1235 [63 Cal.Rptr.2d 422].)
- "California law does not impose a duty to warn about dangers arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 361 [135 Cal.Rptr.3d 288, 266 P.3d 987].)
- "The *O'Neil* [*supra*] court concluded that *Tellez-Cordova* [*Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577] marked an

exception to the general rule barring imposition of strict liability on a manufacturer for harm caused by another manufacturer's product. That exception is applicable when 'the defendant's own product contributed substantially to the harm . . . .' In expounding the exception, the court rejected the notion that imposition of strict liability on manufacturers is appropriate when it is merely foreseeable that their products will be used in conjunction with products made or sold by others. The *O'Neil* court further explained: 'Recognizing a duty to warn was appropriate in *Tellez-Cordova* because there the defendant's product was intended to be used with another product *for the very activity that created a hazardous situation*. Where the intended use of a product inevitably creates a hazardous situation, it is reasonable to expect the manufacturer to give warnings. Conversely, where the hazard arises entirely from another product, and the defendant's product does not create or contribute to that hazard, liability is not appropriate.' " (*Sherman v. Hennessy Industries, Inc.* (2015) 237 Cal.App.4th 1133, 1142 [188 Cal.Rptr.3d 769], original italics, internal citations omitted; see also *Hetzel v. Hennessy Industries, Inc*. (2016) 247 Cal.App.4th 521, 529 [202 Cal.Rptr.3d 310] [*O'Neil* does not require evidence of exclusive use, but rather requires a showing of inevitable use]; *Rondon v. Hennessy Industries, Inc*. (2016) 247 Cal.App.4th 1367, 1379 [202 Cal.Rptr.3d 773] [same].)

- "[L]ike a manufacturer, a raw material supplier has a duty to warn about product risks that are known or knowable in light of available medical and scientific knowledge." (*Webb, supra*, 63 Cal.4th at p. 181.)
- "[T]he duty of a component manufacturer or supplier to warn about the hazards of its products is not unlimited. . . . 'Making suppliers of inherently safe raw materials and component parts pay for the mistakes of the finished product manufacturer would not only be unfair, but it also would impose and intolerable burden on the business world . . . . Suppliers of versatile materials like chains, valves, sand gravel, etc., cannot be expected to become experts in the infinite number of finished products that might conceivably incorporate their multi-use raw materials or components.' Thus, cases have subjected claims made against component suppliers to two related doctrines, the 'raw material supplier defense' and 'the bulk sales/sophisticated purchaser rule.' Although the doctrines are distinct, their application oftentimes overlaps and together they present factors which should be carefully considered in evaluating the liability of component suppliers. Those factors include whether the raw materials or components are inherently dangerous, whether the materials are significantly altered before integration into an end product, whether the supplier was involved in designing the end-product and whether the manufacturer of the end product was in a position to discover and disclose hazards." (*Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 837 [71 Cal.Rptr.2d 817].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1631–1643

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability*

for Defective Products, ¶¶ 2:1275–2:1276 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11[4]; Ch. 7, *Proof*, § 7.05 (Matthew Bender)

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

19 California Points and Authorities, Ch. 190, *Products Liability*, §§ 190.193–190.194 (Matthew Bender)

1206. Strict Liability—Failure to Warn—Products Containing Allergens (Not Prescription Drugs)—Essential Factual Elements

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[*Name of plaintiff*] claims that the [*product*] was defective because it lacked sufficient warnings of potential allergic reactions. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**
2. **That a substantial number of people are allergic to an ingredient in the [*product*];**
3. **That the danger of the ingredient is not generally known, or, if known, the ingredient is one that a consumer would not reasonably expect to find in the [*product*];**
4. **That [*name of defendant*] knew or, by the use of scientific knowledge available at the time, should have known of the ingredient's danger and presence;**
5. **That [*name of defendant*] failed to provide sufficient warnings concerning the ingredient's danger or presence;**
6. **That [*name of plaintiff*] was harmed; and**
7. **That the lack of sufficient warnings was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

A fuller definition of "scientific knowledge" may be appropriate in certain cases. Such a definition would advise that the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was "knowable in light of the generally recognized and prevailing best scientific and medical knowledge available," (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162, 920 P.2d 1347]), and knowable " 'by the application of reasonable, developed human skill and foresight.' " (*Livingston v. Marie Callenders Inc.* (1999) 72 Cal.App.4th 830, 839 [85 Cal.Rptr.2d 528].)

Sources and Authority

- This instruction is based on the holding in *Livingston v. Marie Callenders, Inc.* (1999) 72 Cal.App.4th 830, 838–839 [85 Cal.Rptr.2d 528], adopting Restatement Second of Torts, section 402A, comment j, and Restatement Third of Torts: Products Liability, section 2, comment k, in cases involving allergic reactions.
- "California has adopted the Restatement Second of Torts, section 402A,

comment j, application of strict tort liability failure to warn in the case of allergies. Several Court of Appeal decisions in the context of allergic reactions to nonfood products are consistent with or have expressly adopted comment j." (*Livingston, supra*, 72 Cal.App.4th at p. 838.)

- Restatement Second of Torts, section 402A, comment j, states: "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous . . . ."
- "[A] defendant may be liable to a plaintiff who suffered an allergic reaction to a product on a strict liability failure to warn theory when: the defendant's product contained 'an ingredient to which a substantial number of the population are allergic'; the ingredient 'is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product'; and where the defendant knew or 'by the application of reasonable, developed human skill and foresight should have know[n], of the presence of the ingredient and the danger.' " (*Livingston, supra,* 72 Cal.App.4th at p. 839.)
- "The recently adopted Restatement Third of Torts: Products Liability, section 2, comment k, . . . similarly states: 'Cases of adverse allergic or idiosyncratic reactions involve a special subset of products that may be defective because of inadequate warnings . . . . [¶] The general rule in cases involving allergic reactions is that a warning is required when the harm-causing ingredient is one to which a substantial number of persons are allergic.' Further, the Restatement Third of Torts: Products Liability, section 2, comment k notes: 'The ingredient that causes the allergic reaction must be one whose danger or whose presence in the product is not generally known to consumers. . . . When the presence of the allergenic ingredient would not be anticipated by a reasonable user or consumer, warnings concerning its presence are required.' " (*Livingston, supra*, 72 Cal.App.4th at pp. 838–839)
- "[T]hose issues [noted in the Restatement] are for the trier of fact to determine." (*Livingston, supra*, 72 Cal.App.4th at p. 840.)
- *Livingston* was a food product case; however there are several non-food product cases that are consistent with or have also expressly adopted comment j. (See *McKinney v. Revlon, Inc.* (1992) 2 Cal.App.4th 602, 607, 608 fn. 3 [3 Cal.Rptr.2d 72] [home hair-frosting product]; *Oakes v. E.I. DuPont de Nemours & Co., Inc*. (1969) 272 Cal.App.2d 645, 649 [77 Cal.Rptr. 709] [weed killer];

Harris v. Belton (1968) 258 Cal.App.2d 595, 608 [65 Cal.Rptr. 808] [skin tone cream].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1631–1643

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.165 (Matthew Bender)

1207A. Strict Liability—Comparative Fault of Plaintiff

[*Name of defendant*] claims that [*name of plaintiff*]'s own negligence contributed to [his/her/*nonbinary pronoun*] harm. To succeed on this claim, [*name of defendant*] must prove both of the following:

1. **[*insert one or more of the following:*]**

   [That [*name of plaintiff*] negligently [used/misused/modified] the [*product*];] [or]

   [That [*name of plaintiff*] was [otherwise] negligent;]

   and

2. **That this negligence was a substantial factor in causing [*name of plaintiff*]'s harm.**

If [*name of defendant*] proves the above, [*name of plaintiff*]'s damages are reduced by your determination of the percentage of [*name of plaintiff*]'s responsibility. I will calculate the actual reduction.

Derived from former CACI No. 1207 April 2009; Revised December 2009, May 2020

Directions for Use

Give this instruction if the defendant alleges that the plaintiff's own negligence contributed to the plaintiff's harm. See also CACI No. 405, *Comparative Fault of Plaintiff*. For an instruction on the comparative fault of a third person, see CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Subsequent misuse or modification may be considered in determining comparative fault if it was a substantial factor in causing the plaintiff's injury. (See *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 17 [56 Cal.Rptr.2d 455].) Unforeseeable misuse or modification can be a complete defense if it is the sole cause of the plaintiff's harm. (See *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.

Sources and Authority

- "[W]e do not permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault we discern no reason of policy why it should, following *Li,* be borne by others." (*Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 737 [144 Cal.Rptr. 380, 575 P.2d 1162] [comparative fault applies to strict product liability actions].)
- "[A] petitioner's recovery may accordingly be reduced, but not barred, where his

lack of reasonable care is shown to have contributed to his injury." (*Bradfield v. Trans World Airlines, Inc.* (1979) 88 Cal.App.3d 681, 686 [152 Cal.Rptr. 172].)

- "The record does not support [defendant]'s assertion that modification of the bracket was the sole cause of the accident. The record does indicate that if the bracket had not been modified there would have been no need to remove it to reach the flange bolts, and thus the modification was one apparent cause of [plaintiff]'s death. However, a number of other causes, or potential causes, were established, including: [plaintiff]'s failure to wear protective clothing; [third party]'s failure to furnish the correct replacement bracket for the valve; [third party]'s failure to furnish [employer] with all of the literature it received from [defendant]; and negligence on the part of [employer] independent of its modification of the valve, including violations of various federal Occupational Safety and Health Administration regulations governing equipment and training in connection with the accident." (*Torres, supra,* 49 Cal.App.4th at p. 17.)
- "While a jury may well find [plaintiff]'s conduct substantially contributed to the accident [citing this instruction], we cannot say that conduct, even if sufficient to establish criminal storage of a firearm, absolves [defendants], as a matter of law, from all liability for a design defect that may otherwise be shown to exist in the Glock 21. [Plaintiff]'s responsibility for his own injuries is quintessentially a question for the jury." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1308 [144 Cal.Rptr.3d 326], internal citations omitted.)

Secondary Sources

Witkin, Summary of California Law (11th ed. 2017) Torts, § 1709

California Products Liability Actions, Ch. 8, *Defenses*, §§ 8.03, 8.04 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.53, 460.182 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability,* § 190.253 (Matthew Bender)

1207B. Strict Liability—Comparative Fault of Third Person

[*Name of defendant***] claims that the [negligence/fault] of [***name(s) or description(s) of nonparty tortfeasor(s)***] [also] contributed to [***name of plaintiff***]'s harm. To succeed on this claim, [***name of defendant***] must prove both of the following:**

1. **[***Insert one or both of the following:***]**

   [That [*name(s) or description(s) of nonparty tortfeasor(s)***] negligently modified the [***product***];] [or]**

   [That [*name(s) or description(s) of nonparty tortfeasor(s)***] was [otherwise] [negligent/at fault];]**

   and

2. **That this [negligence/fault] was a substantial factor in causing [***name of plaintiff***]'s harm.**

If you find that the [negligence/ [or] fault] of more than one person, including [*name of defendant***][, [***name of plaintiff***],] and [***name(s) or description(s) of nonparty tortfeasor(s)***], was a substantial factor in causing [***name of plaintiff***]'s harm, you must then decide how much responsibility each has by assigning percentages of responsibility to each person listed on the verdict form. The percentages must total 100 percent.**

You will make a separate finding of [*name of plaintiff***]'s total damages, if any. In determining an amount of damages, you should not consider any person's assigned percentage of responsibility.**

["Person" can mean an individual or a business entity.]

Derived from former CACI No. 1207 April 2009; Revised December 2009, December 2015

Directions for Use

Give this instruction if the defendant has raised the issue of the comparative fault of a third person who is not also a defendant at trial, including defendants who settled before trial and nonjoined alleged tortfeasors. (See *Dafonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603 [7 Cal.Rptr.2d 238, 828 P.2d 140]; see also CACI No. 406, *Apportionment of Responsibility*.) For an instruction on the comparative fault of the plaintiff, see CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*.

This instruction may also be used to allocate liability between a negligent and a strictly liable defendant (*Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 332 [146 Cal. Rptr. 550, 579 P.2d 441].) or between two strictly liable defendants if multiple products are involved. (*Arena v. Owens-Corning Fiberglas Corp.* (1998) 63

Cal.App.4th 1178, 1198 [74 Cal.Rptr.2d 580].) However, there is no comparative fault among entities in the distribution chain of the same product. Each remains fully liable for the plaintiff's economic and noneconomic damages. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 325 [213 Cal.Rptr.3d 82].)

In the first sentence, include "also" if the defendant concedes some degree of liability or alleges the comparative fault of the plaintiff, and select "fault" unless the only basis for liability at issue is negligence. Include the last paragraph if any of the defendants or others alleged to have contributed to the plaintiff's harm are not individuals.

Subsequent misuse or modification may be considered in determining comparative fault if it was a substantial factor in causing the plaintiff's injury. (See *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 17 [56 Cal.Rptr.2d 455].) Unforeseeable misuse or modification can be a complete defense if it is the sole cause of the plaintiff's harm. (See *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.

Sources and Authority

- "[T]he comparative indemnity doctrine may be utilized to allocate liability between a negligent and a strictly liable defendant." (*Safeway Stores, Inc., supra,* 21 Cal.3d at p. 332.)
- "The record does not support [defendant]'s assertion that modification of the bracket was the sole cause of the accident. The record does indicate that if the bracket had not been modified there would have been no need to remove it to reach the flange bolts, and thus the modification was one apparent cause of [plaintiff]'s death. However, a number of other causes, or potential causes, were established, including: [plaintiff]'s failure to wear protective clothing; [third party]'s failure to furnish the correct replacement bracket for the valve; [third party]'s failure to furnish [employer] with all of the literature it received from [defendant]; and negligence on the part of [employer] independent of its modification of the valve, including violations of various federal Occupational Safety and Health Administration regulations governing equipment and training in connection with the accident." (*Torres, supra,* 49 Cal.App.4th at p. 17.)
- "This case does not present a situation where several defendants in the chain of distribution seek apportionment under Proposition 51 based on their relevant fault for injuries caused by a single defective product. In such a situation, courts have held that Proposition 51 does not apply and each defendant is liable for the plaintiff's full noneconomic damages under traditional principles of joint and several liability." (*Bigler-Engler, supra,* 7 Cal.App 5th at p. 325, fn. 35.)
- "Proposition 51 is applicable in a strict liability asbestos exposure case where multiple products cause the plaintiff's injuries and the evidence provides a basis to allocate liability for noneconomic damages between the defective products. Where the evidence shows that a particular product is responsible for only a part of plaintiff's injury, Proposition 51 requires apportionment of the responsibility

for that part of the injury to that particular product's chain of distribution." (*Arena, supra*, 63 Cal.App.4th at p. 1198.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1709

California Products Liability Actions, Ch. 8, *Defenses*, §§ 8.03, 8.04 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.53, 460.182 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability,* § 190.253 (Matthew Bender)

1208. Component Parts Rule

[*Name of defendant***] [manufactured/distributed/supplied] [a/an] [***component part***], which was then integrated into [a/an] [***end product***]. [***Name of defendant***] may be liable for harm caused by a defective [***end product***] if [***name of plaintiff***] proves that (1) [***name of defendant***] substantially participated in the integration of its [***component part***] into the design of the [***end product***] and (2) as a result of the integration of the [***component part***] into the [***end product***], the [***end product***] was defective under the instruction(s) you have been given on [manufacturing defect/design defect/failure to warn].**

New November 2018

Directions for Use

Give this instruction if the component parts rule is at issue. This rule generally relieves a component parts manufacturer, distributor, or supplier of liability for injuries caused by a defect in the product into which the component was integrated. However, there are two exceptions to the rule so that a component-parts defendant may nevertheless be found liable. First, the component itself may have been defective; or second, (a) the defendant may have substantially participated in the integration of the component into the design of the end product, (b) the integration of the component caused the end product to be defective, and (c) the defect in the product causes the harm. (*Ramos v. Brenntag Specialties, Inc.* (2016) 63 Cal.4th 500, 508 [203 Cal.Rptr.3d 273, 372 P.3d 200].) While the component parts rule is labelled a defense (see *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 183 [202 Cal.Rptr.3d 460, 370 P.3d 1022]; see also *Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1006 fn. 6 [169 Cal.Rptr.3d 208]), the plaintiff has the burden of avoiding the defense by proving one of the exceptions.

This instruction is for use under the second exception. To prove that the end product was defective or lacked a required warning, the plaintiff must prove a manufacturing or design defect, or a failure to warn, as with any other strict product liability claim, using CACI No. 1201, *Strict Liability—Manufacturing Defect—Essential Factual Elements,* CACI No. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements,* or CACI No. 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements* (or both), or CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements*. The plaintiff has the same burden if the claim is that the component itself was defective or lacked a required warning.

The component parts rule does not apply if the injury is caused by the component when it is being used as intended before integration into another product. (See *Ramos, supra,* 63 Cal.4th at p. 504.)

Sources and Authority

- "Another defense protects manufacturers and sellers of component parts from liability to users of finished products incorporating their components. Under the component parts doctrine, the supplier of a product component is not liable for injuries caused by the finished product unless (1) the component itself was defective and caused injury or (2) the supplier participated in integrating the component into a product, the integration caused the product to be defective, and that defect caused injury." (*Webb, supra,* 63 Cal.4th at p. 183.)
- "In *Webb* [*supra*], we explained that the component parts doctrine . . . and as accurately reflected in section 5 of the Restatement Third of Torts, Products Liability—applies (1) when a supplier provides a component or raw material that is not itself defective (by virtue of a manufacturing, design, or warning defect), (2) the component or raw material is changed or transformed when incorporated through the manufacturing process into a different finished or end product, and (3) an end user of the finished product is allegedly injured by a defect in the finished product." (*Ramos, supra,* 63 Cal.4th at pp. 507–508, internal citations omitted.)
- "[T]he component parts doctrine provides protection to the supplier of the component or raw material, subjecting that entity to liability for harm caused by a product into which the component has been integrated only if the supplier "(b)(1) . . . substantially participates in the integration of the component into the design of the product; and [¶] (2) the integration of the component causes the product to be defective . . . ; and [¶] (3) the defect in the product causes the harm." (*Ramos, supra,* 63 Cal.4th at p. 508.)
- " 'Component parts are products, whether sold or distributed separately or assembled with other component parts.' 'Product components include raw materials, bulk products, and other constituent products sold for integration into other products.' Component manufacturers and suppliers, as sellers of 'products,' are subject to products liability. 'Like manufacturers, suppliers, and retailers of complete products, component manufacturers and suppliers are "an integral part of the overall producing and marketing enterprise," and may in a particular case "be the only member of that enterprise reasonably available to the injured plaintiff," and may be in the best position to ensure product safety.' " (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 33 [192 Cal.Rptr.3d 158], internal citations omitted.)
- "[T]he duty of a component manufacturer or supplier to warn about the hazards of its products is not unlimited. . . . 'Making suppliers of inherently safe raw materials and component parts pay for the mistakes of the finished product manufacturer would not only be unfair, but it also would impose and [*sic*] intolerable burden on the business world . . . . Suppliers of versatile materials like chains, valves, sand gravel, etc., cannot be expected to become experts in the infinite number of finished products that might conceivably incorporate their multi-use raw materials or components.' Thus, cases have subjected claims made against component suppliers to two related doctrines, the 'raw material supplier

defense' and 'the bulk sales/sophisticated purchaser rule.' Although the doctrines are distinct, their application oftentimes overlaps and together they present factors which should be carefully considered in evaluating the liability of component suppliers. Those factors include whether the raw materials or components are inherently dangerous, whether the materials are significantly altered before integration into an end product, whether the supplier was involved in designing the end-product and whether the manufacturer of the end product was in a position to discover and disclose hazards." (*Artiglio, supra,* 61 Cal.App.4th at p. 837.)

- "[T]he protection afforded to defendants by the component parts doctrine does not apply when the product supplied has not been incorporated into a different finished or end product but instead, as here, itself allegedly causes injury when used in the manner intended by the product supplier." (*Ramos, supra,* 63 Cal.4th at p. 504.)
- "The Restatement further explains 'Product components include raw materials. . . . Thus, when raw materials are contaminated or otherwise defective within the meaning of § 2(a), the seller of the raw material is subject to liability for harm caused by such defects.' California courts have generally adopted the component parts doctrine as it is articulated in the Restatement." (*Brady v. Calsol, Inc.* (2015) 241 Cal.App.4th 1212, 1219 [194 Cal.Rptr.3d 243], internal citation omitted.)
- "The California Supreme Court has not determined whether the component parts defense is limited to fungible products." (*Romine, supra,* 224 Cal.App.4th at p. 1006, fn. 6.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1617, 1666

1209–1219. Reserved for Future Use

1220. Negligence—Essential Factual Elements

[*Name of plaintiff***] [also] claims that [he/she/***nonbinary pronoun***] was harmed by [***name of defendant***]'s negligence and that [he/she/***nonbinary pronoun***/it] should be held responsible for that harm. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [designed/manufactured/supplied/installed/inspected/repaired/rented] the [***product***];**
2. **That [***name of defendant***] was negligent in [designing/manufacturing/supplying/installing/inspecting/repairing/renting] the [***product***];**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s negligence was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2012

Directions for Use

Use this instruction to allege a manufacturing or design defect under a negligence theory. Also give CACI No. 1221, *Negligence—Basic Standard of Care*. If a defect is also alleged under a theory of strict liability, include "also" in the first sentence. For an instruction on negligent failure to warn, see CACI No. 1222, *Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements*.

This instruction may also be given in an action against a defendant who is alleged to have negligently supplied, installed, inspected, repaired, or rented the product.

Presumably, the judge will have already determined that the defendant owed the plaintiff a duty because the product was of a type that could endanger others if it was negligently made. (See *Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rptr.2d 756, 927 P.2d 1260] [existence of a duty is a question of law for the court].) Accordingly, no duty element is included in this instruction.

Sources and Authority

- "As with an action asserted under a strict liability theory, under a negligence theory the plaintiff must prove a defect caused injury. However, '[u]nder a negligence theory, plaintiff must also prove "an additional element, namely, that the defect in the product was due to negligence of the defendant." ' " (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1304–1305 [144 Cal.Rptr.3d 326], internal citation omitted.)
- "No valid reason appears to require a plaintiff to elect whether to proceed on the

theory of strict liability in tort or on the theory of negligence. . . . Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other." (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387 [93 Cal.Rptr. 769, 482 P.2d 681].)

- "The courts of this state are committed to the doctrine that the duty of care exists in the absence of privity of contract not only where the article manufactured is inherently dangerous but also where it is reasonably certain, if negligently manufactured or constructed, to place life and limb in peril." (*Sheward v. Virtue* (1942) 20 Cal.2d 410, 412 [126 P.2d 345], internal citations omitted.)
- Manufacturers or other suppliers of goods and buyers or users have a "special relationship" giving rise to an affirmative duty to assist or protect. (6 Witkin, Summary of Cal. Law (10th ed. 2005) §§ 1038–1042, 1048, 1049.)
- Restatement Second of Torts, section 388, comment (c), provides: "These rules . . . apply to sellers, lessors, donors, or lenders, irrespective of whether the chattel is made by them or by a third person. They apply to all kinds of bailors. . . . They also apply to one who undertakes the repair of a chattel and who delivers it back with knowledge that it is defective because of the work which he is employed to do upon it."

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1594

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.20 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.32 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.190 et seq. (Matthew Bender)

1221. Negligence—Basic Standard of Care

A [designer/manufacturer/supplier/installer/repairer] is negligent if [he/she/*nonbinary pronoun*/it] fails to use the amount of care in [designing/manufacturing/inspecting/installing/repairing] the product that a reasonably careful [designer/manufacturer/supplier/installer/ repairer] would use in similar circumstances to avoid exposing others to a foreseeable risk of harm.

In determining whether [*name of defendant***] used reasonable care, you should balance what [***name of defendant***] knew or should have known about the likelihood and severity of potential harm from the product against the burden of taking safety measures to reduce or avoid the harm.**

New September 2003; Revised December 2012

Directions for Use

Give this instruction with CACI No. 1220, *Negligence—Essential Factual Elements*. This instruction gives guidance to the jury as to how to evaluate element 2 (defendant was negligent) of CACI 1220. For an instruction on negligent failure to warn, see CACI No. 1222, *Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements*.

The duty to inspect or test is included in the "knew or should have known" standard of this instruction: "If the manufacturer designs the product safely, manufactures the product safely, and provides an adequate warning of dangers inherent in the use of the product, then a failure to test the product cannot, standing alone, cause any injury. The duty to test is a subpart of the other three duties because a breach of the duty to test cannot by itself cause any injury." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1486 [81 Cal.Rptr.2d 252], quoting *Kociemba v. G.D. Searle & Co.* (D. Minn. 1989) 707 F.Supp. 1517, 1527.)

Sources and Authority

- "A manufacturer/seller of a product is under a duty to exercise reasonable care in its design so that it can be safely used as intended by its buyer/consumer." (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) This duty " 'extends to all persons within the range of potential danger.' " (*Ibid.*, internal citations omitted.)
- "In determining what precautions, if any, were required under the circumstances, the likelihood of harm, and the gravity of the harm if it happens, must be balanced against the burden of the precaution which would be effective to avoid the harm." (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1077–1078 [91 Cal.Rptr. 319], internal citations omitted.)
- [E]xpert testimony about the safety of a product, in light of industry standards,

can also take into account other applicable and relevant circumstances. As framed by CACI No. 1221, the negligence inquiry asks if the manufacturer failed to use the amount of care in designing the product that a reasonably careful designer or manufacturer would have used in similar circumstances." (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 430 [136 Cal.Rptr.3d 739], internal citations omitted.)

- "[F]reedom from negligence does not inure to the manufacturer because it purchased parts from another which were defective." (*Sheward v. Virtue* (1942) 20 Cal.2d 410, 412 [126 P.2d 345].)
- "The duty of a manufacturer with respect to the design of products placed on the market is defined in the Restatement Second of Torts, section 398: 'A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.' Thus, the manufacturer must use reasonable care 'to so design his product as to make it not accident-proof, but safe for the use for which it was [sic] intended.' What is 'reasonable care,' of course, varies with the facts of each case, but it involves a balancing of the likelihood of harm to be expected from a machine with a given design and the gravity of harm if it happens against the burden of the precaution which would be effective to avoid the harm." (*Pike v. Frank G. Hough Co.* (1970) 2 Cal.3d 465, 470 [85 Cal.Rptr. 629, 467 P.2d 229], internal citation omitted.)
- " '[T]he test of negligent design "involves a balancing of the likelihood of harm to be expected from a machine with a given design and the gravity of harm if it happens against the burden of the precaution which would be effective to avoid the harm." [Citation.] . . . "A manufacturer or other seller can be negligent in marketing a product because of the way it was designed. In short, even if a seller had done all that he could reasonably have done to warn about a risk or hazard related to the way a product was designed, it could be that a reasonable person would conclude that the magnitude of the reasonably foreseeable harm as designed outweighed the utility of the product as so designed." [Citation.] Thus, "most of the evidentiary matters" relevant to applying the risk/benefit test in strict liability cases "are similar to the issues typically presented in a negligent design case." ' " (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1305 [144 Cal.Rptr.3d 326].)
- "A danger is unreasonable when it is foreseeable, and the manufacturer's ability, actual, constructive, or potential, to forestall unreasonable danger is the measure of its duty in the design of its product." (*Balido v. Improved Machinery, Inc.* (1972) 29 Cal.App.3d 633, 640 [105 Cal.Rptr. 890], disapproved on other grounds in *Regents of University of California v. Hartford Accident & Indemnity Co.* (1978) 21 Cal.3d 624, 641–642 [147 Cal.Rptr. 486, 581 P.2d 197].)
- "With respect to tests or inspections, it is well settled that where an article is such that it is reasonably certain, if negligently manufactured or designed, to

place life and limb in peril, the manufacturer is chargeable with negligence if the defective condition could be disclosed by reasonable inspection and tests, and such inspection and tests are omitted." (*Putensen, supra,* 12 Cal.App.3d at p. 1078, internal citations omitted.)

- "[W]here an article is either inherently dangerous or reasonably certain to place life and limb in peril when negligently made, a manufacturer owes a duty of care to those who are the ultimate users. This duty requires reasonable care to be exercised in assembling component parts and inspecting and testing them before the product leaves the plant." (*Reynolds v. Natural Gas Equipment, Inc.* (1960) 184 Cal.App.2d 724, 736 [7 Cal.Rptr. 879], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1631–1643

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1271, 2:1295, 2:1331, 2:1381 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.21 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.190 et seq. (Matthew Bender)

1222. Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] was negligent by not using reasonable care to warn [or instruct] about the [*product*]'s dangerous condition or about facts that made the [*product*] likely to be dangerous. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**
2. **That [*name of defendant*] knew or reasonably should have known that the [*product*] was dangerous or was likely to be dangerous when used or misused in a reasonably foreseeable manner;**
3. **That [*name of defendant*] knew or reasonably should have known that users would not realize the danger;**
4. **That [*name of defendant*] failed to adequately warn of the danger [or instruct on the safe use of the [*product*]];**
5. **That a reasonable [manufacturer/distributor/seller] under the same or similar circumstances would have warned of the danger [or instructed on the safe use of the [*product*]];**
6. **That [*name of plaintiff*] was harmed; and**
7. **That [*name of defendant*]'s failure to warn [or instruct] was a substantial factor in causing [*name of plaintiff*]'s harm.**

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

New September 2003; Revised June 2011, December 2012, May 2020

Directions for Use

Give this instruction in a case involving product liability in which a claim for failure to warn is included under a negligence theory. For an instruction on failure to warn under strict liability and for additional sources and authority, see CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements*. For instructions on design and manufacturing defect under a negligence theory, see CACI No. 1220, *Negligence—Essential Factual Elements*, and CACI No. 1221, *Negligence—Basic Standard of Care*.

To make a prima facie case, the plaintiff has the initial burden of producing

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

The last bracketed paragraph is to be used in prescription drug cases only.

Sources and Authority

- "[T]he manufacturer has a duty to use reasonable care to give warning of the dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use, if the manufacturer has reason to believe that they will not realize its dangerous condition." (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1076–1077 [91 Cal.Rptr. 319].)
- "Under California law, a manufacturer generally has no duty to warn of risks from another manufacturer's product, and is typically liable only for harm caused by its own product." (*Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal.App.5th 292, 315 [249 Cal.Rptr.3d 642].)
- "Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1305 [144 Cal.Rptr.3d 326], internal citation omitted.)
- "Thus, the question defendants wanted included in the special verdict form—whether a reasonable manufacturer under the same or similar circumstances would have given a warning—is an essential inquiry in the negligent failure to warn claim." (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 137 [220 Cal.Rptr.3d 127] [citing this instruction].)
- "Negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other because the plaintiff might allege both when a product warning contributes to her injury." (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101 [85 Cal.Rptr.3d 299].)
- "The 'known or knowable' standard arguably derives from negligence principles,

and failure to warn claims are generally ' "rooted in negligence" to a greater extent than' manufacturing or design defect claims. Unlike those other defects, a ' "warning defect" relates to a failure extraneous to the product itself' and can only be assessed by examining the manufacturer's conduct. These principles notwithstanding, California law recognizes separate failure to warn claims under both strict liability and negligence theories. In general, a product seller will be strictly liable for failure to warn if a warning was feasible and the absence of a warning caused the plaintiff's injury. Reasonableness of the seller's failure to warn is immaterial in the strict liability context. Conversely, to prevail on a claim for negligent failure to warn, the plaintiff must prove that the seller's conduct fell below the standard of care. If a prudent seller would have acted reasonably in not giving a warning, the seller will not have been negligent." (*Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 181 [202 Cal.Rptr.3d 460, 370 P.3d 1022], footnote and internal citations omitted.)

- "It is true that the two types of failure to warn claims are not necessarily exclusive: 'No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. . . . [¶] Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other.' Despite the often significant overlap between the theories of negligence and strict liability based on a product defect, a plaintiff is entitled to instructions on both theories if both are supported by the evidence." (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 [99 Cal.Rptr.3d 418].)
- "(1) [T]he strict liability instructions 'more than subsumed the elements of duty to warn set forth in the negligence instructions'; (2) under the instructions, there is no 'real difference between a warning to ordinary users about a product *use* that involves a substantial danger, and a warning about a product that is dangerous or likely to be dangerous for its intended use'; (3) [defendant]'s duty under the strict liability instructions 'to warn of potential risks and side effects envelope[d] a broader set of risk factors than the duty, [under the] negligence instructions, to warn of facts which make the product "likely to be dangerous" for its intended use'; (4) the reference in the strict liability instructions here to 'potential risks . . . that were known or knowable through the use of scientific knowledge' encompasses the concept in the negligence instructions of risks [defendant] 'knew or reasonably should have known'; and (5) for all these reasons, the jury's finding that [defendant] was not liable under a strict liability theory 'disposed of any liability for failure to warn' on a negligence theory." (*Trejo, supra,* 13 Cal.App.5th at pp. 132–133, original italics, internal citations omitted.)
- "In the context of prescription drugs, a manufacturer's duty is to warn physicians about the risks known or reasonably known to the manufacturer. The manufacturer has no duty to warn of risks that are 'merely speculative or conjectural, or so remote and insignificant as to be negligible.' If the

manufacturer provides an adequate warning to the prescribing physician, the manufacturer need not communicate a warning directly to the patient who uses the drug." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 164 [226 Cal.Rptr.3d 336, 407 P.3d 18], internal citations omitted.)

- "Because the same warning label must appear on the brand-name drug as well as its generic bioequivalent, a brand-name drug manufacturer owes a duty of reasonable care in ensuring that the label includes appropriate warnings, regardless of whether the end user has been dispensed the brand-name drug or its generic bioequivalent. If the person exposed to the generic drug can reasonably allege that the brand-name drug manufacturer's failure to update its warning label foreseeably and proximately caused physical injury, then the brand-name manufacturer's liability for its own negligence does not automatically terminate merely because the brand-name manufacturer transferred its rights in the brand-name drug to a successor manufacturer." (*T.H.*, *supra*, 4 Cal.5th at p. 156.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1317–1321

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1271, 2:1295 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.21, Ch. 7, *Proof*, § 7.05 (Matthew Bender)

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

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.165 et seq. (Matthew Bender)

1223. Negligence—Recall/Retrofit

[*Name of plaintiff*] claims that [*name of defendant*] was negligent because [he/she/*nonbinary pronoun*/it] failed to [recall/retrofit] the [*product*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [manufactured/distributed/sold] the [*product*];**
2. **That [*name of defendant*] knew or reasonably should have known that the [*product*] was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner;**
3. **That [*name of defendant*] became aware of this defect after the [*product*] was sold;**
4. **That [*name of defendant*] failed to [recall/retrofit] [or warn of the danger of] the [*product*];**
5. **That a reasonable [manufacturer/distributor/seller] under the same or similar circumstances would have [recalled/retrofitted] the [*product*];**
6. **That [*name of plaintiff*] was harmed; and**
7. **That [*name of defendant*]'s failure to [recall/retrofit] the [*product*] was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised October 2004

Directions for Use

If the issue concerns a negligently conducted recall, modify this instruction accordingly.

Sources and Authority

- "Failure to conduct an adequate retrofit campaign may constitute negligence apart from the issue of defective design." (*Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1827 [34 Cal.Rptr.2d 732], internal citation omitted.)
- In *Lunghi v. Clark Equipment Co*. (1984) 153 Cal.App.3d 485 [200 Cal.Rptr. 387], the court observed that, where the evidence showed that the manufacturer became aware of dangers after the product had been on the market, the jury "could still have found that Clark's knowledge of the injuries caused by these features imposed a *duty to warn* of the danger, and/or a *duty to conduct an adequate retrofit campaign*." The failure to meet the standard of reasonable care with regard to either of these duties could have supported a finding of negligence. (*Id.* at p. 494, original italics.)

- In *Balido v. Improved Machinery, Inc.* (1972) 29 Cal.App.3d 633 [105 Cal.Rptr. 890] (disapproved on other grounds in *Regents of University of California v. Hartford Accident & Indemnity Co.* (1978) 21 Cal.3d 624, 641–642 [147 Cal.Rptr. 486, 581 P.2d 197]), the court concluded that a jury could reasonably have found negligence based upon the manufacturer's failure to retrofit equipment determined to be unsafe after it was sold, even though the manufacturer told the equipment's owners of the safety problems and offered to correct those problems for $500. (*Id.* at p. 649.)
- If a customer fails to comply with a recall notice, this will not automatically absolve the manufacturer from liability: "A manufacturer cannot delegate responsibility for the safety of its product to dealers, much less purchasers." (*Springmeyer v. Ford Motor Co.* (1998) 60 Cal.App.4th 1541, 1562–1563 [71 Cal.Rptr.2d 190], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1643

1 California Products Liability Actions, Ch. 7, *Problems of Causation*, § 7.06 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.52 (Matthew Bender)

1224. Negligence—Negligence for Product Rental/Standard of Care

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[A person who rents products to others for money is negligent if that person fails to use reasonable care to:

1. **Inspect the products for defects;**
2. **Make them safe for their intended use; and**
3. **Adequately warn of any known dangers.]**

[or]

[A person who lends products to others without charge only is required to use reasonable care to warn of known defects.]

New September 2003; Revised May 2020

Directions for Use

Use this instruction in conjunction with CACI No. 1220, *Negligence—Essential Factual Elements*, and instead of CACI No. 1221, *Negligence—Basic Standard of Care*, in cases involving rentals.

If the case involves a product lent gratuitously for the mutual benefit of the parties (e.g., to a prospective purchaser), the first paragraph is applicable and the instruction needs to be modified.

In a purely gratuitous lending case, if the object is a "dangerous instrumentality" there may be a duty to conduct a reasonable inspection before lending. (See *Tierstein v. Licht* (1959) 174 Cal.App.2d 835, 842 [345 P.2d 341].)

Sources and Authority

- Duties of Lessor of Personal Property. Civil Code section 1955.
- If a bailment is for hire, or provides a mutual benefit, the bailor has a duty to the bailee and to third persons to (1) warn of actually known defects and (2) to use reasonable care to make an examination of the good before lending it "in order to make certain that it [is] fit for the use known to be intended." (*Tierstein, supra,* 174 Cal.App.2d at pp. 840–841.)
- A bailment, otherwise gratuitous, where made to induce a purchase, has been considered sufficient to give rise to the same duty of reasonable care on the part of the bailor as an ordinary bailment for hire. This is regarded as a bailment for mutual benefit. (*Tierstein, supra,* 174 Cal.App.2d at p. 842.)
- Under either a negligence or an implied warranty theory, "the essential inquiry . . . is whether [the defendants] made such inspection of their equipment as was necessary to discharge their duty of reasonable care." (*McNeal v. Greenberg*

(1953) 40 Cal.2d 740, 742 [255 P.2d 810].) The bailor is not an insurer or guarantor. (*Tierstein, supra,* 174 Cal.App.2d at p. 841.)

- Restatement Second of Torts, section 408, provides: "One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be endangered by its probable use, for physical harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it."
- This Restatement section was cited with approval in *Rae v. California Equipment Co.* (1939) 12 Cal.2d 563, 569 [86 P.2d 352].
- "The general rule is that the only duty which a gratuitous bailor owes either to the bailee or to third persons is to warn them of actually known defects which render the chattel dangerous for the purpose for which it is ordinarily used; he has no liability for injuries caused by defects in the subject matter of the bailment of which he was not aware." (*Tierstein, supra,* 174 Cal.App.2d at p. 841.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1670

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.053 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 413, *Personal Property Leases*, § 413.34 (Matthew Bender)

1225–1229. Reserved for Future Use

1230. Express Warranty—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/it] was harmed by the [***product***] because [***name of defendant***] represented, either by words or actions, that the [***product***] [***insert description of alleged express warranty, e.g., "was safe"***], but the [***product***] was not as represented. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***insert one or more of the following:***]**

   [gave [*name of plaintiff***] a written warranty that the [***product***] [***insert description of written warranty***];] [or]**

   [made a [statement of fact/promise] [to/received by] [*name of plaintiff***] that the [***product***] [***insert description of alleged express warranty***];] [or]**

   [gave [*name of plaintiff***] a description of the [***product***];] [or]**

   [gave [*name of plaintiff***] a sample or model of the [***product***];]**

2. **That the [***product***] [***insert one or more of the following:***]**

   [did not perform as [stated/promised];] [or]

   [did not meet the quality of the [description/sample/model];]

[3. That [*name of plaintiff***] took reasonable steps to notify [***name of defendant***] within a reasonable time that the [***product***] was not as represented, whether or not [***name of defendant***] received such notice;]**

4. **That [***name of defendant***] failed to [repair/***specify other remedy provided by warranty***] the [***product***] as required by the warranty;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That the failure of the [***product***] to be as represented was a substantial factor in causing [***name of plaintiff***]'s harm.**

[Formal words such as "warranty" or "guarantee" are not required to create a warranty. It is also not necessary for [*name of defendant***] to have specifically intended to create a warranty. But a warranty is not created if [***name of defendant***] simply stated the value of the goods or only gave [his/her/***nonbinary pronoun***] opinion of or recommendation regarding the goods.]**

New September 2003; Revised February 2005, June 2015

Directions for Use

This instruction is for use if breach of an express warranty is alleged under the California Commercial Code. (See *Orichian v. BMW of North America, LLC* (2014) 226 Cal.App.4th 1322, 1333–1334 [172 Cal.Rptr.3d 876]; Comm. Code, § 2313.) If a breach of written warranty under the federal Magnuson-Moss Warranty Act (see 15 U.S.C. § 2301 et seq.) is alleged, give the first option for element 1. (See 15 U.S.C. §§ 2310(d)(1), 2301(6).)

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652–653 [55 Cal.Rptr. 94].)

If an instruction on the giving of notice to the seller is needed, see CACI No. 1243, *Notification/Reasonable Time*.

Sources and Authority

- Express Warranties. California Uniform Commercial Code section 2313.
- Applicable to "Transactions in Goods." California Uniform Commercial Code section 2102.
- "Goods" Defined. California Uniform Commercial Code section 2105.
- Damages Under Commercial Code. California Uniform Commercial Code section 2714.
- "An express warranty 'is a contractual promise from the seller that the goods conform to the promise. If they do not, the buyer is entitled to recover the difference between the value of the goods accepted by the buyer and the value of the goods had they been as warranted.' " (*Dagher v. Ford Motor Co.* (2015) 238 Cal.App.4th 905, 928 [190 Cal.Rptr.3d 261].)
- "A warranty relates to the title, character, quality, identity, or condition of the goods. The purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 20 [220 Cal.Rptr. 392], internal citation omitted.)
- "The essential elements of a cause of action under the California Uniform Commercial Code for breach of an express warranty to repair defects are (1) an express warranty to repair defects given in connection with the sale of goods; (2) the existence of a defect covered by the warranty; (3) the buyer's notice to the seller of such a defect within a reasonable time after its discovery; (4) the seller's failure to repair the defect in compliance with the warranty; and (5) resulting damages." (*Orichian, supra*, 226 Cal.App.4th at pp. 1333–1334, internal citations omitted.)
- "Privity is not required for an action based upon an express warranty." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 8 [120 Cal.Rptr. 681, 534 P.2d 377].)
- "Used car owners that obtain their vehicles via private sales and who comply

with the warranty terms may seek to enforce the express warranty against the manufacturer by bringing an action under the Commercial Code based on breach of express warranty. Such an action does not require that the plaintiff purchase the vehicle from a retail seller." (*Dagher, supra*, 238 Cal.App.4th at p. 928.)

- " 'The determination as to whether a particular statement is an expression of opinion or an affirmation of a fact is often difficult, and frequently is dependent upon the facts and circumstances existing at the time the statement is made.' " (*Keith, supra,* 173 Cal.App.3d at p. 21, internal citation omitted.)
- "Statements made by a seller during the course of negotiation over a contract are presumptively affirmations of fact unless it can be demonstrated that the buyer could only have reasonably considered the statement as a statement of the seller's opinion. Commentators have noted several factors which tend to indicate an opinion statement. These are (1) a lack of specificity in the statement made, (2) a statement that is made in an equivocal manner, or (3) a statement which reveals that the goods are experimental in nature." (*Keith, supra,* 173 Cal.App.3d at p. 21.)
- "It is important to note . . . that even statements of opinion can become warranties under the code if they become part of the basis of the bargain." (*Hauter, supra,* 14 Cal.3d at p. 115, fn. 10.)
- "The basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller, the Uniform Commercial Code requires no such proof." (*Hauter, supra*, 14 Cal.3d at p. 115, internal citations omitted.)
- "It is immaterial whether defendant had actual knowledge of the contraindications. 'The obligation of a warranty is absolute, and is imposed as a matter of law irrespective of whether the seller knew or should have known of the falsity of his representations.' " (*Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 442 [79 Cal.Rptr. 369], internal citations omitted.)
- "[A] sale is ordinarily an essential element of any warranty, express or implied . . . ." (*Fogo v. Cutter Laboratories, Inc.* (1977) 68 Cal.App.3d 744, 759 [137 Cal.Rptr. 417], internal citations omitted.)
- "Neither Magnuson-Moss nor the California Uniform Commercial Code requires proof that a defect substantially impairs the use, value, or safety of a vehicle in order to establish a breach of an express or written warranty, as required under Song-Beverly." (*Orichian, supra*, 226 Cal.App.4th at p. 1331; fn. 9, see CACI No. 3204, *"Substantially Impaired" Explained*.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 57–67

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, §§ 2.31–2.33, Ch. 7, *Proof*, § 7.03 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*,

§§ 502.23, 502.42–502.50, 502.140–502.150 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.60 et seq. (Matthew Bender)

1231. Implied Warranty of Merchantability—Essential Factual Elements

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[*Name of plaintiff*] [also] claims that [he/she/*nonbinary pronoun*/it] was harmed by the [*product*] that [he/she/*nonbinary pronoun*/it] bought from [*name of defendant*] because the [*product*] did not have the quality that a buyer would expect. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] bought the [*product*] from [*name of defendant*];**
2. **That, at the time of purchase, [*name of defendant*] was in the business of selling these goods [or by [his/her/*nonbinary pronoun*/its] occupation held [himself/herself/*nonbinary pronoun*/itself] out as having special knowledge or skill regarding these goods];**
3. **That the [*product*] [*insert one or more of the following:*]**

   [was not of the same quality as those generally acceptable in the trade;]

   [was not fit for the ordinary purposes for which such goods are used;]

   [did not conform to the quality established by the parties' prior dealings or by usage of trade;]

   [*other ground as set forth in California Uniform Commercial Code section 2314(2);*]
4. **[That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*product*] did not have the expected quality;]**
5. **That [*name of plaintiff*] was harmed; and**
6. **That the failure of the [*product*] to have the expected quality was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

This cause of action could also apply to products that are leased. If so, modify the instruction accordingly.

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57,

61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652–653 [55 Cal.Rptr. 94].)

If an instruction on the giving of notice to the seller is needed, see CACI No. 1243, *Notification/Reasonable Time*.

Sources and Authority

- Implied Warranty of Merchantability. California Uniform Commercial Code section 2314.
- Customary Dealings of Parties. California Uniform Commercial Code section 1303.
- "Merchant" Defined. California Uniform Commercial Code section 2104(1).
- "Goods" Defined. California Uniform Commercial Code section 2105(1).
- "Unlike express warranties, which are basically contractual in nature, the implied warranty of merchantability arises by operation of law. It does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295–1296 [44 Cal.Rptr.2d 526], internal citations omitted.)
- "[I]n cases involving personal injuries resulting from defective products, the theory of strict liability in tort has virtually superseded the concept of implied warranties." (*Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 432 [79 Cal.Rptr. 369].)
- "Vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability." (*United States Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1441 [279 Cal.Rptr. 533], internal citations omitted.)
- "[Plaintiff] comes within a well-recognized exception to the [privity] rule: he is a member of the purchaser's family." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 8 [120 Cal.Rptr. 681, 534 P.2d 377].)
- "Therefore, says plaintiff, . . . in view of modern industrial usage employe[e]s should be considered a member of the industrial 'family' of the employer—whether corporate or private—and to thus stand in such privity to the manufacturer as to permit the employe[e]s to be covered by warranties made to the purchaser-employer. [¶] We are persuaded that this position is meritorious." (*Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339, 347 [5 Cal.Rptr. 863, 353 P.2d 575].)
- "A buyer who is damaged by a breach of implied warranty has two possible measures of those damages: one where the buyer has rightfully rejected or 'justifiably revoked acceptance' of the goods, and one where the buyer has accepted the goods." (*Simgel Co., Inc. v. Jaguar Land Rover North America, LLC* (2020) 55 Cal.App.5th 305, 315–316 [269 Cal.Rptr.3d 364].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 51

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, §§ 2.31–2.33, Ch. 7, *Proof*, § 7.03 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.24, 502.51, 502.200–502.214 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.63 et seq. (Matthew Bender)

1232. Implied Warranty of Fitness for a Particular Purpose—Essential Factual Elements

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[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*/it] was harmed by the [*product*] that [he/she/*nonbinary pronoun*/it] bought from [*name of defendant*] because the [*product*] was not suitable for [*name of plaintiff*]'s intended purpose. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] bought the [*product*] from [*name of defendant*];**
2. **That, at the time of purchase, [*name of defendant*] knew or had reason to know that [*name of plaintiff*] intended to use the product for a particular purpose;**
3. **That, at the time of purchase, [*name of defendant*] knew or had reason to know that [*name of plaintiff*] was relying on [his/her/*nonbinary pronoun*/its] skill and judgment to select or furnish a product that was suitable for the particular purpose;**
4. **That [*name of plaintiff*] justifiably relied on [*name of defendant*]'s skill and judgment;**
5. **That the [*product*] was not suitable for the particular purpose;**
6. **[That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*product*] was not suitable;]**
7. **That [*name of plaintiff*] was harmed; and**
8. **That the failure of the [*product*] to be suitable was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

This cause of action could also apply to products that are leased. If so, modify the instruction accordingly.

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652–653 [55 Cal.Rptr. 94].)

If an instruction on the giving of notice to the seller is needed, see CACI No. 1243, *Notification/Reasonable Time*.

Sources and Authority

- Implied Warranty of Fitness for Particular Purpose. California Uniform Commercial Code section 2315.
- "A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity." (4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 51.)
- "An implied warranty of fitness for a particular purpose arises only where (1) the purchaser at the time of contracting intends to use the goods for a particular purpose, (2) the seller at the time of contracting has reason to know of this particular purpose, (3) the buyer relies on the seller's skill or judgment to select or furnish goods suitable for the particular purpose, and (4) the seller at the time of contracting has reason to know that the buyer is relying on such skill and judgment." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 25 [220 Cal.Rptr. 392], internal citation omitted.)
- " 'A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295, fn. 2 [44 Cal.Rptr.2d 526], internal citation omitted.)
- "The warranty of fitness for a particular purpose is not limited to sales by a merchant as is the warranty of merchantability. It may be imposed on any seller possessing sufficient skill and judgment to justify the buyer's reliance. The Code drafters suggest, however, that a nonmerchant seller will only in particular circumstances have that degree of skill and judgment necessary to justify imposing the warranty." (4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 75.)
- "The reliance elements are important to the consideration of whether an implied warranty of fitness for a particular purpose exists. . . . The major question in determining the existence of an implied warranty of fitness for a particular purpose is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs." (*Keith, supra,* 173 Cal.App.3d at p. 25, internal citations omitted.)
- In *Keith,* the reviewing court upheld the trial court's finding that there was no reliance because "the plaintiff did not rely on the skill and judgment of the defendants to select a suitable vessel, but that he rather relied on his own experts." (*Keith, supra,* 173 Cal.App.3d at p. 25.)
- "Vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability." (*United States Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1441 [279 Cal.Rptr. 533], internal citations omitted.)

- Although privity appears to be required for actions based upon the implied warranty of merchantability, there are exceptions to this rule, such as one for members of the purchaser's family. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 8 [120 Cal.Rptr. 681, 534 P.2d 377].) Vertical privity is also waived for employees. (*Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339 [5 Cal.Rptr. 863, 353 P.2d 575].) A plaintiff satisfies the privity requirement when he or she leases or negotiates the sale or lease of the product. (*United States Roofing, supra*.)

Secondary Sources

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.24, 502.51, 502.220 (Matthew Bender)

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

1233. Implied Warranty of Merchantability for Food—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by the [***food product***] that was sold by [***name of defendant***] because the [***food product***] was not fit for human consumption. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [ate/drank] a [***food product***] sold by [***name of defendant***];**
2. **That, at the time of purchase, [***name of defendant***] was in the business of selling the [***food product***] [or by [his/her/***nonbinary pronoun***] occupation held [himself/herself/***nonbinary pronoun***/itself] out as having special knowledge or skill regarding this [***food product***]];**
3. **That the [***food product***] was harmful when consumed;**
4. **That the harmful condition would not reasonably be expected by the average consumer;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That the [***food product***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

If an instruction on the giving of notice to the seller is needed, see CACI No. 1243, *Notification/Reasonable Time*.

The advisory committee believes that the judge, not the jury, would decide whether the food substance is natural or foreign under *Mexicali Rose v. Superior Court* (1992) 1 Cal.4th 617 [4 Cal.Rptr.2d 145, 822 P.2d 1292].

Sources and Authority

- "In the peculiar context of foodstuffs, the theory of breach of an implied warranty of merchantability has closer affinities to tort law than to contract law because it allows recovery of damages, without regard to privity of contract, for personal injuries as well as economic loss." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 871 [93 Cal.Rptr.2d 364], internal citations omitted.)
- "If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined unfit or defective. A plaintiff in such a case has no

cause of action in strict liability or implied warranty. If, however, the presence of the natural substance is due to a restaurateur's failure to exercise due care in food preparation, the injured patron may sue under a negligence theory." (*Mexicali Rose v. Superior Court* (1992) 1 Cal.4th 617, 633 [4 Cal.Rptr.2d 145, 822 P.2d 1292].)

- "If the injury-causing substance is foreign to the food served, then the injured patron may also state a cause of action in implied warranty and strict liability, and the trier of fact will determine whether the substance (i) could be reasonably expected by the average consumer and (ii) rendered the food unfit or defective." (*Mexicali Rose, supra,* 1 Cal.4th at p. 633.)
- The *Mexicali Rose* decision was limited to commercial restaurant establishments. (*Mexicali Rose, supra,* 1 Cal.4th at p. 619, fn. 1.) However, the reasoning of that case has been applied to supermarkets. (*Ford v. Miller Meat Co.* (1994) 28 Cal.App.4th 1196 [33 Cal.Rptr.2d 899].)
- "The term 'natural' refers to bones and other substances natural to the product served, and does not encompass substances such as mold, botulinus bacteria or other substances (like rat flesh or cow eyes) not natural to the *preparation* of the product served." (*Mexicali Rose, supra,* 1 Cal.4th at p. 631, fn. 5.)
- It appears that the court would decide as a matter of law if the injury-producing substance is "natural" or not: "If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined unfit or defective. A plaintiff in such a case has no cause of action in strict liability or implied warranty." (*Mexicali Rose, supra,* 1 Cal.4th at p. 633.)

Secondary Sources

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.32 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 268, *Food*, § 268.14A (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.201 (Matthew Bender)

1234–1239. Reserved for Future Use

1240. Affirmative Defense to Express Warranty—Not "Basis of Bargain"

[*Name of defendant***] is not responsible for any harm to [***name of plaintiff***] if [***name of defendant***] proves that [his/her/***nonbinary pronoun***/its] [statement/description/sample/model/***other***] was not a basis of the parties' bargain.**

The [statement/description/sample/model/*other***] is presumed to be a basis of the bargain. To overcome this presumption, [***name of defendant***] must prove that the resulting bargain was not based in any way on the [statement/description/sample/model/***other***].**

If [*name of defendant***] proves that [***name of plaintiff***] had actual knowledge of the true condition of the [***product***] before agreeing to buy, the resulting bargain was not based in any way on the [statement/description/sample/model/***other***].**

New September 2003; Revoked June 2010; Restored and Revised December 2010

Sources and Authority

- Creation of Express Warranties. California Uniform Commercial Code section 2313.
- "The key under [California Uniform Commercial Code section 2313] is that the seller's statements—whether fact or opinion—must become 'part of the basis of the bargain.' The basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller, the Uniform Commercial Code requires no such proof. According to official comment 3 to the Uniform Commercial Code following section 2313, 'no particular reliance . . . need be shown in order to weave [the seller's affirmations of fact] into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.' " (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115 [120 Cal.Rptr. 681, 534 P.2d 377, internal citations and footnote omitted.)
- "The California Supreme Court, in discussing the continued viability of the reliance factor, noted that commentators have disagreed in regard to the impact of this development. Some have indicated that it shifts the burden of proving nonreliance to the seller, and others have indicated that the code eliminates the concept of reliance altogether." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 22 [220 Cal.Rptr. 392], citing *Hauter*, *supra*, 14 Cal.3d at pp. 115–116.)
- "The official Uniform Commercial Code comment in regard to section 2-313 'indicates that in actual practice affirmations of fact made by the seller about the

goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement.' It is clear from the new language of this code section that the concept of reliance has been purposefully abandoned." (*Keith*, *supra*, 173 Cal.App.3d at p. 23, internal citations omitted.)

- "The change of the language in section 2313 of the California Uniform Commercial Code modifies both the degree of reliance and the burden of proof in express warranties under the code. A warranty statement made by a seller is presumptively part of the basis of the bargain, and the burden is on the seller to prove that the resulting bargain does not rest at all on the representation." (*Keith*, *supra*, 173 Cal.App.3d at p. 23.)
- "[O]nce affirmations have been made, they are woven into the fabric of the agreement and the seller must present 'clear affirmative proof' to remove them from the agreement." (*Weinstat v. Dentsply International, Inc.* (2010) 180 Cal.App.4th 1213, 1234 [103 Cal.Rptr.3d 614.)
- "[W]hile the basis of the bargain of course includes dickered terms to which the buyer specifically assents, section 2313 itself does not suggest that express warranty protection is confined to them such that affirmations by the seller that are not dickered are excluded. Any affirmation, once made, is part of the agreement unless there is 'clear affirmative proof' that the affirmation has been taken out of the agreement." (*Weinstat*, *supra*, 180 Cal.App.4th at p. 1229.)
- "The official comment to section 2313 is also instructive on this point, providing: 'The precise time when words of description or affirmation are made . . . is not material. The sole question is whether the language . . . [is] fairly to be regarded as part of the contract.' Thus, the California Uniform Commercial Code contemplates that affirmations, promises and descriptions about the goods contained in product manuals and other materials that are given to the buyer at the time of delivery can become part of the basis of the bargain, and can be 'fairly . . . regarded as part of the contract,' notwithstanding that delivery occurs after the purchase price has been paid." (*Weinstat*, *supra*, 180 Cal.App.4th at p. 1230.)
- "The buyer's actual knowledge of the true condition of the goods prior to the making of the contract may make it plain that the seller's statement was not relied upon as one of the inducements for the purchase, but the burden is on the seller to demonstrate such knowledge on the part of the buyer. Where the buyer inspects the goods before purchase, he may be deemed to have waived the seller's express warranties. But, an examination or inspection by the buyer of the goods does not necessarily discharge the seller from an express warranty if the defect was not actually discovered and waived." (*Keith*, *supra*, 173 Cal.App.3d at pp. 23–24.)
- "First, . . . affirmations and descriptions in product literature received at the time of delivery but after payment of the purchase price are, without more, part of the basis of the bargain, period. Second, the seller's right to rebut goes to

proof that extracts the affirmations from the 'agreement' or 'bargain of the parties in fact,' not, as *Keith* would suggest, to proof that they were not an inducement for the purchase. Relying on *Keith*, the court in effect equated the concept of the 'bargain in fact of the parties' with the concept of reliance, but . . . the two are not synonymous. Moreover, the opinion in *Keith* contradicts itself on this matter. On the one hand the opinion states unequivocally that '[i]t is clear' section 2313 'purposefully abandoned' the concept of reliance. On the other hand, we must ask if section 2313 has eliminated the concept of reliance from express warranty law all together, by what logic can reliance reappear, by its absence, as an affirmative defense?" (*Weinstat*, *supra*, 180 Cal.App.4th at p. 1234, internal citation omitted.)

Secondary Sources

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.62 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.60 (Matthew Bender)

21 California Legal Forms, Ch. 52, *Sales of Goods Under the Uniform Commercial Code*, § 52.290[1] (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 24, *Suing or Defending Action for Breach of Warranty*, 24.36[4]

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)

1241. Affirmative Defense—Exclusion or Modification of Express Warranty

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[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] is not responsible for any harm to [***name of plaintiff***] because [***name of defendant***], by words or conduct, limited [his/her/***nonbinary pronoun***/its] representations regarding the [***product***]. To succeed, [***name of defendant***] must prove that [he/she/***nonbinary pronoun***/it] clearly limited the representations regarding [***insert alleged warranty, e.g., "seaworthiness"***].**

New September 2003

Directions for Use

Limitation can be by words or conduct.

Sources and Authority

- Creation of Express Warranty by Words or Conduct. California Uniform Commercial Code section 2316(1).
- The California Uniform Commercial Code Comment to section 2316 states: "This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude 'all warranties, express or implied.' It seeks to protect a buyer from unexpected and unbargained language of express warranty . . . ."
- "Although section 2316 has drawn criticism for its vagueness, its purpose is clear. No warranty, express or implied, can be modified or disclaimed unless a seller *clearly* limits his liability." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 118–119 [120 Cal.Rptr. 681, 534 P.2d 377], internal citations omitted.)
- "Because a disclaimer or modification is inconsistent with an express warranty, words of disclaimer or modification give way to words of warranty unless some clear agreement between the parties dictates the contrary relationship. At the very least, section 2316 allows limitation of warranties only by means of *words* that clearly communicate that a particular risk falls on the buyer." (*Hauter, supra,* 14 Cal.3d at p. 119, internal citation omitted.)
- "[A]ny disclaimer or modification must be strictly construed against the seller." (*Hauter, supra,* 14 Cal.3d at p. 119.)
- "Strict construction against the person who has both warranted a particular fact to be true and then attempted to disclaim the warranty is especially appropriate in light of the fact that '[a] disclaimer of an express warranty is essentially contradictory . . . .' " (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 958 [199 Cal.Rptr. 789], internal citation omitted.)
- "A disclaimer of warranties must be specifically bargained for so that a

disclaimer in a warranty given to the buyer *after* he signs the contract is *not* binding." (*Dorman v. International Harvester Co.* (1975) 46 Cal.App.3d 11, 19–20 [120 Cal.Rptr. 516].)

- "Interpretation of a written document, where extrinsic evidence is unnecessary, is a question of law for the trial court to determine." (*Temple v. Velcro USA, Inc.* (1983) 148 Cal.App.3d 1090, 1095 [196 Cal.Rptr. 531], internal citations omitted.)

Secondary Sources

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.23 (Matthew Bender)

1242. Affirmative Defense—Exclusion of Implied Warranties

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] is not responsible for any harm to [***name of plaintiff***] because [***name of defendant***] eliminated any implied representations relating to [the quality that a buyer would expect from the [***product***]] [or] [the [***product***]'s fitness for a particular purpose]. To succeed, [***name of defendant***] must prove:**

[*Insert one or more of the following:***]**

[That the sale of the [*product***] included notice using words such as "with all faults," "as is," or other language that would have made a buyer aware that the [***product***] was being sold without any guarantees.]**

[That, before entering into the contract, [*name of plaintiff***] examined the [product/sample/model] as fully as desired and that a complete examination would have revealed the [***product***]'s deficiency.]**

[That [*name of plaintiff***] refused, after a demand by [***name of defendant***], to examine the [product/sample/model] and that such examination would have revealed the [***product***]'s deficiency.]**

[That the parties' prior dealings, course of performance, or usage of trade had eliminated any implied representations.]

New September 2003

Sources and Authority

- Exclusion or Modification of Implied Warranties. California Uniform Commercial Code section 2316.
- The California Uniform Commercial Code Comment to this section states: "Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous."
- The California Uniform Commercial Code Comment to section 2316 states: "Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous." Accordingly, disclaimers of warranties for a particular purpose are probably issues for the court only. Section 1201(10) provides: "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color. But in a telegram any stated term is 'conspicuous.' Whether a term or

clause is 'conspicuous' or not is for decision by the court."

- The California Uniform Commercial Code Comment to section 2316 observes that "oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had 'reason to know' under the section on implied warranty of fitness for a particular purpose."
- The California Uniform Commercial Code Comment to section 2316 states that the three exceptions listed under subdivision (3) "are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded."
- The California Uniform Commercial Code comment to section 2316 states: "Paragraph (a) of subsection (3) deals with general terms such as 'as is,' 'as they stand,' 'with all faults,' and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved."
- The California Uniform Commercial Code comment to section 2316 states: "In order to bring the transaction within the scope of 'refused to examine' in paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully."
- The California Uniform Commercial Code comment to section 2316 states: "The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination."
- "Interpretation of a written document, where extrinsic evidence is unnecessary, is a question of law for the trial court to determine." (*Temple, supra,* 148 Cal.App.3d at p. 1095, internal citations omitted.)
- "A disclaimer of warranties must be specifically bargained for so that a disclaimer in a warranty given to the buyer *after* he signs the contract is *not* binding." (*Dorman v. International Harvester Co.* (1975) 46 Cal.App.3d 11, 19–20 [120 Cal.Rptr. 516].)
- "[A]ny disclaimer or modification must be strictly construed against the seller." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 119 [120 Cal.Rptr. 681, 534 P.2d 377].)

Secondary Sources

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.24 (Matthew Bender)

1243. Notification/Reasonable Time

If a buyer is required to notify the seller that a product [is not as represented] [does not have the expected quality] [is not suitable] [is in a harmful condition], [he/she/*nonbinary pronoun*/it] must do so within a reasonable time after [he/she/*nonbinary pronoun*/it] discovers or should have discovered this. A reasonable time depends on the circumstances of the case. In determining whether notice was given within a reasonable time, you must apply a more relaxed standard to a retail consumer than you would to a merchant buyer. A buyer notifies a seller by taking such steps as may be reasonably required to inform the seller [regardless of whether the seller actually receives the notice].

New September 2003

Sources and Authority

- Notice to Seller of Breach. California Uniform Commercial Code section 2607(3).
- The California Uniform Commercial Code comment to section 2-607(4) states: "The time of notification is to be determined by applying commercial standards to a merchant buyer. 'A reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy. [¶] The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation."
- "Notification" Defined. California Uniform Commercial Code section 1202(d).
- What is a Reasonable Time. California Uniform Commercial Code section 1205(a).
- A plaintiff is not required to prove that he or she gave notice of a breach of warranty in personal injury and property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652–653 [55 Cal.Rptr. 94].)

- Notice is more likely to be required in disputes between merchants. (See *Fieldstone Co. v. Briggs Plumbing Products, Inc.* (1997) 54 Cal.App.4th 357, 369–370 [62 Cal.Rptr.2d 701].)
- When required, notice must be pleaded and proved. (*Vogel v. Thrifty Drug Co.* (1954) 43 Cal.2d 184, 188 [272 P.2d 1].)
- The purpose of the demand for notice is to protect the seller from stale claims (*Whitfield v. Jessup* (1948) 31 Cal.2d 826, 828 [193 P.2d 1]; *Metowski v. Traid Corp.* (1972) 28 Cal.App.3d 332, 339 [104 Cal.Rptr. 599]) and to give the defendant an opportunity to repair the defective item, reduce damages, improve products in the future, and negotiate settlements. (*Pollard v. Saxe & Yolles Development Co.* (1974) 12 Cal.3d 374, 380 [115 Cal.Rptr. 648, 525 P.2d 88].)

Secondary Sources

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.28, 502.100 (Matthew Bender)

1244. Affirmative Defense—Sophisticated User

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

New October 2008; Revised December 2014

Directions for Use

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

In some cases, it may be necessary to expand this instruction to state that the plaintiff knew or should have known of the particular risk posed by the product, of the severity of the potential consequences, and how to use the product to reduce or avoid the risks, to the extent that information was known to the defendant. (See *Buckner v. Milwaukee Electric Tool Corp.* (2013) 222 Cal.App.4th 522, 536 [166 Cal.Rptr.3d 202].)

Sources and Authority

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

supra, 43 Cal.4th at p. 65, internal citations omitted.)

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

know, of the item's hazards. In view of this requirement, the intermediary's sophistication is not, as matter of law, sufficient to avert liability; there must be a sufficient reason for believing that the intermediary's sophistication is likely to operate to protect the user, or that the user is likely to discover the hazards in some other manner. The fact that the user is an employee or servant of the sophisticated intermediary cannot plausibly be regarded as a sufficient reason, as a matter of law, to infer that the latter will protect the former. We therefore reject [defendant]'s contention that an intermediary's sophistication invariably shields suppliers from liability to the intermediary's employees or servants." (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1296–1297 [164 Cal.Rptr.3d 112].)

- "In order to establish the defense, a manufacturer must demonstrate that sophisticated users of the product know what the risks are, including the degree of danger involved (i.e., the severity of the potential injury), and how to use the product to reduce or avoid the risks, to the extent that information is known to the manufacturer." (*Buckner, supra,* 222 Cal.App.4th at p. 536.)
- " 'Under the "should have known" standard there will be some users who were actually unaware of the dangers. However, the same could be said of the currently accepted obvious danger rule; obvious dangers are obvious to most, but are not obvious to absolutely everyone. The obvious danger rule is an objective test, and the courts do not inquire into the user's subjective knowledge in such a case. In other words, even if a user was truly unaware of a product's hazards, that fact is irrelevant if the danger was objectively obvious. [Citations.] Thus, under the sophisticated user defense, the inquiry focuses on whether the plaintiff knew, or should have known, of the particular risk of harm from the product giving rise to the injury.' [Citation]" (*Moran v. Foster Wheeler Energy Corp.* (2016) 246 Cal.App.4th 500, 511 [200 Cal.Rptr.3d 902].)
- "[S]peculation about a risk does not give rise to constructive *knowledge* of a risk under the 'should have known' test." (*Scott v. Ford Motor Co*. (2014) 224 Cal.App.4th 1492, 1501 [169 Cal.Rptr.3d 823], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1631, 1703, 1708–1709

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

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

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

1245. Affirmative Defense—Product Misuse or Modification

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*/it] is not responsible for [*name of plaintiff*]'s claimed harm because the [*product*] was [misused/ [or] modified] after it left [*name of defendant*]'s possession. To succeed on this defense, [*name of defendant*] must prove that:

1. **The [*product*] was [misused/ [or] modified] after it left [*name of defendant*]'s possession; and**
2. **The [misuse/ [or] modification] was so highly extraordinary that it was not reasonably foreseeable to [*name of defendant*], and therefore should be considered as the sole cause of [*name of plaintiff*]'s harm.**

New April 2009; Revised December 2009, June 2011, December 2013

Directions for Use

Give this instruction if the defendant claims a complete defense to strict product liability because the product was misused or modified after it left the defendant's possession and control in an unforeseeable way, and the evidence permits defendant to argue that the subsequent misuse or modification was the sole cause of the plaintiff's injury. (See *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) If misuse or modification was a substantial factor contributing to, but not the sole cause of, plaintiff's harm, there is no complete defense, but the conduct of the plaintiff or of third parties may be considered under principles of comparative negligence or fault. (See *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 15–21 [56 Cal.Rptr.2d 455].) See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Third party negligence that is the immediate cause of an injury may be viewed as a superseding cause if it is so highly extraordinary as to be unforeseeable. Product misuse or modification may be deemed to be a superseding cause, which provides a complete defense to liability. (See *Torres, supra*, 49 Cal.App. 4th at pp. 18–19.) Element 2 incorporates this aspect of superseding cause as an explanation of what is meant by "sole cause." If misuse or modification truly were the *sole* cause, the product would not be defective.

It would appear that at least one court views superseding cause as a different standard from sole cause. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 685 [115 Cal.Rptr.3d 590] [product misuse may serve as a complete defense when the misuse was so unforeseeable that it should be deemed the sole *or* superseding cause], original italics.)

Sources and Authority

- " '[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse. . . . [T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact. . . . [A] manufacturer owes a foreseeable user of its product a duty to warn of risks of using the product.' " (*Wright v. Stang Mfg. Co.* (1997) 54 Cal.App.4th 1218, 1235 [63 Cal.Rptr.2d 422].)
- "[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the *sole* reason that the product caused injury." (*Campbell, supra,* 22 Cal.3d at p. 56, original italics, internal citations omitted.)
- "[S]trict liability should not be imposed upon a manufacturer when injury results from a use of its product that is not reasonably foreseeable." (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 126 [104 Cal.Rptr. 433, 501 P.2d 1153].)
- "[Defendant] contends . . . that it cannot be held liable for any design defect because the accident was attributable to the misuse of the rewinder by [employer] and [plaintiff]. In order to avoid liability for product defect, [defendant] was required to prove, as an affirmative defense, that [employer]'s and [plaintiff]'s misuse of the machine . . . was an unforeseeable, superseding cause of the injury to [plaintiff]." *Perez, supra,* 188 Cal.App.4th at pp. 679–680.)
- "[P]roduct misuse may serve as a complete defense when the misuse 'was so unforeseeable that it should be deemed the sole or superseding cause.' . . . '[T]he defense of "superseding cause . . ." . . . absolves a tortfeasor, *even though his [or her] conduct was a substantial contributing factor,* when an independent event intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible. [Citations.]' Here, the trial court reasonably concluded, in substance, that [plaintiff]'s misuse of the rewinder was so extreme as to be the sole cause of his injury. That conclusion dispensed with the need to apply principles of comparative fault." (*Perez, supra,* 188 Cal.App.4th at p. 685, original italics.)
- "Third party negligence which is the immediate cause of an injury may be viewed as a superseding cause when it is so highly extraordinary as to be unforeseeable. 'The foreseeability required is of the risk of harm, not of the particular intervening act. In other words, the defendant may be liable if his conduct was 'a substantial factor' in bringing about the harm, though he neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred.' It must appear that the intervening act has produced 'harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible.' " (*Torres, supra,* 49

Cal.App.4th at pp. 18–19, internal citations omitted.)

- " 'Misuse' is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm. This causation is one of the elements of the 'misuse' affirmative defense and thus the burden falls on the defendant to prove it." (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)
- "[Defendant] further contends that [plaintiff]'s injuries arose not from a defective product, but rather, from his parents' modification of the product or their negligent supervision of its use. These arguments cannot be advanced by demurrer. Creation of an unreasonable risk of harm through product modification or negligent supervision is not clearly established on the face of [plaintiff]'s complaint. Instead, these theories must be pled as affirmative defenses." (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].)
- "[Defendant]'s alternative contention [plaintiff]'s failure to safely store the Glock 21 was the sole proximate cause of his injuries is not an appropriate ground for granting summary judgment. Product misuse, an affirmative defense, is a superseding cause of injury that absolves a tortfeasor of his or her own wrongful conduct only when the misuse was ' "so highly extraordinary as to be unforeseeable." ' [citing this instruction] 'However, foreseeability is a question for the jury unless undisputed facts leave no room for a reasonable difference of opinion.' " (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1308 [144 Cal.Rptr.3d 326], internal citations omitted.)
- "[T]here are cases in which the modification of a product has been determined to be so substantial and unforeseeable as to constitute a superseding cause of an injury as a matter of law. However, foreseeability is a question for the jury unless undisputed facts leave no room for a reasonable difference of opinion. Thus, the issue of superseding cause is generally one of fact. Superseding cause has been viewed as an issue of fact even in cases where 'safety neglect' by an employer has increased the risk of injury, or modification of the product has made it more dangerous." (*Torres, supra,* 49 Cal.App.4th at p. 19, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1696, 1697

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶ 2:1329 et seq. (The Rutter Group)

California Product Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.13[4] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.183 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.201 (Matthew Bender)

1246. Affirmative Defense—Design Defect—Government Contractor

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

1. **That [***name of defendant***] contracted with the United States government to provide the [***product***] for military use;**
2. **That the United States approved reasonably precise specifications for the [***product***];**
3. **That the [***product***] conformed to those specifications; and**
4. **[That [***name of defendant***] warned the United States about the dangers in the use of the [***product***] that were known to [***name of defendant***] but not to the United States.]**

   [*or*]

4. **[That the United States was aware of the dangers in the use of the [***product***].]**

New June 2010; Revised December 2010, November 2024

Directions for Use

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

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

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

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

Sources and Authority

- "The [United States] Supreme Court noted that in areas of ' "uniquely federal

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

- "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated—i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision." (*Boyle, supra*, 487 U.S. at pp. 512–513.)
- "[T]he fact that a company supplies goods to the military does not, in and of itself, immunize it from liability for the injuries caused by those goods. Where the goods ordered by the military are those readily available, in substantially similar form, to commercial users, the military contractor defense does not apply." (*In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 811.)
- "[W]here a purchase does not involve 'reasonably precise specifications' bearing on the challenged design feature, the government necessarily has not made a considered evaluation of and affirmative judgment call about the design." (*Kase*, *supra*, 6 Cal.App.5th at p. 628.)
- "In our view, if a product is produced according to military specifications and used by the military because of particular qualities which serve a military purpose, and is incidentally sold commercially as well, that product may nonetheless still qualify as military equipment under the military contractor defense." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1319 [273 Cal.Rptr. 214]; see also *Kase, supra*, 6 Cal.App.5th at p. 637 ["We continue to agree with *Jackson* and *Oxford* that a product's commercial availability does not necessarily foreclose the government contractor defense."].)
- "While courts such as the court in *Hawaii* have sought to confine the

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

- "[T]he Supreme Court in *Boyle* did not expressly limit its holding to products liability causes of action. Thus, the government contractor defense is applicable to related negligence claims." (*Oxford, supra*, 177 Cal.App.4th at p. 711.)
- "[I]n order to satisfy the first condition—government 'approval' . . . the government's involvement must transcend rubber stamping." (*Oxford, supra*, 177 Cal.App.4th at p. 712.)
- "[A]pproval must result from a 'continuous exchange' and 'back and forth dialogue' between the contractor and the government. When the government engages in a thorough review of the allegedly defective design and takes an active role in testing and implementing that design, *Boyle's* first element is met." (*Getz v. Boeing Co.* (9th Cir. 2011) 654 F.3d 852, 861, internal citation omitted.)
- "[T]he operative test for conformity with reasonably precise specifications turns on whether 'the alleged defect . . . exist[ed] independently of the design itself.' 'To say that a product failed to conform to specifications is just another way of saying that it was defectively manufactured.' Therefore, absent some evidence of a latent manufacturing defect, a military contractor can establish conformity with reasonably precise specifications by showing '[e]xtensive government involvement in the design, review, development and testing of a product' and by demonstrating 'extensive acceptance and use of the product following production.' " (*Getz, supra*, 654 F.3d at p. 864, internal citations omitted.)
- "[T]he cases recognize that a contractor 'can demonstrate a fully informed government decision by showing either that they conveyed the relevant known and "substantial enough" dangers . . . *or* that the government did not need the warnings because it already possessed that information.' " (*Kase*, *supra*, 6 Cal.App.5th at p. 643, original italics, internal citations omitted.)
- "Although the source of the government contractor defense is the United States' sovereign immunity, we have explicitly stated that 'the government contractor defense does not confer sovereign immunity on contractors.' " (*Rodriguez v. Lockheed Martin Corp.* (9th Cir. 2010) 627 F.3d 1259, 1265.)

Secondary Sources

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

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

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

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

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

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

1247. Affirmative Defense—Failure to Warn—Government Contractor

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

1. **That [*name of defendant*] contracted with the United States government to provide the [*product*] for military use;**
2. **That the United States imposed reasonably precise specifications regarding the provision of warnings for the [*product*];**
3. **That the [*product*] conformed to those specifications regarding warnings; and**

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

[*or*]

[4. That the United States was aware of the dangers in the use of the [*product*].]

New December 2010; Revised November 2024

Directions for Use

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

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

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

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

Defect—Government Contractor.

Sources and Authority

- "The appellate court in Tate [*Tate v. Boeing Helicopters* (6th Cir. 1995) 55 F.3d 1150, 1157] offered an alternative test for applying the government contractor defense in the context of failure to warn claims: 'When state law would otherwise impose liability for a failure to warn of dangers in using military equipment, that law is displaced if the contractor can show: (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not.' " (*Oxford*, *supra*, 177 Cal.App.4th at p. 712.)
- "As in design defect cases, in order to satisfy the first condition—government 'approval'—in failure to warn cases, the government's involvement must transcend rubber stamping. And where the government goes beyond approval and actually determines for itself the warnings to be provided, the contractor has surely satisfied the first condition because the government exercised its discretion. The second condition in failure to warn cases, as in design defect cases, assures that the defense protects the government's, not the contractor's, exercise of discretion. Finally, the third condition encourages frank communication to the government of the equipment's dangers and increases the likelihood that the government will make a well-informed judgment." (*Oxford*, *supra*, 177 Cal.App.4th at p. 712, quoting *Tate*, *supra*, 55 F.3d at p. 1157.)
- "Under California law, a manufacturer has a duty to warn of a danger when the manufacturer has knowledge of the danger or has reason to know of it and has no reason to know that those who use the product will realize its dangerous condition. Whereas the government contractor's defense may be used to trump a design defect claim by proving that the government, not the contractor, is responsible for the defective design, that defense is inapplicable to a failure to warn claim in the absence of evidence that in making its decision whether to provide a warning . . . , [defendant] was 'acting in compliance with "reasonably precise specifications" imposed on [it] by the United States.' " (*Butler v. Ingalls Shipbuilding* (9th Cir. 1996) 89 F.3d 582, 586, internal citations omitted.)
- "In a failure-to-warn action, where no conflict exists between requirements imposed under a federal contract and a state law duty to warn, regardless of any conflict which may exist between the contract and state law design requirements, Boyle commands that we defer to the operation of state law." (*Butler*, *supra*, 89 F.3d at p. 586.)
- "Defendants' evidence did not establish as a matter of law the necessary significant conflict between federal contracting requirements and state law. Although defendants' evidence did show that certain warnings were required by the military specifications, that evidence did not establish that the specifications placed any limitation on additional information from the manufacturers to users

of their products. Instead, the evidence suggested no such limitation existed." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1317 [273 Cal.Rptr. 214].)

- "The [United States] Supreme Court noted that in areas of ' "uniquely federal interests" ' state law may be preempted or displaced by federal law, and that civil liability arising from the performance of federal procurement contracts is such an area. The court further determined that preemption or displacement of state law occurs in an area of uniquely federal interests only where a ' "significant conflict" ' exists between an identifiable federal policy or interest and the operation of state law." (*Oxford, supra,* 177 Cal.App.4th at p. 708, quoting *Boyle*, *supra*, 487 U.S. at pp. 500, 504, 507, 512.)
- "[T]he Supreme Court in Boyle did not expressly limit its holding to products liability causes of action. Thus, the government contractor defense is applicable to related negligence claims." (*Oxford*, *supra*, 177 Cal.App.4th at p. 711.)
- "[T]he fact that a company supplies goods to the military does not, in and of itself, immunize it from liability for the injuries caused by those goods. Where the goods ordered by the military are those readily available, in substantially similar form, to commercial users, the military contractor defense does not apply." (*In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 811.)
- "In our view, if a product is produced according to military specifications and used by the military because of particular qualities which serve a military purpose, and is incidentally sold commercially as well, that product may nonetheless still qualify as military equipment under the military contractor defense." (*Jackson*, *supra*, 223 Cal.App.3d at p. 1319.)
- "While courts such as the court in *Hawaii* have sought to confine the government contractor defense to products that are made exclusively for the military, we agree with the court in *Jackson* that this limitation is unduly confining. Though the court in *Boyle* discussed the parameters of the contractor defense in terms of 'military equipment,' use of that term appears to have followed from the facts of that case. Other courts considering this issue have concluded the defense is not limited to military contracts. . . . [*Boyle's*] application focuses instead on whether the issue or area is one involving 'uniquely federal interests' and, if so, whether the application of state law presents a 'significant conflict' with federal policy." (*Oxford*, *supra*, 177 Cal.App.4th at p. 710.)
- "[T]he cases recognize that a contractor 'can demonstrate a fully informed government decision by showing either that they conveyed the relevant known and "substantial enough" dangers . . . *or* that the government did not need the warnings because it already possessed that information.' " (*Kase*, *supra*, 6 Cal.App.5th at p. 643, original italics, internal citations omitted.)

Secondary Sources

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

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

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

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

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

1248. Affirmative Defense—Inherently Unsafe Consumer Product (Civ. Code, § 1714.45)

[*Name of defendant*] claims that it is not responsible for [*name of plaintiff*]'s claimed harm because [*specify product*] is an inherently unsafe consumer product. To succeed on this defense, [*name of defendant*] must prove all of the following:

1. **That [*product*] is a common consumer product intended for personal consumption; and**
2. **That [*product*] is inherently unsafe;**
3. **But [*product*] is no more dangerous than what an ordinary consumer of the product with knowledge common to the community would expect.**

New June 2016

Directions for Use

This instruction sets forth an immunity defense to product liability for a product that is clearly recognizable as inherently dangerous. (See Civ. Code, § 1714.45(a).) The statute requires that the product be "a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts." (Civ. Code, § 1714.45(a)(2).) This reference is perhaps somewhat confusing because the Restatement comment makes it clear that sugar, castor oil, alcohol, and butter are not *unreasonably* dangerous. The implication from the statutory references is that although they are not unreasonably dangerous, they are inherently unsafe and thus within the protection provided to the manufacturer by the statute.

Sources and Authority

- Nonliability for Inherently Unsafe Consumer Product. Civil Code section 1714.45.
- Comment i to Section 402A of the Restatement (Second) of Torts provides: "*Unreasonably dangerous*. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably

dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous."

- "Additional limitations on the scope of the immunity may be deduced from the history and purpose of the Immunity Statute . . . .The statute's express premise . . . was 'that suppliers of certain products which are "inherently unsafe," but which the public wishes to have available despite awareness of their dangers, should not be responsible in tort for resulting harm to those who voluntarily consumed the products despite such knowledge.' . . . [T]he Immunity Statute [is] based on the principle that 'if a product is pure and unadulterated, its inherent or unavoidable danger, commonly known to the community which consumes it anyway, does not expose the seller to liability for resulting harm to a voluntary user.' " (*Naegele v. R.J. Reynolds Tobacco Co.* (2002) 28 Cal.4th 856, 862 [123 Cal.Rptr.2d 61, 50 P.3d 769], internal citations omitted.)
- "The law should not ignore interactive effects that might render a product more dangerous than is contemplated by the ordinary consumer who purchases it and possesses the ordinary knowledge common to the community as to the product's characteristics. Therefore, when a court addresses whether a multi-ingredient product is a common consumer product for purposes of Civil Code section 1714.45 and the ingredients have an interactive effect, the product and its inherent dangers must be considered as a whole so that the interactive effects of its ingredients are not overlooked or trivialized." (*Fiorini v. City Brewing Co., LLC* (2014) 231 Cal.App.4th 306, 325 [179 Cal.Rptr.3d 827].)
- "The foregoing inferences preclude us from finding, as a matter of law, that [product] was a common consumer product for purposes of Civil Code section 1714.45, subdivision (a). As a result, that factual question should be presented to the trier of fact." (*Fiorini, supra*, 231 Cal.App.4th at p. 326, footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1930 et seq.

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11[5] (Matthew Bender)

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.04 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.70 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.80A et seq. (Matthew Bender)

1249. Affirmative Defense—Reliance on Knowledgeable Intermediary

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] is not responsible for any harm to [***name of plaintiff***] based on a failure to warn because [***name of defendant***] sold [***specify product, e.g., asbestos***] to an intermediary purchaser [***name of intermediary***]; and [***name of defendant***] relied on [***name of intermediary***] to provide adequate warnings to end users of [***e.g., asbestos***]. To succeed on this defense, [***name of defendant***] must prove:**

1. **That [***name of defendant***] sold [***specify product, e.g., asbestos***] to [***name of intermediary***];**

[2. That [*name of defendant***] conveyed adequate warnings of the particular risks in the use of [***e.g., asbestos***] to [***name of intermediary***].]**

[or]

[2. That [*name of defendant***] knew that [***name of intermediary***] was aware of, or should have been aware of, the particular risks of [***e.g., asbestos***];]**

and

3. **That [***name of defendant***] actually and reasonably relied on [***name of intermediary***] to convey adequate warnings of the particular risks in the use of [***e.g., asbestos***] to those who, like [***name of plaintiff***], might encounter the risk of [***e.g., asbestos***].**

   Reasonable reliance depends on many factors, including, but not limited to:

   a. **The degree of risk posed by [***e.g., asbestos***];**

   b. **The feasibility of [***name of defendant***]'s directly warning those who might encounter [***e.g., asbestos***] in a finished product; and**

   c. **The likelihood that the intermediary purchaser will convey warnings.**

      In determining the likelihood that [*name of intermediary***] would convey adequate warnings, consider what a supplier of [***e.g., asbestos***] should know about [***name of intermediary***]. Factors to consider include, but are not limited to:**

      (1) Whether [*name of intermediary***] knew or should have been aware of the specific risks posed by [***e.g., asbestos***];**

(2) Whether [*name of intermediary*] had a reputation for carefulness; and

(3) Whether [*name of intermediary*] was willing to, and had the ability to, communicate adequate warnings to end users.

New May 2017

Directions for Use

Give this instruction if the defendant supplier of materials claims that it gave warnings to an intermediary purchaser or relied on an intermediary purchaser to provide warnings to end users of the product. Reasonable reliance on an intermediary is an affirmative defense to a claim of failure to warn under both strict liability and negligence theories. (See *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 187 [202 Cal.Rptr.3d 460, 370 P.3d 1022].)

This instruction sets forth all of the elements of the defense. The reasonableness of the defendant's reliance under factors a–c on the intermediary to warn end users is a question of fact. (*Webb, supra*, 63 Cal.4th at p. 180.)

Sources and Authority

- "When a hazardous raw material is supplied for any purpose, including the manufacture of a finished product, the supplier has a duty to warn about the material's dangers. Under the sophisticated intermediary doctrine, the supplier can discharge this duty if it conveys adequate warnings to the material's purchaser, or sells to a sufficiently sophisticated purchaser, and reasonably relies on the purchaser to convey adequate warnings to others, including those who encounter the material in a finished product. Reasonable reliance depends on many circumstances, including the degree of risk posed by the material, the likelihood the purchaser will convey warnings, and the feasibility of directly warning end users. The doctrine balances the competing policies of compensating those injured by dangerous products and encouraging conduct that can feasibly be performed." (*Webb, supra*, 63 Cal.4th at p. 177.)
- "To establish a defense under the sophisticated intermediary doctrine, a product supplier must show not only that it warned or sold to a knowledgeable intermediary, but also that it actually and reasonably relied on the intermediary to convey warnings to end users. This inquiry will typically raise questions of fact for the jury to resolve unless critical facts establishing reasonableness are undisputed." (*Webb, supra*, 63 Cal.4th at pp. 189–190.)
- "Because the sophisticated intermediary doctrine is an affirmative defense, the supplier bears the burden of proving that it adequately warned the intermediary, or knew the intermediary was aware or should have been aware of the specific hazard, and reasonably relied on the intermediary to transmit warnings." (*Webb, supra*, 63 Cal.4th at p. 187.)
- "Like the sophisticated user defense, the sophisticated intermediary defense

applies to failure to warn claims sounding in either strict liability or negligence. As we have previously observed, 'there is little functional difference between the two theories in the failure to warn context.' '[I]n failure to warn cases, whether asserted on negligence or strict liability grounds, there is but one unitary theory of liability which is negligence based—the duty to use reasonable care in promulgating a warning.' " (*Webb, supra*, 63 Cal.4th at p. 187, internal citations omitted.)

- "The goal of products liability law is not merely to spread risk but also 'to "induce conduct that is capable of being performed." ' The sophisticated intermediary doctrine serves this goal by recognizing a product supplier's duty to warn but permitting the supplier to discharge this duty in a responsible and practical way. It appropriately and equitably balances the practical realities of supplying products with the need for consumer safety." (*Webb, supra*, 63 Cal.4th at p. 187, internal citation omitted.)
- "The 'gravity' of risk factor encompasses both the 'serious or trivial character of the harm' that is possible and the likelihood that this harm will result. This factor focuses on the nature of the material supplied. If the substance is extremely dangerous, the supplier may need to take additional steps, such as inquiring about the intermediary's warning practices, to ensure that warnings are communicated. The overarching question is the reasonableness of the supplier's conduct given the potential severity of the harm." (*Webb, supra*, 63 Cal.4th at p. 190, internal citation omitted.)
- "The second Restatement factor, measuring the likelihood that the intermediary will warn, focuses on the reliability of the intermediary. The supplier's knowledge about the intermediary's reliability is judged by an objective standard, based on what a reasonable supplier would have known under the circumstances. Relevant concerns for this factor include, for example, the intermediary's level of knowledge about the hazard, its reputation for carefulness or consideration, and its willingness, and ability, to communicate adequate warnings to end users. Of course, a supplier is always free to inquire about the intermediary's warning policies and practices as a means of assessing the intermediary's reliability. The Second Restatement suggests economic motivations may also be important. For example, an intermediary manufacturer may have an incentive to withhold necessary information about a component material if warnings would make its product less attractive." (*Webb, supra*, 63 Cal.4th at p. 190, internal citations omitted.)
- "It is also significant if, under the circumstances giving rise to the plaintiff's claim, the intermediary itself had a legal duty to warn end users about the particular hazard in question. In general, ' "every person has a right to presume that every other person will perform his duty and obey the law." ' As the Restatement notes, '[m]odern life would be intolerable unless one were permitted to rely to a certain extent on others' doing what they normally do, particularly if it is their duty to do so.' This consideration may be especially relevant in the context of a raw material or other component supplied for use in making a

finished product. Under California law, a product manufacturer has a legal duty to warn its customers of all known or knowable dangers arising from use of the product. However, regardless of the purchaser's independent duty, the supplier cannot reasonably ignore known facts that would provide notice of a substantial risk that the intermediary might fail to warn or that warnings might fail to reach the consumer." (*Webb, supra*, 63 Cal.4th at p. 191, internal citations omitted.)

- "When raw materials are supplied in bulk for the manufacture of a finished product, it may be difficult for the supplier to convey warnings to the product's ultimate consumers. These suppliers likely have no way to identify ultimate product users and no ready means to communicate with them." (*Webb, supra*, 63 Cal.4th at p. 191.)
- "We recognize that direct proof of actual reliance may be difficult to obtain when, as in the case of latent disease, the material was supplied to an intermediary long ago. However, actual reliance is an inference the factfinder should be able to draw from circumstantial evidence about the parties' dealings." (*Webb, supra*, 63 Cal.4th at p. 193.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1321

1 California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.21[3][c] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.11[10][b] (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.263 et seq. (Matthew Bender)

1250–1299. Reserved for Future Use

VF-1200. Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue

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We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?**

   _____ Yes _____ No

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

2. **Did the [*product*] contain a manufacturing defect when it left [*name of defendant*]'s possession?**

   _____ Yes _____ No

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

3. **Was the manufacturing defect a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

4. **What are [*name of plaintiff*]'s damages? Do not reduce the damages based on the fault, if any, of [*name of plaintiff*] or [*name/description of other person*].**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

If [*name of plaintiff*] has proved any damages, answer question 5. If [*name of plaintiff*] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of plaintiff*] negligent?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, insert the number zero next to [*name of plaintiff*]'s name in question 9 and answer question 7.

6. Was [*name of plaintiff*]'s negligence a substantial factor in causing [his/her/*nonbinary pronoun*] harm?

_____ Yes _____ No

If your answer to question 6 is yes, then answer questions 7 and 9. If you answered no, insert the number zero next to [*name of plaintiff*]'s name in question 9 and answer question 7.

7. Was [*name/description of other person*] negligent?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, insert the number zero next to [*name/description of other person*]'s name in question 9.

8. Was [*name/description of other person*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, insert the number zero next to [*name/description of other person*]'s name in question 9.

9. What percentage of responsibility for [*name of plaintiff*]'s harm do you assign to:

[*Name of defendant*]:	_____ **%**
[*Name of plaintiff*]:	_____ **%**
[*Name/description of other person*]:	_____ **%**
TOTAL	**100 %**

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2009, December 2009, December 2010, June 2011, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1201, *Strict Liability—Manufacturing Defect—Essential Factual Elements*, CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*. If product misuse or modification is alleged as a complete defense (see CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*), questions 2 and 3 of CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification*, may be included after question 1.

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

If the negligence or fault of more than one third person is alleged to have contributed to the plaintiff's injury, repeat questions 7 and 8.

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

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

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

VF-1201. Strict Products Liability—Design Defect—Affirmative Defense—Misuse or Modification

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [manufacture/distribute/sell] the [***product***]?**

   _____ **Yes** _____ **No**

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

2. **Was the [***product***] [misused/ [or] modified] after it left [***name of defendant***]'s possession in a way that was so highly extraordinary that it was not reasonably foreseeable to [him/her/***nonbinary pronoun***/it]?**

   _____ **Yes** _____ **No**

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

3. **Was the [misuse/ [or] modification] the sole cause of [***name of plaintiff***]'s harm?**

   _____ **Yes** _____ **No**

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

[4. Is the [*product***] one about which an ordinary consumer can form reasonable minimum safety expectations?**

   _____ **Yes** _____ **No**

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

[5. Did the [*product***] fail to perform as safely as an ordinary consumer would have expected when used or misused in an intended or reasonably foreseeable way?**

   _____ **Yes** _____ **No**

   Regardless of your answer to question 5, answer question 6.]

[6. Did the benefits of the [*product***]'s design outweigh the risks of the design?**

   _____ **Yes** _____ **No**

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

7. Was the [*product*]'s design a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify

the [clerk/bailiff/court attendant].

New September 2003; Revised October 2004, April 2007, April 2009, December 2010, June 2011, December 2011, December 2014, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements*, CACI No. 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof*, and CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 6 through 9 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue*, may be added at the end.

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

This verdict form can be used in a case in which the jury will decide design defect under both the consumer expectation and the risk-benefit tests. If only the risk-benefit test is at issue, omit questions 4 and 5. If only the consumer expectation test is at issue, omit question 6. Modify the transitional language following questions 5 and 6 if only one test is at issue in the case. Include question 4 if the court has decided to give to the jury the preliminary question as to whether the consumer expectation test can be applied to the product at issue in the case. (See *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233–1234 [115 Cal.Rptr.3d 151].) An additional question may be needed if the defendant claims that the plaintiff's injuries were caused by some product other than the defendant's.

If specificity is not required, users do not have to itemize all the damages listed in question 8. The breakdown is optional depending on the circumstances.

If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

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

Revoked December 2014; See CACI No. VF-1201

VF-1203. Strict Products Liability—Failure to Warn

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?**

   _____ Yes _____ No

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

2. **Did the [*product*] have potential [risks/side effects/allergic reactions] that were [known/ [or] knowable in light of the [scientific/ [and] medical] knowledge that was generally accepted in the scientific community] at the time of [manufacture/distribution/sale]?**

   _____ Yes _____ No

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

3. **Did the potential [risks/side effects/allergic reactions] present a substantial danger to persons using or misusing the [*product*] in an intended or reasonably foreseeable way?**

   _____ Yes _____ No

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

4. **Would ordinary consumers have recognized the potential [risks/side effects/allergic reactions]?**

   _____ Yes _____ No

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

5. **Did [*name of defendant*] fail to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions]?**

   _____ Yes _____ No

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

6. Was the lack of sufficient [instructions] [or] [warnings] a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2009, December 2010, June 2011, December 2011, December 2016, May 2024

Directions for Use

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

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

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

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

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

VF-1204. Products Liability—Negligence—Comparative Fault of Plaintiff at Issue

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We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [design/manufacture/supply/install/inspect/repair/rent] the [*product*]?**

   _____ Yes _____ No

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

2. **Was [*name of defendant*] negligent in [designing/manufacturing/supplying/installing/inspecting/repairing/renting] the [*product*]?**

   _____ Yes _____ No

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

3. **Was [*name of defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

4. **What are [*name of plaintiff*]'s total damages? Do not reduce the damages based on the fault, if any, of [*name of plaintiff*].**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

If [*name of plaintiff*] has proved any damages, answer question 5. If [*name of plaintiff*] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of plaintiff*] negligent?

_____ Yes _____ No

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

6. Was [*name of plaintiff*]'s negligence a substantial factor in causing [his/her/*nonbinary pronoun*] harm?

_____ Yes _____ No

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

7. What percentage of responsibility for [*name of plaintiff*]'s harm do you assign to:

[*Name of defendant*]:	**_____ %**
[*Name of plaintiff*]:	**_____ %**
TOTAL	**100 %**

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2009, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1220, *Negligence—Essential Factual Elements*, and CACI No. 405, *Comparative Fault of Plaintiff*.

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

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

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

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

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?**

   _____ Yes _____ No

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

2. **Did [*name of defendant*] know or should [he/she/*nonbinary pronoun*/it] reasonably have known that the [*product*] was dangerous or was likely to be dangerous when used or misused in a reasonably foreseeable manner?**

   _____ Yes _____ No

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

3. **Did [*name of defendant*] know or should [he/she/*nonbinary pronoun*/it] reasonably have known that users would not realize the danger?**

   _____ Yes _____ No

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

4. **Did [*name of defendant*] fail to adequately warn of the danger [or instruct on the safe use of] the [*product*]?**

   _____ Yes _____ No

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

5. **Would a reasonable [manufacturer/distributor/seller] under the same or similar circumstances have warned of the danger [or instructed on the safe use of] the [*product*]?**

   _____ Yes _____ No

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

6. Was [*name of defendant*]'s failure to warn a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2011, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1222, *Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements.*

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

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

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

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

VF-1206. Products Liability—Express Warranty—Affirmative Defense—Not "Basis of Bargain"

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] represent to [***name of plaintiff***] by a [statement/description/sample/model/***other***] that the [***product***] [***insert description of alleged express warranty***]?**

   _____ **Yes** _____ **No**

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

2. **Was the resulting bargain between the parties in which [***name of plaintiff***] decided to [***purchase/use***] the [***product***] based in any way on [***name of defendant***]'s [statement/description/sample/model/***other***]?**

   _____ **Yes** _____ **No**

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

3. **Did the [***product***] fail to [perform] [or] [have the same quality] as represented?**

   _____ **Yes** _____ **No**

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

4. **Was the failure of the [***product***] to [perform] [or] [meet the quality] as represented a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

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

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

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised February 2005, April 2007, December 2010, June 2011, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 1230, *Express Warranty—Essential Factual Elements*, and CACI No. 1240, *Affirmative Defense to Express Warranty—Not "Basis of Bargain."*

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

Under various circumstances, the plaintiff must also prove that the plaintiff made a reasonable attempt to notify the defendant of the defect. Thus, if appropriate, the following question should be added before the question regarding the plaintiff's harm: "Did [*name of plaintiff*] take reasonable steps to notify [*name of defendant*] within a reasonable time that the [*product*] [was not/did not perform] as requested?"

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

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

Do not include question 2 if the affirmative defense is not at issue.

VF-1207. Products Liability—Implied Warranty of Merchantability—Affirmative Defense—Exclusion of Implied Warranties

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We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] buy the [*product*] from [*name of defendant*]?**

   _____ Yes _____ No

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

2. **Was [*name of defendant*] in the business of selling these goods?**

   _____ Yes _____ No

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

3. **Did the sale of the [*product*] include notice that would have made a buyer aware that it was being sold without any representations relating to the quality that a buyer would expect?**

   _____ Yes _____ No

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

4. **Was the [*product*] fit for the ordinary purposes for which such goods are used?**

   _____ Yes _____ No

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

5. **Was the failure of the [*product*] to have the expected quality a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

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

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

   [a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 1231, *Implied Warranty of Merchantability—Essential Factual Elements*, and CACI No. 1242, *Affirmative Defense—Exclusion of Implied Warranties.*

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

Under various circumstances, the plaintiff must also prove that the plaintiff made a reasonable attempt to notify the defendant of the defect. Thus, where appropriate, the following question should be added prior to the question regarding the plaintiff's harm: "Did [*name of plaintiff*] take reasonable steps to notify [*name of defendant*]

within a reasonable time that the [*product*] [was not/did not perform] as requested?"

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

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

Question 2 should be modified if the defendant purported to have special knowledge or skill regarding the goods. Question 3 should be modified if a different ground of liability is asserted under Commercial Code section 2314(2). Question 6 should be modified if the defendant is asserting other grounds under Commercial Code section 2316(3). This form should also be modified if notification is an issue.

Do not include question 3 if the affirmative defense is not at issue.

VF-1208. Products Liability—Implied Warranty of Fitness for a Particular Purpose

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We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] buy the [*product*] from [*name of defendant*]?**

   _____ **Yes** _____ **No**

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

2. **At the time of purchase, did [*name of defendant*] know or have reason to know that [*name of plaintiff*] intended to use the [*product*] for a particular purpose?**

   _____ **Yes** _____ **No**

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

3. **At the time of purchase, did [*name of defendant*] know that [*name of plaintiff*] was relying on [*name of defendant*]'s skill and judgment to select or furnish a product that was suitable for the particular purpose?**

   _____ **Yes** _____ **No**

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

4. **Did [*name of plaintiff*] justifiably rely on [*name of defendant*]'s skill and judgment?**

   _____ **Yes** _____ **No**

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

5. **Was the [*product*] suitable for the particular purpose?**

   _____ **Yes** _____ **No**

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

6. **Was the failure of the [*product*] to be suitable a substantial factor**

in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 1232, *Implied Warranty of Fitness for a*

Particular Purpose—Essential Factual Elements.

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

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

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

Question 2 of this form should be modified if the defendant purported to have special knowledge or skill regarding the goods. Question 3 should be modified if a different ground of liability is asserted under Commercial Code section 2314(2). This form should also be modified if notification is an issue.

VF-1209–VF-1299. Reserved for Future Use

ASSAULT AND BATTERY

1300. Battery—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] committed a battery. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [touched [***name of plaintiff***]] [or] [caused [***name of plaintiff***] to be touched] with the intent to harm or offend [him/her/***nonbinary pronoun***];**
2. **That [***name of plaintiff***] did not consent to the touching; [and]**
3. **That [***name of plaintiff***] was harmed [or offended] by [***name of defendant***]'s conduct[./; and]**

[4. That a reasonable person in [*name of plaintiff***]'s situation would have been offended by the touching.]**

New September 2003; Revised October 2004

Directions for Use

Give the bracketed words in element 3 and element 4 if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

For a definition of "intent," see CACI No. 1320, *Intent.*

Sources and Authority

- Consent as Defense. Civil Code section 3515.
- "The essential elements of a cause of action for battery are: (1) defendant touched plaintiff, or caused plaintiff to be touched, with the intent to harm or offend plaintiff; (2) plaintiff did not consent to the touching; (3) plaintiff was harmed or offended by defendant's conduct; and (4) a reasonable person in plaintiff's position would have been offended by the touching." (*So v. Shin* (2013) 212 Cal.App.4th 652, 669 [151 Cal.Rptr.3d 257] [citing this instruction].)
- "A battery is a violation of an individual's interest in freedom from intentional, unlawful, harmful or offensive unconsented contacts with his or her person." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249].)
- "Although it is not incorrect to say that battery is an unlawful touching, . . . it is redundant to use 'unlawful' in defining battery in a jury instruction, and may be misleading to do so without informing the jury what would make the conduct unlawful." (*Barouh v. Haberman* (1994) 26 Cal.App.4th 40, 45 [31 Cal.Rptr.2d 259], internal citation omitted.)
- "The crimes of assault and battery are intentional torts. In the perpetration of such crimes negligence is not involved. As between the guilty aggressor and the

person attacked the former may not shield himself behind the charge that his victim may have been guilty of contributory negligence, for such a plea is unavailable to him." (*Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 385 [59 Cal.Rptr. 382].)

- " 'It has long been established, both in tort and criminal law, that "the least touching" may constitute battery. In other words, force against the person is enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark.' " (*People v. Mansfield* (1988) 200 Cal.App.3d 82, 88 [245 Cal.Rptr. 800], internal citations omitted.)
- "[T]he tort of battery generally is not limited to direct body-to-body contact. In fact, the commentary to the Restatement Second of Torts clearly states that the '[m]eaning of "contact with another's person" ' . . . does not require that one 'should bring any part of his own body in contact with another's person. . . . [One] is liable [for battery] in this Section if [one] throws a substance, such as water, upon the other . . . .' " (*Mount Vernon Fire Ins. Co. v. Busby* (2013) 219 Cal.App.4th 876, 881 [162 Cal.Rptr.3d 211].)
- "The element of lack of consent to the particular contact is an essential element of battery." (*Rains, supra,* 150 Cal.App.3d at p. 938.)
- "As a general rule, one who consents to a touching cannot recover in an action for battery. . . . However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 609–610 [278 Cal.Rptr. 900].)
- "In an action for civil battery the element of intent is satisfied if the evidence shows defendant acted with a 'willful disregard' of the plaintiff's rights." (*Ashcraft, supra,* 228 Cal.App.3d at p. 613, internal citation omitted.)
- " 'The usages of decent society determine what is offensive.' " (*Barouh, supra,* 26 Cal.App.4th at p. 46, fn. 5, internal citation omitted.)
- "Even though pushing a door cannot be deemed a harmful injury, the pushing of a door which was touching the prosecutrix could be deemed an offensive touching and a battery is defined as a harmful or offensive touching." (*People v. Puckett* (1975) 44 Cal.App.3d 607, 614–615 [118 Cal.Rptr. 884].)
- " 'If defendant unlawfully aims at one person and hits another he is guilty of assault and battery on the party he hit, the injury being the direct, natural and probable consequence of the wrongful act.' " (*Singer v. Marx* (1956) 144 Cal.App.2d 637, 642 [301 P.2d 440], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 452–488

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-J, *Assault And Battery*, ¶ 5:858 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.01[3] (Matthew

Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.13 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.21 (Matthew Bender)

California Civil Practice: Torts §§ 12:7–12:9 (Thomson Reuters)

1301. Assault—Essential Factual Elements

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

[1. That [*name of defendant***] acted, intending to cause harmful [or offensive] contact;**

2. That [*name of plaintiff***] reasonably believed that [he/she/***nonbinary pronoun***] was about to be touched in a harmful [or an offensive] manner;]**

[or]

[1. That [*name of defendant***] threatened to touch [***name of plaintiff***] in a harmful [or an offensive] manner;**

2. That it reasonably appeared to [*name of plaintiff***] that [***name of defendant***] was about to carry out the threat;]**

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

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

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

[A touching is offensive if it offends a reasonable sense of personal dignity.]

[Words alone do not amount to an assault.]

New September 2003; Revised October 2004, June 2005

Directions for Use

For a definition of "intent," see CACI No. 1320, *Intent*. The last bracketed sentence should be read in cases in which there is a dispute as to whether the defendant's conduct involved more than words.

Sources and Authority

- "The essential elements of a cause of action for assault are: (1) defendant acted with intent to cause harmful or offensive contact, or threatened to touch plaintiff in a harmful or offensive manner; (2) plaintiff reasonably believed she was about to be touched in a harmful or offensive manner or it reasonably appeared to plaintiff that defendant was about to carry out the threat; (3) plaintiff did not consent to defendant's conduct; (4) plaintiff was harmed; and (5) defendant's conduct was a substantial factor in causing plaintiff's harm." (*So v. Shin* (2013)

212 Cal.App.4th 652, 668–669 [151 Cal.Rptr.3d 257] [citing this instruction].)

- " 'Generally speaking, an assault is a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present.' " (*Plotnik v. Meihaus* (2012) 208 Cal. App. 4th 1590, 1603–1604 [146 Cal.Rptr.3d 585].)
- "A civil action for assault is based upon an invasion of the right of a person to live without being put in fear of personal harm." (*Lowry v. Standard Oil Co. of California* (1944) 63 Cal.App.2d 1, 6–7 [146 P.2d 57], internal citation omitted.)
- "The tort of assault is complete when the anticipation of harm occurs." (*Kiseskey v. Carpenters' Trust for Southern California* (1983) 144 Cal.App.3d 222, 232 [192 Cal.Rptr 492].)
- "Furthermore, . . . 'while apprehension of that contact is the basis of assault [citation,] [m]ere words, however threatening, will not amount to an assault. [Citations.]' " (*Plotnik*, *supra*, 208 Cal.App.4th at p. 1604.)
- Restatement Second of Torts, section 21 provides:

  (1) An actor is subject to liability to another for assault if

  (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

  (b) the other is thereby put in such imminent apprehension.

  (2) An action which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 452–488

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-J, *Assault And Battery*, ¶ 5:856 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.01[4] (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.15 (Matthew Bender)

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

California Civil Practice: Torts §§ 12:3–12:6 (Thomson Reuters)

1302. Consent Explained

A plaintiff may express consent by words or acts that are reasonably understood by another person as consent.

A plaintiff may also express consent by silence or inaction if a reasonable person would understand that the silence or inaction intended to indicate consent.

New September 2003

Directions for Use

See CACI No. 1303, *Invalid Consent*, if there is an issue concerning the validity of plaintiff's consent.

Sources and Authority

- Consent as Defense. Civil Code section 3515.
- "The element of lack of consent to the particular contact is an essential element of battery." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249].)
- "Consent to an act, otherwise a battery, normally vitiates the wrong." (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 375 [193 Cal.Rptr. 422].)
- "As a general rule, one who consents to a touching cannot recover in an action for battery. . . . However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 609–610 [278 Cal.Rptr. 900].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 457–488

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.20 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.91 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.24 (Matthew Bender)

California Civil Practice: Torts §§ 12:9, 12:18–12:19 (Thomson Reuters)

1303. Invalid Consent

[*Name of plaintiff*] claims that [his/her/*nonbinary pronoun*] consent [was obtained by fraud/mistake/duress] [was obtained as a result of [his/her/*nonbinary pronoun*] incapacity] [or that [*name of defendant*]'s conduct went beyond the scope of [his/her/*nonbinary pronoun*] limited consent].

If [*name of plaintiff*] proves that [his/her/*nonbinary pronoun*] consent was [*insert ground for vitiating consent, e.g., "obtained by fraud," "exceeded"*], then you must find that [he/she/*nonbinary pronoun*] did not consent.

New September 2003

Directions for Use

For instructions on fraud, mistake, and duress, see other instructions in the *Contracts* and *Fraud or Deceit* series.

Sources and Authority

- Restatement Second of Torts, section 892B provides:

  (1) Except as stated in subsection (2), consent to conduct of another is effective for all consequences of the conduct and for the invasion of any interests resulting from it.

  (2) If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.

  (3) Consent is not effective if it is given under duress.

- Consent may be invalidated if the act exceeds the scope of the consent or if the consent is fraudulently induced. (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 375 [193 Cal.Rptr. 422].)
- Liability may be found where a physician "intentionally deceive[s] another into submitting to otherwise offensive touching to achieve a nontherapeutic purpose known only to the physician." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 941 [198 Cal.Rptr. 249].)
- "As a general rule, one who consents to a touching cannot recover in an action for battery. . . . However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 609–610 [278 Cal.Rptr. 900].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 457–488

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.20 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.57, 58.91 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.24 (Matthew Bender)

California Civil Practice: Torts §§ 12:9, 12:18–12:19 (Thomson Reuters)

1304. Affirmative Defense—Self-Defense/Defense of Others

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] is not responsible for [***name of plaintiff***]'s harm because [he/she/***nonbinary pronoun***] was acting in [self-defense/defense of another]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] reasonably believed that [***name of plaintiff***] was going to harm [him/her/***nonbinary pronoun***/[***insert identification of other person***]]; and**
2. **That [***name of defendant***] used only the amount of force that was reasonably necessary to protect [himself/herself/***nonbinary pronoun***/[***insert identification of other person***]].**

New September 2003; Revised June 2014

Sources and Authority

- Self Defense. Civil Code section 50.
- "When an alleged act of self-defense . . . is at issue, the question of what force was reasonable and justified is *peculiarly one for determination by the trier of fact*." (*Burton v. Sanner* (2012) 207 Cal.App.4th 12, 14 [142 Cal.Rptr.3d 782], original italics.)
- "Self-defense being an affirmative defense, it must, in a civil action, be established by the defendant by a preponderance of the evidence." (*Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 386 [59 Cal.Rptr. 382].)
- "In a suit for assault and battery, the defendant is not liable if that defendant reasonably believed, in view of all the circumstances of the case, that the plaintiff was going to harm him or her and the defendant used only the amount of force reasonably necessary to protect himself or herself." (*J.J. v. M.F.* (2014) 223 Cal.App.4th 968, 976 [167 Cal.Rptr.3d 670] [citing this instruction].)
- "The right to use force against another has long been limited by the condition that the force be no more than ' "that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury." 'When the amount of force used is justifiable under the circumstances, it is not willful and the actor may escape liability for intentionally injurious conduct that is otherwise actionable. But if force is applied in excess of that which is justified, the actor remains subject to liability for the damages resulting from the excessive use of force. . . . When an alleged act of self-defense or defense of property is at issue, the question of what force was reasonable and justified is peculiarly one for determination by the trier of fact." (*Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 730–731 [80 Cal.Rptr.2d 506, 968 P.2d 65], internal citations omitted.)

- "The right of self-defense is not limited by actualities. The correct rule . . . [is]: 'Generally . . . , the force that one may use in self-defense is that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury.' In emphasizing that the law of self-defense is a law of necessity courts should never lose sight of the fact that the necessity may be either real or apparent." (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 599–600 [191 P.2d 432], internal citations omitted.)
- "The reasonableness standard is an objective standard." (*Burton, supra*, 207 Cal.App.4th at p. 20.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 489–493, 495

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.21 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.19–58.20, 58.70–58.71 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.40 et seq. (Matthew Bender)

California Civil Practice: Torts §§ 12:20–12:21 (Thomson Reuters)

1305A. Battery by Law Enforcement Officer (Nondeadly Force)—Essential Factual Elements

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

1. **That [***name of defendant***] intentionally touched [***name of plaintiff***] [or caused [***name of plaintiff***] to be touched];**
2. **That [***name of defendant***] used unreasonable force on [***name of plaintiff***];**
3. **That [***name of plaintiff***] did not consent to the use of that force;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s use of unreasonable force was a substantial factor in causing [***name of plaintiff***]'s harm.**

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

In deciding whether [*name of defendant***] used unreasonable force, you must consider the totality of the circumstances and determine what amount of force a reasonable [***insert type of officer***] in [***name of defendant***]'s position would have used under the same or similar circumstances. "Totality of the circumstances" means all facts known to the officer at the time, including the conduct of [***name of defendant***] and [***name of plaintiff***] leading up to the use of force. You should consider, among other factors, the following:**

(a) Whether [*name of plaintiff***] reasonably appeared to pose an immediate threat to the safety of [***name of defendant***] or others;**

(b) The seriousness of the crime at issue; and

(c) Whether [*name of plaintiff***] was actively resisting [arrest/detention] or attempting to evade [arrest/detention].**

[An officer who makes or attempts to make an arrest does not have to retreat or stop because the person being arrested resists or threatens to resist. Tactical repositioning or other deescalation tactics are not retreat. An officer does not lose the right to self-defense by using objectively

reasonable force to [arrest/detain/ [,/or] prevent escape/ [,/or] overcome resistance.]

New September 2003; Revised December 2012, May 2020, November 2020; Renumbered from CACI No. 1305 and Revised May 2021

Directions for Use

See CACI No. 1302, *Consent Explained*, and CACI No. 1303, *Invalid Consent*, if there is an issue concerning the plaintiff's consent.

For additional authorities on excessive force, see the Sources and Authority for CACI No. 440, *Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*, CACI No. 441, *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*, and CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*.

By its terms, Penal Code section 835a's deadly force provisions apply to "peace officers." It would appear that a battery claim involving nondeadly force does not depend on whether the individual qualifies as a peace officer under the Penal Code. (See Pen. Code, § 835a; see also Pen. Code, § 830 et seq. [defining "peace officer"].) For cases involving the use of deadly force by a peace officer, use CACI No. 1305B, *Battery by Peace Officer (Deadly Force)—Essential Factual Elements*. (Pen. Code, § 835a.) This instruction and CACI No. 1305B may require modification if the jury must decide whether the force used by the defendant was deadly or nondeadly.

Include the bracketed sentence in the second paragraph only if the defendant claims that the person being arrested or detained resisted the officer.

Factors (a), (b), and (c) are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive (see *Glenn v. Wash. County* (9th Cir. 2011) 673 F.3d 864, 872); additional factors may be added if appropriate to the facts of the case.

Include the final bracketed paragraph only if the defendant claims that the person being arrested resisted arrest or threatened resistance.

Sources and Authority

- Use of Objectively Reasonable Force to Arrest. Penal Code section 835a.
- Duty to Submit to Arrest. Penal Code section 834a.
- "Plaintiff must prove unreasonable force as an element of the tort." (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)
- " ' "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . [T]he question is whether the officers' actions are 'objectively

reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . .' ' In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)

- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention . . . ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)
- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)
- "Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of 'the totality of the circumstances at the time,' including 'the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.' The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal.Rptr.3d 1, 207 P.3d 506], internal citation omitted.)

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2020) Crimes Against the Person, §§ 13–14

4 Witkin & Epstein, California Criminal Law (4th ed. 2020) Crimes Against the Person, § 39

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 496

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

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

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

(Matthew Bender)
California Civil Practice: Torts § 12:22 (Thomson Reuters)

1305B. Battery by Peace Officer (Deadly Force)—Essential Factual Elements

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A peace officer may use deadly force only when necessary in defense of human life. [*Name of plaintiff***] claims that [***name of defendant***] unnecessarily used deadly force on [him/her/***nonbinary pronoun/name of decedent***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally touched [***name of plaintiff/decedent***] [or caused [***name of plaintiff/decedent***] to be touched];**
2. **That [***name of defendant***] used deadly force on [***name of plaintiff/decedent***];**
3. **That [***name of defendant***]'s use of deadly force was not necessary to defend human life;**
4. **That [***name of plaintiff/decedent***] was [harmed/killed]; and**
5. **That [***name of defendant***]'s use of deadly force was a substantial factor in causing [***name of plaintiff/decedent***]'s [harm/death].**

[*Name of defendant***]'s use of deadly force was necessary to defend human life only if a reasonable officer in the same situation would have believed, based on the totality of the circumstances known to or perceived by [***name of defendant***] at the time, that deadly force was necessary [***insert one or both of the following:***]**

[to defend against an imminent threat of death or serious bodily harm to [*name of defendant***] [or] [to another person][; or/.]]**

[to apprehend a fleeing person for a felony, when all of the following conditions are present:

i. **The felony threatened or resulted in death or serious bodily injury to another;**

ii. **[***Name of defendant***] reasonably believed that the person fleeing would cause death or serious bodily injury to another unless immediately apprehended; and**

iii. **If practical under the circumstances, [***name of defendant***] made reasonable efforts to identify [himself/herself/***nonbinary pronoun***] as a peace officer and to warn that deadly force would be used, unless the officer had objectively reasonable grounds to believe the person is aware of those facts.]**

[A peace officer must not use deadly force against persons based only on the danger those persons pose to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of

death or serious bodily injury to the peace officer or to another person.]

[A person being [arrested/detained] has a duty not to use force to resist the peace officer unless the peace officer is using unreasonable force.]

"Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm.

A threat of death or serious bodily injury is "imminent" when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

"Totality of the circumstances" means all facts known to the peace officer at the time, including the conduct of [*name of defendant***] and [***name of plaintiff/decedent***] leading up to the use of deadly force. In determining whether [***name of defendant***]'s use of deadly force was necessary in defense of human life, you must consider [***name of defendant***]'s tactical conduct and decisions before using deadly force on [***name of plaintiff/decedent***] and whether [***name of defendant***] used other available resources and techniques as [an] alternative[s] to deadly force, if it was reasonably safe and feasible to do so. [You must also consider whether [***name of defendant***] knew or had reason to know that the person against whom [he/she/***nonbinary pronoun***] used force was suffering from a physical, mental health, developmental, or intellectual disability [that may have affected the person's ability to understand or comply with commands from the officer[s]].]**

[A peace officer who makes or attempts to make an arrest does not have to retreat or stop because the person being arrested is resisting or threatening to resist. Tactical repositioning or other deescalation tactics are not retreat. A peace officer does not lose the right to self-defense by use of objectively reasonable force to effect the arrest or to prevent escape or to overcome resistance. A peace officer does, however, have a duty to use reasonable tactical repositioning or other deescalation tactics.]

New May 2021

Directions for Use

Use this instruction for a claim of battery using deadly force by a peace officer. If a plaintiff alleges battery by both deadly and nondeadly force, or if the jury must

decide whether the amount of force used was deadly or nondeadly, this instruction may be used along with the CACI No. 1305A, *Battery by Law Enforcement Officer (Nondeadly Force)—Essential Factual Elements*.

By its terms, Penal Code section 835a's deadly force provisions apply to "peace officers," a term defined by the Penal Code. (See Pen. Code, § 835a; see also Pen. Code, § 830 et seq. [defining "peace officer"].) That the defendant is a peace officer may be stipulated to or decided by the judge as a matter of law. In such a case, the judge must instruct the jury that the defendant was a peace officer. If there are contested issues of fact on this issue, include the specific factual findings necessary for the jury to determine whether the defendant was acting as a peace officer.

In the paragraph after the essential factual elements, select either or both bracketed options depending on the asserted justification(s) for the use of deadly force.

"Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm. (Pen. Code, § 835a(e)(1).) Note that this definition does not require that the encounter result in the death of the person against whom the force was used. If there is no dispute about the use of deadly force, the court should instruct the jury that deadly force was used.

In the "totality of the circumstances" paragraph, do not include the final optional sentence or its optional clause unless there is evidence of a disability or evidence of the person's ability to comprehend or comply with the officer's commands.

Include the final bracketed paragraph only if the defendant claims that the person being arrested resisted arrest or threatened resistance.

In a wrongful death or survival action, use the name of the decedent victim where applicable and further modify the instruction as appropriate.

Sources and Authority

- Legislative Findings re Use of Force by Law Enforcement. Penal Code section 835a(a).
- When Use of Deadly Force is Justified. Penal Code section 835a(c).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).
- "Peace Officer" Defined. Penal Code section 830 et seq.
- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention . . . ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)
- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 427, 993

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

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

California Civil Practice: Torts § 12:22 (Thomson Reuters)

1306. Sexual Battery—Essential Factual Elements (Civ. Code, § 1708.5)

[*Name of plaintiff*] claims that [*name of defendant*] committed a sexual battery. To establish this claim, [*name of plaintiff*] must prove the following:

1. **[(a) That [*name of defendant*] intended to cause a harmful [or offensive] contact with [*name of plaintiff*]'s [sexual organ/anus/ groin/buttocks/ [or] breast], and a sexually offensive contact with [*name of plaintiff*] resulted, either directly or indirectly;]**

   [OR]

   [(b) That [*name of defendant*] intended to cause a harmful [or offensive] contact with [*name of plaintiff*] by use of [*name of defendant*]'s [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with [*name of plaintiff*] resulted, either directly or indirectly;]

   [OR]

   [(c) That [*name of defendant*] caused an imminent fear of a harmful [or offensive] contact with [[*name of plaintiff*]'s [sexual organ/anus/groin/buttocks/ [or] breast]/ [or] [*name of plaintiff*] by use of [*name of defendant*]'s [sexual organ/anus/groin/buttocks/ [or] breast]], and a sexually offensive contact with [*name of plaintiff*] resulted, either directly or indirectly;]

   [OR]

   [(d) That [*name of defendant*] caused contact between a sexual organ, from which a condom had been removed, and [*name of plaintiff*]'s [sexual organ/anus/groin/buttocks/ [or] breast];]

   [OR]

   [(e) That [*name of defendant*] caused contact between [a/an] [sexual organ/anus/groin/buttocks/ [or] breast] and [*name of plaintiff*]'s sexual organ from which [*name of defendant*] had removed a condom;]

   AND

2. **That [*name of plaintiff*] did not [consent to the touching/verbally consent to the condom being removed]; and**

3. **That [*name of plaintiff*] was harmed [or offended] by [*name of defendant*]'s conduct.**

["Offensive contact" means contact that offends a reasonable sense of

personal dignity.]

New October 2008; Revised May 2022

Directions for Use

Omit any of the options for element 1 that are not supported by the evidence. If more than one are at issue, include the word "OR" between them.

For sexual battery under Civil Code section 1708.5(d)(1) (defining "intimate part"), unconsented touching of a breast must involve the breast of a female. The instruction may require modification if there is a factual question on this issue.

Use the second bracketed alternative in element 2 only if option (d) or option (e) is at issue. (Compare Civ. Code, § 1708.5(a), (b), (c) with Civ. Code, § 1708.5(d), (e).) Modification of the instruction will be necessary if the plaintiff's claim involves any of options (a)–(c) and option (d) or option (e) because the consent requirement is not the same.

Give the bracketed words "or offensive" in element 1 and "or offended" in element 3 and include the optional last sentence if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

For a definition of "intent," see CACI No. 1320, *Intent.*

Sources and Authority

- Sexual Battery. Civil Code section 1708.5.
- Consent as Defense. Civil Code section 3515.
- "A cause of action for sexual battery under Civil Code section 1708.5 requires the batterer intend to cause a 'harmful or offensive' contact and the batteree suffer a 'sexually offensive contact.' Moreover, the section is interpreted to require that the batteree did not consent to the contact." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1225 [44 Cal.Rptr.2d 197], internal citation omitted.)
- "The element of lack of consent to the particular contact is an essential element of battery." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249].)
- "As a general rule, one who consents to a touching cannot recover in an action for battery. . . . However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 609–610 [278 Cal.Rptr. 900].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 452–488

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.01[3] (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.27, 58.55 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery,* § 21.27 (Matthew Bender)

California Civil Practice: Torts §§ 12:7–12:9, 12:36–12:39 (Thomson Reuters)

1307–1319. Reserved for Future Use

1320. Intent

[*Name of defendant***] acted intentionally if [he/she/***nonbinary pronoun***] intended to [***insert facts, e.g., "assault [name of plaintiff]," "commit a battery"***] or if [he/she/***nonbinary pronoun***] was substantially certain that the [***insert facts, e.g., "assault," "battery"***] would result from [his/her/***nonbinary pronoun***] conduct.**

New September 2003

Directions for Use

This instruction may be used to define intent for other intentional torts, where appropriate.

Sources and Authority

- "In an action for civil battery the element of intent is satisfied if the evidence shows defendant acted with a 'willful disregard' of the plaintiff's rights." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 613 [278 Cal.Rptr. 900], internal citation omitted.)
- "As a general rule, California law recognizes that '. . . every person is presumed to intend the natural and probable consequences of his acts.' Thus, a person who acts willfully may be said to intend ' " 'those consequences which (a) represent the very purpose for which an act is done (regardless of the likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire).' " ' The same definition is applied to many intentional torts." (*Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740, 746 [57 Cal.Rptr.2d 821], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 455

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.13[1] (Matthew Bender)

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

1321. Transferred Intent

If [*name of defendant*] intended to commit a battery or assault on one person, but by mistake or accident committed the act on [*name of plaintiff*], then the battery or assault is the same as if the intended person had been the victim.

New October 2008

Directions for Use

Use this instruction with CACI No. 1300, *Battery—Essential Factual Elements*, or CACI No. 1301, *Assault—Essential Factual Elements,* if it is alleged that the defendant intended to batter or assault one person, and mistakenly or accidentally battered or assaulted the plaintiff.

Sources and Authority

- "While throwing rocks at trees or into the street ordinarily is an innocent and lawful pastime, that same act when directed at another person is wrongful. The evidence at bar . . . warrants an inference that [defendant] threw at [third party] and inadvertently struck [plaintiff]. In such circumstances the doctrine of "transferred intent" renders him liable to [plaintiff]. . . . 'If defendant unlawfully aims at one person and hits another he is guilty of assault and battery on the party he hit, the injury being the direct, natural and probable consequence of the wrongful act.' The rule is not confined to criminal cases, as argued by respondents." (*Singer v. Marx* (1956) 144 Cal.App.2d 637, 642 [301 P.2d 440], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 455

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.01[3][c] (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.13, 58.15 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.22 (Matthew Bender)

California Civil Practice: Torts § 12:8 (Thomson Reuters)

1322–1399. Reserved for Future Use

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [touch [*name of plaintiff*]] [or] [cause [*name of plaintiff*] to be touched] with the intent to harm or offend [him/her/*nonbinary pronoun*]?**

   _____ Yes _____ No

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

2. **Did [*name of plaintiff*] consent to be touched?**

   _____ Yes _____ No

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

3. **Was [*name of plaintiff*] harmed [or offended] by [*name of defendant*]'s conduct?**

   _____ Yes _____ No

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

[4. Would a reasonable person in [*name of plaintiff*]'s situation have been offended by the touching?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised October 2004, April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1300, *Battery—Essential Factual Elements.*

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

Give the bracketed words in question 3 and bracketed question 4 only if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801,

814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [touch [***name of plaintiff***]] [or] [cause [***name of plaintiff***] to be touched] with the intent to harm or offend [him/her/***nonbinary pronoun***]?**

   _____ **Yes** _____ **No**

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

2. **Did [***name of plaintiff***] consent to be touched?**

   _____ **Yes** _____ **No**

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

3. **Was [***name of plaintiff***] harmed [or offended] by [***name of defendant***]'s conduct?**

   _____ **Yes** _____ **No**

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

[4. **Would a reasonable person in [***name of plaintiff***]'s situation have been offended by the touching?**

   _____ **Yes** _____ **No**

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

5. **Did [***name of defendant***] reasonably believe that [***name of plaintiff***] was going to harm [him/her/***nonbinary pronoun***/[***insert identification of other person***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, skip question 6 and answer question 7.

6. **Did [***name of defendant***] use only the amount of force that was reasonably necessary to protect [himself/herself/***nonbinary pronoun***/[***insert identification of other person***]]?**

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised October 2004, April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1300, *Battery—Essential Factual Elements*, and CACI No. 1304, *Self-Defense/Defense of Others.*

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

Give the bracketed words in question 3 and bracketed question 4 only if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

We answer the questions submitted to us as follows:

[1. Did [*name of defendant*] act, intending to cause a harmful [or an offensive] contact with [*name of plaintiff*] or intending to place [him/her/*nonbinary pronoun*] in fear of a harmful or an offensive contact?

_____ Yes _____ No

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

2. Did [*name of plaintiff*] reasonably believe that [he/she/*nonbinary pronoun*] was about to be touched in a harmful [or an offensive] manner?

_____ Yes _____ No

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

[1. Did [*name of defendant*] threaten to touch [*name of plaintiff*] in a harmful [or an offensive] manner?

_____ Yes _____ No

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

2. Did it reasonably appear to [*name of plaintiff*] that [he/she/*nonbinary pronoun*] was about to be touched in a harmful [or an offensive] manner?

_____ Yes _____ No

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

3. Did [*name of plaintiff*] consent to [*name of defendant*]'s conduct?

_____ Yes _____ No

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

4. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised October 2004, June 2005, April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1301, *Assault—Essential Factual Elements.*

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

As appropriate to the facts of the case, read one of the bracketed alternative sets of questions 1 and 2.

Give the bracketed words in question 2 only if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

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

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1303A. Battery by Law Enforcement Officer (Nondeadly Force)

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] intentionally touch [*name of plaintiff*] [or cause [*name of plaintiff*] to be touched]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] use unreasonable force on [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of plaintiff*] consent to the use of that force?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s use of unreasonable force a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016; Renumbered from CACI No. VF-1303 and Revised May 2021; Revised May 2024

Directions for Use

This verdict form is based on CACI No. 1305A, *Battery by Law Enforcement Officer (Nondeadly Force)—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual

findings that are required in order to calculate the amount of prejudgment interest.

VF-1303B. Battery by Peace Officer (Deadly Force)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] intentionally touch [***name of plaintiff/decedent***] [or cause [***name of plaintiff/decedent***] to be touched]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] use deadly force that was not necessary in defense of human life on [***name of plaintiff/decedent***]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s use of deadly force a substantial factor in causing [harm/death] to [***name of plaintiff/decedent***]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New May 2021; Revised May 2024

Directions for Use

This verdict form is based on CACI No. 1305B, *Battery by Peace Officer (Deadly Force)—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories.*

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest.* This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1304–VF-1399. Reserved for Future Use

FALSE IMPRISONMENT

1400. No Arrest Involved—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was wrongfully [restrained/confined/detained] by [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally deprived [***name of plaintiff***] of [his/her/***nonbinary pronoun***] freedom of movement by use of [physical barriers/force/threats of force/menace/fraud/deceit/unreasonable duress]; [and]**
2. **That the [restraint/confinement/detention] compelled [***name of plaintiff***] to stay or go somewhere for some appreciable time, however short;**
3. **That [***name of plaintiff***] did not [knowingly or voluntarily] consent;**
4. **That [***name of plaintiff***] was actually harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[If you find elements 1, 2, and 3 above, but you find that [*name of plaintiff***] was not actually harmed, [he/she/***nonbinary pronoun***] is still entitled to a nominal sum, such as one dollar.]**

[[*Name of plaintiff***] need not have been aware that [he/she/***nonbinary pronoun***] was being [restrained/confined/detained] at the time.]**

New September 2003; Revised December 2010, December 2011, May 2020

Directions for Use

In element 3, include the words "knowingly or voluntarily" if it is alleged that the plaintiff's consent was obtained by fraud. (See *Scofield v. Critical Air Medicine, Inc.* (1996) 45 Cal.App.4th 990, 1006, fn. 16 [52 Cal.Rptr.2d 915].)

Include the paragraph about nominal damages if there is a dispute about whether the plaintiff was actually harmed. (See *Scofield*, *supra*, 45 Cal.App.4th at p. 1007.) Include the last paragraph if applicable. (See *Id.* at pp. 1006–1007.)

If the defendant alleges the existence of a lawful privilege, the judge should read the applicable affirmative defense instructions immediately following this one.

Sources and Authority

- "The crime of false imprisonment is defined by Penal Code section 236 as the 'unlawful violation of the personal liberty of another.' The tort is identically defined. As we recently formulated it, the tort consists of the ' "nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable

length of time, however short." ' That length of time can be as brief as 15 minutes. Restraint may be effectuated by means of physical force, threat of force or of arrest, confinement by physical barriers, or by means of any other form of unreasonable duress." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 716 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citations omitted.)

- " '[T]he tort [of false imprisonment] consists of the " 'nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short.' " ' " (*Scofield, supra,* 45 Cal.App.4th at p. 1001, internal citations omitted.)
- "The only mental state required to be shown to prove false imprisonment is the intent to confine, or to create a similar intrusion." (*Fermino, supra,* 7 Cal.4th at p. 716.)
- "[False imprisonment] requires some restraint of the person and that he be deprived of his liberty or compelled to stay where he does not want to remain, or compelled to go where he does not wish to go; and that the person be restrained of his liberty without sufficient complaint or authority." (*Collins v. County of Los Angeles* (1966) 241 Cal.App.2d 451, 459–460 [50 Cal.Rptr. 586], internal citations omitted.)
- "[I]t is clear that force or the threat of force are not the only means by which the tort of false imprisonment can be achieved. Fraud or deceit or any unreasonable duress are alternative methods of accomplishing the tort." (*Scofield, supra,* 45 Cal.App.4th at p. 1002, internal citations omitted.)
- "Because '[t]here is no real or free consent when it is obtained through fraud' . . . the [plaintiffs'] confinement on the aircraft was nonconsensual and therefore actionable as a false imprisonment." (*Scofield*, *supra*, 45 Cal.App.4th at p. 1006, fn. 16, internal citations omitted.)
- "[C]ontemporaneous awareness of the false imprisonment is not, and need not be, an essential element of the tort." (*Scofield, supra,* 45 Cal.App.4th at p. 1006.)
- "[T]he critical question as to causation in intentional torts is whether the actor's conduct is a substantial factor in bringing about the type of harm which he intended from his original act." (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1536, fn. 6 [254 Cal.Rptr. 492], internal citations omitted.)
- "[T]he law of this state clearly allows a cause of action for false imprisonment notwithstanding the fact a plaintiff suffered merely nominal damage." (*Scofield, supra,* 45 Cal.App.4th at p. 1007.)
- "In addition to recovery for emotional suffering and humiliation, one subjected to false imprisonment is entitled to compensation for other resultant harm, such as loss of time, physical discomfort or inconvenience, any resulting physical illness or injury to health, business interruption, and damage to reputation, as well as punitive damages in appropriate cases." (*Scofield, supra,* 45 Cal.App.4th at p. 1009, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 499–502

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, §§ 42.01, 42.07, 42.20 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.17 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.40 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 13:8–13:10 (Thomson Reuters)

1401. False Arrest Without Warrant by Peace Officer—Essential Factual Elements

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[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was wrongfully arrested by [*name of defendant*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] arrested [*name of plaintiff*] without a warrant;**
2. **That [*name of plaintiff*] was [actually] harmed; and**
3. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

Give CACI No. 1402, *False Arrest Without Warrant—Affirmative Defense—Peace Officer—Probable Cause to Arrest*, if applicable, immediately after this instruction.

If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 2:

> If you find the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she/*nonbinary pronoun*] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is also entitled to additional damages if [he/she/*nonbinary pronoun*] proves the following:

The second sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the second element only if nominal damages are also being sought.

Sources and Authority

- "Arrest" Defined. Penal Code section 834.
- Public Employee Liability for False Arrest. Government Code section 820.4.
- "Peace Officer" Defined. Penal Code section 830 et seq.
- "False arrest and false imprisonment are the same tort. False arrest is a way of committing false imprisonment." (*Cox v. Griffin* (2019) 34 Cal.App.5th 440, 446, fn. 6 [246 Cal.Rptr.3d 185].)
- A person is liable for false imprisonment if he or she " 'authorizes, encourages, directs, or assists an officer to do an unlawful act, or procures an unlawful arrest, without process, or participates in the unlawful arrest . . . .' " (*Du Lac v. Perma Trans Products, Inc.* (1980) 103 Cal.App.3d 937, 941 [163 Cal.Rptr. 335], internal citation omitted.) Where a defendant "knowingly [gives] the police false

or materially incomplete information, of a character that could be expected to stimulate an arrest" . . . "such conduct can be a basis for imposing liability for false imprisonment." (*Id.* at p. 942.)

- "It has long been the law that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 592 [156 Cal.Rptr. 198, 595 P.2d 975].)
- "[T]he elements of the tort of false arrest are: defendant arrested plaintiffs without a warrant, plaintiffs were harmed, and defendant's conduct was a substantial factor in causing the harm." (*Carcamo v. Los Angeles County Sheriff's Dept.* (2021) 68 Cal.App.5th 608, 616 [283 Cal.Rptr.3d 647].)
- "False imprisonment and malicious prosecution are mutually inconsistent torts and only one, if either, will lie in this case. In a malicious criminal prosecution, the detention was malicious but it was accomplished properly, i.e., by means of a procedurally valid arrest. In contrast, if the plaintiff is arrested pursuant to a procedurally improper warrant or warrantless arrest, the remedy is a cause of action for false imprisonment." (*Cummings v. Fire Ins. Exch.* (1988) 202 Cal.App.3d 1407, 1422 [249 Cal.Rptr. 568].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 507–513

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.23 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

California Civil Practice: Torts § 13:20 (Thomson Reuters)

1402. False Arrest Without Warrant—Affirmative Defense—Peace Officer—Probable Cause to Arrest

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[*Name of defendant***] claims the arrest was not wrongful because [he/she/***nonbinary pronoun***] had the authority to arrest [***name of plaintiff***] without a warrant.**

[If [*name of defendant***] proves that [***insert facts that, if proved, would constitute reasonable cause to believe that plaintiff had committed a crime in defendant's presence***], then [***name of defendant***] had the authority to arrest [***name of plaintiff***] without a warrant.]**

[*or***]**

[If [*name of defendant***] proves that [***insert facts that, if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony, whether or not a felony had actually been committed***], then [***name of defendant***] had the authority to arrest [***name of plaintiff***] without a warrant.]**

New September 2003

Directions for Use

In the brackets, the judge must insert the fact or facts that are actually controverted and that may be necessary to arrive at the probable cause determination. There may be one or more facts or combinations of facts that are necessary to make this determination, in which case they can be phrased in the alternative.

If a criminal act is alleged as justification, it may be necessary to instruct whether the crime is a felony, misdemeanor, or public offense.

Penal Code section 836 provides, in part, that a warrantless arrest may be made if a person has committed a felony, although not in the officer's presence. While the requirement of probable cause is not explicitly stated, it would seem that the officer must always have probable cause at the time of the arrest and that subsequent conviction of a felony does not sanitize an improper arrest.

If the first bracketed paragraph is used, the judge should include "in the officer's presence" as part of the facts that the jury needs to find if there is a factual dispute on this point.

Sources and Authority

- Arrest Without a Warrant. Penal Code section 836(a).
- Felonies and Misdemeanors. Penal Code section 17(a).
- "Peace Officers" Defined. Penal Code section 830 et seq.
- "An officer is not liable for false imprisonment for the arrest without a warrant

of a person whom he has reasonable grounds to believe is guilty of a crime." (*Allen v. McCoy* (1933) 135 Cal.App. 500, 507–508 [27 P.2d 423].)

- "[P]robable cause for arrest in a criminal proceeding is the same as probable cause in a civil case for damages alleging false arrest." (*Carcamo v. Los Angeles County Sheriff's Dept.* (2021) 68 Cal.App.5th 608, 620–621 [283 Cal.Rptr.3d 647].)
- "It has long been the law that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest. Considerations of both a practical and policy nature underlie this rule. The existence of justification is a matter which ordinarily lies peculiarly within the knowledge of the defendant. The plaintiff would encounter almost insurmountable practical problems in attempting to prove the negative proposition of the nonexistence of any justification. This rule also serves to assure that official intermeddling is justified, for it is a serious matter to accuse someone of committing a crime and to arrest him without the protection of the warrant process." (*Cervantez v. J. C. Penney Co.* (1979) 24 Cal.3d 579, 592 [156 Cal.Rptr. 198, 595 P.2d 975], footnote and internal citations omitted.)
- "We look to whether facts known to the arresting officer 'at the moment the arrest was made' ' "would persuade someone of 'reasonable caution' that the person to be arrested has committed a crime." ' " (*Cornell v. City & County of San Francisco* (2017) 17 Cal.App.5th 766, 779 [225 Cal.Rptr.3d 356], internal citations omitted.)
- "If the facts that gave rise to the arrest are undisputed, the issue of probable cause is a question of law for the trial court. When, however, the facts that gave rise to the arrest are controverted, the trial court must instruct the jury as to what facts, if established, would constitute probable cause. 'The trier of fact's function in false arrest cases is to resolve conflicts in the evidence. Accordingly, where the evidence is conflicting with respect to probable cause, " 'it [is] the duty of the court to instruct the jury as to what facts, if established, would constitute probable cause.' " . . . The jury then decides whether the evidence supports the necessary factual findings.' " (*Levin v. United Air Lines, Inc.* (2008) 158 Cal.App.4th 1002, 1018–1019 [70 Cal.Rptr.3d 535], internal citations omitted.)
- "The legal standard we apply to assess probable cause is an objective one in which the subjective motivations of the arresting officers have no role. But it is an overstatement to say that what is in the mind of an arresting officer is wholly irrelevant, for the objective test of reasonableness is simply a measure by which we assess whether the circumstances as subjectively perceived by the officer provide a reasonable basis for the seizure." (*Cornell*, *supra*, 17 Cal.App.5th at p. 779, internal citations omitted.)
- "The arrests of plaintiffs were justified only if defendants can meet their burden to show the arresting officer had probable cause, which is objectively reasonable

cause to believe plaintiffs committed a crime. 'California courts speak of "reasonable cause" and "probable cause" interchangeably.' Can a law enforcement agency have objectively reasonable cause to believe plaintiffs committed a crime if deputies arrest them for violating a statute our Supreme Court declared void more than half a century ago? The answer is no." (*Carcamo, supra,* 68 Cal.App.5th at 618.)

- " 'Presence' is not mere physical proximity but is determined by whether the offense is apparent to the officer's senses." (*People v. Sjosten* (1968) 262 Cal.App.2d 539, 543–544 [68 Cal.Rptr. 832], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 509, 511

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.23 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.20 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.65 et seq. (Matthew Bender)

California Civil Practice: Torts §§ 13:22–13:24 (Thomson Reuters)

1403. False Arrest Without Warrant by Private Citizen—Essential Factual Elements

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[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was wrongfully arrested by [*name of defendant*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] intentionally caused [*name of plaintiff*] to be arrested without a warrant; [and]**
2. **That [*name of plaintiff*] was [actually] harmed; and**
3. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

[A private person does not need to physically restrain a suspect in order to make a citizen's arrest. A private person can make a citizen's arrest by calling for a peace officer, reporting the offense, and pointing out the suspect.]

New September 2003; Revised December 2011

Directions for Use

Give CACI No. 1404, *False Arrest Without Warrant—Affirmative Defense—Private Citizen—Probable Cause to Arrest*, if applicable, immediately after this instruction.

If the plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 2:

> If you find the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she/*nonbinary pronoun*] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is also entitled to additional damages if [he/she/*nonbinary pronoun*] proves the following:

The second sentence, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the second element only if nominal damages are also being sought.

Sources and Authority

- "Arrest" Defined. Penal Code section 834.
- "False arrest and false imprisonment are the same tort. False arrest is a way of committing false imprisonment." (*Cox v. Griffin* (2019) 34 Cal.App.5th 440, 446, fn. 6 [246 Cal.Rptr.3d 185].)
- "It has long been the law that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest." (*Cervantez v. J.C. Penney Co.*

(1979) 24 Cal.3d 579, 592 [156 Cal.Rptr. 198, 595 P.2d 975].)

- " '[T]he delegation of the physical act of arrest need not be express, but may be implied from the citizen's act of summoning an officer, reporting the offense, and pointing out the suspect.' " (*Johanson v. Dept. of Motor Vehicles* (1995) 36 Cal.App.4th 1209, 1216 [43 Cal.Rptr.2d 42], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 511, 512

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.22 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

California Civil Practice: Torts §§ 13:8–13:10 (Thomson Reuters)

1404. False Arrest Without Warrant—Affirmative Defense—Private Citizen—Probable Cause to Arrest

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[*Name of defendant***] claims the citizen's arrest was not wrongful because [he/she/***nonbinary pronoun***] had the authority to cause [***name of plaintiff***] to be arrested without a warrant.**

[If [*name of defendant***] proves that [***name of plaintiff***] committed or attempted to commit a crime in [***name of defendant***]'s presence, then the arrest was lawful.]**

[*or***]**

[If [*name of defendant***] proves that a felony was committed and that [***insert facts, that if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony***], then the arrest was lawful.]**

New September 2003

Directions for Use

The judge must insert in the brackets the fact or facts that are actually controverted and that may be necessary to arrive at the probable cause determination. There may be one or more facts or combinations of facts that are necessary to make this determination, in which case they can be phrased in the alternative.

If a criminal act is alleged as justification, it may be necessary to instruct whether the crime is a felony, misdemeanor, or public offense.

Penal Code section 837 provides, in part, that a warrantless arrest may be made if a person has committed a felony, although not in the citizen's presence. While the requirement of probable cause is not explicitly stated, it would seem that the citizen must always have probable cause at the time of the arrest and that subsequent conviction of a felony does not sanitize an improper arrest.

Sources and Authority

- Citizen's Arrest. Penal Code section 837.
- Felonies and Misdemeanors. Penal Code section 17(a).
- "What is probable cause, as has been often announced, is not a question of fact for the jury, but one of law for the court, to be decided in accordance with the circumstances at the time of the detention, unhampered by the outcome of the charge against the plaintiff of the public offense or by the conclusions of the trial court." (*Collyer v. S.H. Kress Co.* (1936) 5 Cal.2d 175, 181 [54 P.2d 20], internal citations omitted.)
- " 'Presence' is not mere physical proximity but is determined by whether the

offense is apparent to the [person]'s senses." (*People v. Sjosten* (1968) 262 Cal.App.2d 539, 543–544 [68 Cal.Rptr. 832], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 511, 512

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.22 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.19 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.60 et seq. (Matthew Bender)

California Civil Practice: Torts § 13:11 (Thomson Reuters)

1405. False Arrest With Warrant—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was wrongfully arrested by [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of defendant***] arrested [***name of plaintiff***];]**

   [*or***]**

   [That [*name of defendant***] intentionally caused [***name of plaintiff***] to be wrongfully arrested;]**

2. **That [***insert facts supporting the invalidity of the warrant or the unlawfulness of the arrest, e.g., "the warrant for [name of plaintiff]'s arrest had expired"***];**

3. **That [***name of plaintiff***] was [actually] harmed; and**

4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2011

Directions for Use

CACI No. 1406, *False Arrest With Warrant—Peace Officer—Affirmative Defense—"Good-Faith" Exception*, should be given after this instruction if that defense is asserted.

If the plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 3:

> If you find both of the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she/*nonbinary pronoun*] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is also entitled to additional damages if [he/she/*nonbinary pronoun*] proves the following:

The second sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the third element only if nominal damages are also being sought.

Sources and Authority

- Penal Code section 834.
- Public Employee Liability for False Arrest. Government Code section 820.4.
- "False arrest and false imprisonment are the same tort. False arrest is a way of committing false imprisonment." (*Cox v. Griffin* (2019) 34 Cal.App.5th 440, 446, fn. 6 [246 Cal.Rptr.3d 185].)
- " 'The action for false imprisonment is frequently alleged to have been

committed by reason of some wrongful arrest under some pretended or void order of some court, in which class of false imprisonment cases it is incumbent on the plaintiff to allege facts showing or tending to show that such arrest, under such court procedure, was wrongful, unauthorized and without any probable cause; . . . .' " (*Peters v. Bigelow* (1934) 137 Cal.App. 135, 139 [30 P.2d 450].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 514–516

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.25 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.20 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.77 et seq. (Matthew Bender)

California Civil Practice: Torts §§ 13:26–13:30 (Thomson Reuters)

1406. False Arrest With Warrant—Peace Officer—Affirmative Defense—"Good-Faith" Exception

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[*Name of defendant***] claims that the arrest was not wrongful. To succeed, [***name of defendant***] must prove all of the following:**

1. **That the arrest warrant would have appeared valid to a reasonably intelligent and informed person;**
2. **That [***name of defendant***] believed the warrant was valid; and**
3. **That [***name of defendant***] had a reasonable belief that [***name of plaintiff***] was the person referred to in the warrant.**

If [*name of defendant***] has proven all of the above, then the arrest was not wrongful.**

New September 2003

Directions for Use

The absence-of-malice requirement is satisfied if the officer believes the warrant is valid and the warrant is valid on its face, notwithstanding any personal hostility or ill will.

Sources and Authority

- Immunity for Good-Faith Acts. Civil Code section 43.55(a).
- "With regard to Civil Code section 43.55, the immunity set forth therein for arrests made pursuant to a regular warrant is only conditional. A failure of any condition prevents the immunity from attaching to a public entity or employee." (*Harden v. Bay Area Rapid Transit Dist.* (1989) 215 Cal.App.3d 7, 14 [263 Cal.Rptr. 549].)
- " 'Malice,' as that term is used in section 43.55, refers not to the actual physical execution of the warrant, but to the officer's state of mind in procuring or executing the warrant. For instance, malice for purposes of section 43.55 has been found in situations where the officer purposefully withheld exculpatory evidence from the magistrate issuing the arrest warrant, where the officer knowingly used false information in order to obtain the warrant, or where the officer executes the warrant with knowledge that it has been recalled or is no longer valid." (*Ting v. U.S.* (9th Cir. 1991) 927 F.2d 1504, 1514, internal citations omitted.)
- Courts have described the meaning of a warrant "regular on its face" as follows: "Unless there is a clear absence of jurisdiction on the part of the court or magistrate issuing the process, it is sufficient if upon its face it [the warrant] appears to be valid in the judgment of an ordinarily intelligent and informed

layman." (*Allison v. County of Ventura* (1977) 68 Cal.App.3d 689, 697 [137 Cal.Rptr. 542].)

- "Peace officers are not required to investigate the supportive legal proceedings from which a warrant issues. However, they are required to exercise the judgment of an 'ordinarily intelligent and informed layman' to observe the blatant and patent inadequacy of a warrant emanating from a civil action which directs arrest and neither sets bail nor informs the arrestee of the offense charged for which arrest is ordered." (*Allison, supra,* 68 Cal.App.3d at p. 703.)
- "A police officer must use reasonable prudence and diligence to determine whether a party being arrested is the one described in the warrant. The officer may not refuse to act upon information offered him which discloses the warrant is being served on the wrong person. But, the prudence and diligence required of an arresting officer in determining whether to make an arrest must be balanced against the need to act swiftly and to make on-the-spot evaluations, often under chaotic conditions." (*Lopez v. City of Oxnard* (1989) 207 Cal.App.3d 1, 7 [254 Cal.Rptr. 556].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 514–516

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.25 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment* (Matthew Bender)

California Civil Practice: Torts §§ 13:26–13:30 (Thomson Reuters)

1407. Unnecessary Delay in Processing/Releasing—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was wrongfully confined by [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] held [***name of plaintiff***] in custody;**
2. **That there was an unnecessary delay [***insert facts, e.g., "in taking [name of plaintiff] before a judge" or "in releasing [name of plaintiff]"***];**
3. **That [***name of plaintiff***] did not consent to the delay;**
4. **That [***name of plaintiff***] was [actually] harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2011

Directions for Use

If the plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 4:

> If you find the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she/*nonbinary pronoun*] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is also entitled to additional damages if [he/she/*nonbinary pronoun*] proves the following:

The second sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the fourth element only if nominal damages are also being sought.

Sources and Authority

- "Arrest" Defined. Penal Code section 834.
- Time for Arraignment. Penal Code section 825(a).
- Public Employee Liability for False Arrest. Government Code section 820.4.
- "The critical factor is the necessity for any delay in arraignment. These provisions do not authorize a two-day detention in all cases. Instead, 'a limit [is placed] upon what may be considered a necessary delay, and a detention of less than two days, if unreasonable under the circumstances, is in violation of the statute' and of the Constitution." (*People v. Thompson* (1980) 27 Cal.3d 303, 329 [165 Cal.Rptr. 289, 611 P.2d 883].)
- " '[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is

but one way of committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673 [123 Cal.Rptr. 525].)

- "In determining which delays are necessary, this court has rejected arguments that the delay was 'not unusual' or made 'the work of the police and the district attorney easier.' As the Court of Appeal recently observed, '[t]here is no authority to delay for the purpose of investigating the case. Subject to obvious health considerations the only permissible delay between the time of arrest and bringing the accused before a magistrate is the time necessary: to complete the arrest; to book the accused; to transport the accused to court; or the district attorney to evaluate the evidence for the limited purpose of determining what charge, if any, is to be filed; and to complete the necessary clerical and administrative tasks to prepare a formal pleading.' " (*Youngblood v. Gates* (1988) 200 Cal.App.3d 1302, 1319 [246 Cal.Rptr. 775], internal citations omitted.)
- "Although both false imprisonment and malicious prosecution may cause a person to be restrained or confined, under *Asgari* (*Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744 [63 Cal.Rptr.2d 842, 937 P.2d 273]) only damages attributable to injuries arising from false arrest and false imprisonment are compensable in an action under state law against a public entity and its employees. False imprisonment ends at the point malicious prosecution begins which, under *Asgari*, is the point at which the person is arraigned." (*County of Los Angeles v. Superior Court* (2000) 78 Cal.App.4th 212, 220–221 [92 Cal.Rptr.2d 668].)
- "[W]here the arrest is lawful, subsequent unreasonable delay in taking the person before a magistrate will not affect the legality of the arrest, although it will subject the offending person to liability for so much of the imprisonment as occurs after the period of necessary or reasonable delay." (*Dragna v. White* (1955) 45 Cal.2d 469, 473 [289 P.2d 428].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 518

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.26 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.24 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.110 et seq. (Matthew Bender)

California Civil Practice: Torts §§ 13:31–13:34 (Thomson Reuters)

1408. Affirmative Defense—Police Officer's Lawful Authority to Detain

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[*Name of defendant***] claims that the detention was not wrongful because [he/she/***nonbinary pronoun***] had a right to detain [***name of plaintiff***] for questioning or other limited investigation.**

If [*name of defendant***] has proven that [***insert facts, that if established, would constitute a reasonable suspicion***], then [***name of defendant***] had a right to detain [***name of plaintiff***] for questioning or other limited investigation.**

New September 2003

Directions for Use

This instruction is intended to apply to false imprisonment actions not involving an arrest. The inserted facts must support a finding of reasonable suspicion as a matter of law.

If the factual issues are too complicated, consider bifurcating the trial.

Sources and Authority

- "In an action for false arrest and imprisonment, the question of reasonable or probable cause is ordinarily one for the court, and not for the jury. When the facts are admitted or are beyond controversy, the question is to be determined by the court alone. When the facts are controverted or the evidence conflicting, the determination of their legal effect by the court is necessarily hypothetical and the jury is to be told that if it finds the facts in a designated way such facts do or do not amount to probable cause." (*Whaley v. Jansen* (1962) 208 Cal.App.2d 222, 227 [25 Cal.Rptr. 184].)
- "Although the line may at times be a fine one, there is a well-settled distinction in law between an arrest and a detention. A detention is a lesser intrusion upon a person's liberty requiring less cause and consisting of briefly stopping a person for questioning or other limited investigation." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 591, fn. 5 [156 Cal.Rptr. 198, 595 P.2d 975].)
- Government Code section 820.4 provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."
- "The Fourth Amendment to the United States Constitution prohibits seizures of persons, including brief investigative stops, when they are 'unreasonable.' Our state Constitution has a similar provision. A seizure occurs whenever a police officer 'by means of physical force or show of authority' restrains the liberty of a person to walk away." (*People v. Souza* (1994) 9 Cal.4th 224, 229 [36

Cal.Rptr.2d 569, 885 P.2d 982], internal citations omitted.)

- "A detention . . . has been said to occur 'if the suspect is not free to leave at will—if he is kept in the officer's presence by physical restraint, threat of force, or assertion of authority.' " (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 330 [27 Cal.Rptr.2d 406], internal citation omitted.)
- "It is settled that circumstances short of probable cause to make an arrest may justify a police officer stopping and briefly detaining a person for questioning or other limited investigation." (*In re Tony C.* (1978) 21 Cal.3d 888, 892 [148 Cal.Rptr. 366, 582 P.2d 957].)
- "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*Souza, supra,* 9 Cal.4th at p. 231.)
- "The state bears the burden of justifying a detention, as with all warrantless intrusions." (*People v. Wilkins* (1986) 186 Cal.App.3d 804, 809 [231 Cal.Rptr. 1], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 504

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.20 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.20 et seq. (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.65 et seq. (Matthew Bender)

1409. Common Law Right to Detain for Investigation

[*Name of defendant***] claims that the detention was not wrongful because [he/she/***nonbinary pronoun***] had a right to detain [***name of plaintiff***]. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] was the [owner/employer/employee/agent] of a business;**
2. **That [***name of defendant***] had reasonable grounds to believe that [***name of plaintiff***] had wrongfully [taken or damaged merchandise or other personal property] [secured services] from the business. If you find that [***insert facts, that if established, would constitute reasonable grounds***], then [***name of defendant***] had reasonable grounds to detain [***name of plaintiff***];**
3. **That [***name of defendant***] detained [***name of plaintiff***] for a reasonable amount of time; and**
4. **That [***name of defendant***] detained [***name of plaintiff***] in a reasonable manner.**

New September 2003

Sources and Authority

- "[W]e conclude that the merchant's probable cause defense is limited to suits based upon a detention and does not extend to suits based upon an arrest." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 591 [156 Cal.Rptr. 198, 595 P.2d 975].)
- "Ordinarily, the owner of property, in the exercise of his inherent right to protect the same, is justified in restraining another who seeks to interfere with or injure it." (*Collyer v. S.H. Kress Co.* (1936) 5 Cal.2d 175, 180 [54 P.2d 20], internal citation omitted.)
- "Merchants who detain individuals whom they have probable cause to believe are about to injure their property are privileged against a false imprisonment action. The detention itself must be carried out for a reasonable time and in a reasonable manner." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 716 [30 Cal.Rptr.2d 18, 872 P.2d 559].)
- "We note that the merchant's privilege is a defense to a false imprisonment action. As such, the lack of that privilege on defendant's part need not be specifically pleaded by plaintiff. Although a false imprisonment must involve an 'unlawful' restraint on an individual's liberty, [plaintiff's] allegations sufficiently plead that her confinement was unlawful. Moreover, the question of whether a detainment was reasonable is generally a question of fact." (*Fermino, supra,* 7 Cal.4th at p. 723, fn. 8, internal citations omitted.)

- Penal Code section 490.5(f) provides, in part: "A merchant may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the merchant has probable cause to believe the person to be detained is attempting to unlawfully take or has unlawfully taken merchandise from the merchant's premises."

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 504, 505

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.20 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.17 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.41 (Matthew Bender)

California Civil Practice: Torts § 13:11 (Thomson Reuters)

1410–1499. Reserved for Future Use

VF-1400. False Imprisonment—No Arrest Involved

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] intentionally deprive [*name of plaintiff*] of [his/her/*nonbinary pronoun*] freedom of movement by use of [physical barriers/force/threats of force/menace/fraud/deceit/unreasonable duress]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] consent?**

   _____ Yes _____ No

   If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1400, *No Arrest Involved—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 3 to direct the jury to skip question 4 and answer question 5 if they find no harm. Then add a new question 5: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 4 that the jury should not answer question 5. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*.

This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1401. False Imprisonment—No Arrest Involved—Affirmative Defense—Right to Detain for Investigation

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] intentionally deprive [***name of plaintiff***] of [his/her/***nonbinary pronoun***] freedom of movement by use of [physical barriers/force/threats of force/menace/fraud/deceit/unreasonable duress]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] have the right to detain [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] consent?**

   _____ Yes _____ No

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1400, *No Arrest Involved—Essential Factual Elements,* and CACI No. 1409, *Common Law Right to Detain for Investigation.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 4 to direct the jury to skip question 5 and answer question 6 if they find no harm. Then add a new question 6: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 5 that the jury should not answer question 6. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages,

especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1402. False Arrest Without Warrant

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [arrest [*name of plaintiff*]/intentionally cause [*name of plaintiff*] to be arrested] without a warrant?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

   Total Future Economic Damages: $_____]

   [c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

   [d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

   TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1401, *False Arrest Without Warrant by Peace Officer—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 2 to direct the jury to skip question 3 and answer question 4 if they find no harm. Then add a new question 4: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 3 that the jury should not answer question 4. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If specificity is not required, users do not have to itemize all the damages listed in question 3 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1403. False Arrest Without Warrant by Peace Officer—Affirmative Defense—Probable Cause to Arrest

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] arrest [***name of plaintiff***] without a warrant?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[Did [***insert facts that, if proved, would constitute reasonable cause to believe that plaintiff had committed a crime in defendant's presence***]?]**

   [or]

   [Did [*insert facts that, if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony, whether or not a felony had actually been committed***]?]**

   _____ Yes _____ No

   If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1401, *False Arrest Without Warrant by Peace Officer—Essential Factual Elements,* and CACI No. 1402, *False Arrest Without Warrant—Affirmative Defense—Peace Officer—Probable Cause to Arrest.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 3 to direct the jury to skip question 4 and answer question 5 if they find no harm. Then add a new question 5: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 4 that the jury should not answer question 5. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages,

especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1404. False Arrest Without Warrant by Private Citizen—Affirmative Defense—Probable Cause to Arrest

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] intentionally cause [***name of plaintiff***] to be arrested without a warrant?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[Did [***name of plaintiff***] commit or attempt to commit a crime in [***name of defendant***]'s presence?]**

   [or]

   [Was a felony committed and [*insert facts, that if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony***]?]**

   _____ **Yes** _____ **No**

   If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1403, *False Arrest Without Warrant by Private Citizen—Essential Factual Elements,* and CACI No. 1404, *False Arrest Without Warrant—Affirmative Defense—Private Citizen—Probable Cause to Arrest.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 3 to direct the jury to skip question 4 and answer question 5 if they find no harm. Then add a new question 5: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 4 that the jury should not answer question 5. Please note that the

committee has found no cases requiring the jury to determine the amount of nominal damages.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1405. False Arrest With Warrant

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [arrest [***name of plaintiff***]/intentionally cause [***name of plaintiff***] to be arrested]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[***Insert question regarding facts supporting the invalidity of the warrant or the unlawfulness of the arrest, e.g., "Had the warrant for [name of plaintiff]'s arrest expired?"***]**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1405, *False Arrest With Warrant—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 3 to direct the jury to skip question 4 and answer question 5 if they find no harm. Then add a new question 5: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 4 that the jury should not answer question 5. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*.

This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1406. False Arrest With Warrant—Peace Officer—Affirmative Defense—"Good-Faith" Exception

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] arrest [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[***Insert question regarding facts supporting the invalidity of the warrant or the unlawfulness of the arrest, e.g., "Had the warrant for [name of plaintiff]'s arrest expired?"***]**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Would the arrest warrant have appeared valid to a reasonably intelligent and informed person?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, skip questions 4 and 5 and answer question 6.

4. **Did [***name of defendant***] believe the warrant was valid?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. **Did [***name of defendant***] have a reasonable belief that [***name of plaintiff***] was the person referred to in the warrant?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 6 is yes, then answer question 7. If you

answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1405, *False Arrest With Warrant—Essential Factual Elements,* and CACI No. 1406, *False Arrest With Warrant—Peace Officer—Affirmative Defense—"Good-Faith" Exception.*

The special verdict forms in this section are intended only as models. They may

need to be modified depending on the facts of the case.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 6 to direct the jury to skip question 7 and answer question 8 if they find no harm. Then add a new question 8: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 7 that the jury should not answer question 8. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1407. False Imprisonment—Unnecessary Delay in Processing/ Releasing

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We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] hold [*name of plaintiff*] in custody?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was there an unnecessary delay [***insert facts, e.g., "in taking [name of plaintiff] before a judge" or "in releasing [name of plaintiff]"***]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of plaintiff*] consent to the delay?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1407, *Unnecessary Delay in Processing/Releasing—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the jury returns a verdict of no harm, the plaintiff is still entitled to an award of nominal damages, such as one dollar. If nominal damages are being sought, modify the directions after question 4 to direct the jury to skip question 5 and answer question 6 if they find no harm. Then add a new question 6: "What amount of nominal damages do you award [*name of plaintiff*]?" If this is done, add a direction after question 5 that the jury should not answer question 6. Please note that the committee has found no cases requiring the jury to determine the amount of nominal damages.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1408–VF-1499. Reserved for Future Use

MALICIOUS PROSECUTION

1500. Former Criminal Proceeding—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] wrongfully caused a criminal proceeding to be brought against [him/her/*nonbinary pronoun*/it]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was actively involved in causing [*name of plaintiff*] to be arrested [and prosecuted] [or in causing the continuation of the prosecution];**

[2. That the criminal proceeding ended in [*name of plaintiff*]'s favor;]

[3. That no reasonable person in [*name of defendant*]'s circumstances would have believed that there were grounds for causing [*name of plaintiff*] to be arrested [and prosecuted];]

4. **That [*name of defendant*] acted primarily for a purpose other than to bring [*name of plaintiff*] to justice;**

5. **That [*name of plaintiff*] was harmed; and**

6. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 2 above, whether the criminal proceeding ended in [his/her/*nonbinary pronoun*/its] favor. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 3 above, whether a reasonable person in [*name of defendant*]'s circumstances would have believed that there were grounds for causing [*name of plaintiff*] to be arrested [and prosecuted]. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008, June 2015, May 2018

Directions for Use

Give this instruction in a malicious prosecution case based on an underlying

criminal prosecution. If there is an issue as to what it means to be "actively involved" in element 1, also give CACI No. 1504, *Former Criminal Proceeding—"Actively Involved" Explained.*

In elements 1 and 3 and in the next-to-last paragraph, include the bracketed references to prosecution if the arrest was without a warrant. Whether prosecution is required in an arrest on a warrant has not definitively been resolved. (See *Van Audenhove v. Perry* (2017) 11 Cal.App.5th 915, 919–925 [217 Cal.Rptr.3d 843].)

Malicious prosecution requires that the criminal proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. (See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury.

Element 4 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.
- "Malicious prosecution consists of initiating or procuring the arrest and prosecution of another under lawful process, but from malicious motives and without probable cause." (*Cedars-Sinai Medical Center v. Superior Court* (1988) 206 Cal.App.3d 414, 417 [253 Cal.Rptr. 561], internal citation omitted.)
- "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118], internal citations omitted.)
- "[A] cause of action for malicious prosecution cannot be premised on an arrest that does not result in formal charges (at least when the arrest is not pursuant to

a warrant)." (*Van Audenhove*, *supra*, 11 Cal.App.5th at p. 917 [rejecting Rest.2d Torts, § 654. subd. (2)(c)].)

- "Cases dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime." (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720 [117 Cal.Rptr. 241, 527 P.2d 865], internal citations omitted.)
- "[T]he effect of the approved instruction [in *Dreux v. Domec* (1861) 18 Cal. 83] was to impose liability upon one who had not taken part until after the commencement of the prosecution." (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 263 [138 Cal.Rptr. 654].)
- "When, as here, the claim of malicious prosecution is based upon initiation of a criminal prosecution, the question of probable cause is whether it was objectively reasonable for the defendant . . . to suspect the plaintiff . . . had committed a crime." (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 465 [156 Cal.Rptr.3d 901].)
- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, . . . the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when . . . there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 881, internal citations omitted.)
- "Admittedly, the fact of the grand jury indictment gives rise to a prima facie case of probable cause, which the malicious prosecution plaintiff must rebut. However, as respondents' own authorities admit, that rebuttal may be by proof that the indictment was based on false or fraudulent testimony." (*Williams v. Hartford Ins. Co.* (1983) 147 Cal.App.3d 893, 900 [195 Cal.Rptr. 448].)
- "Acquittal of the criminal charge, in the criminal action, did not create a conflict of evidence on the issue of probable cause. [Citations.]" (*Verdier v. Verdier* (1957) 152 Cal.App.2d 348, 352, fn. 3 [313 P.2d 123].)
- " '[T]he plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.' Termination of the prior proceeding is not necessarily favorable simply because the party prevailed in the prior proceeding; the termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky, supra,* 64 Cal.App.4th at p. 128, internal citations omitted.)
- " 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of

lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge of crime against an innocent person.' " (*Cote v. Henderson* (1990) 218 Cal.App.3d 796, 804 [267 Cal.Rptr. 274], quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150 [114 P.2d 335].)

- "[I]n most cases, a person who merely alerts law enforcement to a possible crime . . . is not liable if . . . law enforcement, on its own, after an independent investigation, decides to prosecute." (*Cox v. Griffin* (2019) 34 Cal.App.5th 440, 452 [246 Cal.Rptr.3d 185].)
- "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)
- "Generally, the requirements of the doctrine of collateral estoppel 'will be met when courts are asked to give preclusive effect to preliminary hearing probable cause findings in subsequent civil actions for false arrest and malicious prosecution. [Citation.]' 'A determination of probable cause at a preliminary hearing may preclude a suit for false arrest or for malicious prosecution'].) 'One notable exception to this rule would be in a situation where the plaintiff alleges that the arresting officer lied or fabricated evidence presented at the preliminary hearing. [Citation.] When the officer misrepresents the nature of the evidence supporting probable cause and that issue is not raised at the preliminary hearing, a finding of probable cause at the preliminary hearing would not preclude relitigation of the issue of integrity of the evidence.' Defendants argue, and we agree, that the stated exception itself contains an exception—i.e., if the plaintiff alleges that the arresting officer lied or fabricated evidence at the preliminary hearing, plaintiff challenges that evidence at the preliminary hearing as being false, and the magistrate decides the credibility issue in the arresting officer's favor, then collateral estoppel still may preclude relitigation of the issue in a subsequent civil proceeding involving probable cause." (*Greene v. Bank of America* (2015) 236 Cal.App.4th 922, 933 [186 Cal.Rptr.3d 887], internal citations omitted.)
- "The plea of nolo contendere is considered the same as a plea of guilty. Upon a plea of nolo contendere the court shall find the defendant guilty, and its legal effect is the same as a plea of guilty for all purposes. It negates the element of a favorable termination, which is a prerequisite to stating a cause of action for malicious prosecution." (*Cote, supra,* 218 Cal.App.3d at p. 803, internal citation omitted.)
- " '*Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.*' " (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 185 [156 Cal.Rptr. 745], disapproved on other grounds in *Sheldon Appel Co., supra*, 47 Cal.3d at p. 882, original italics, internal citations omitted.)

- " 'For purposes of a malicious prosecution claim, malice "is not limited to actual hostility or ill will toward the plaintiff. . . ." [Citation.]' '[I]f the defendant had no substantial grounds for believing in the plaintiff's guilt, but, nevertheless, instigated proceedings against the plaintiff, it is logical to infer that the defendant's motive was improper.' " (*Greene, supra*, 216 Cal.App.4th at pp. 464–465, internal citation omitted.)
- "Malice may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff." (*Verdier, supra*, 152 Cal.App.2d at p. 354.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 552–570, 605

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* § 43.01 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.10 et seq. (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.20–147.53 (Matthew Bender)

1501. Wrongful Use of Civil Proceedings

[*Name of plaintiff*] claims that [*name of defendant*] wrongfully brought a lawsuit against [him/her/*nonbinary pronoun*/it]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was actively involved in bringing [or continuing] the lawsuit;**

[2. That the lawsuit ended in [*name of plaintiff*]'s favor;]

[3. That no reasonable person in [*name of defendant*]'s circumstances would have believed that there were reasonable grounds to bring the lawsuit against [*name of plaintiff*];]

4. **That [*name of defendant*] acted primarily for a purpose other than succeeding on the merits of the claim;**

5. **That [*name of plaintiff*] was harmed; and**

6. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 2 above, whether the earlier lawsuit ended in [his/her/*nonbinary pronoun*/its] favor. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 3 above, whether [*name of defendant*] had reasonable grounds for bringing the earlier lawsuit against [him/her/*nonbinary pronoun*/it]. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008

Directions for Use

Malicious prosecution requires that the proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were

any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, the jury may be required to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. (See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury to decide.

Element 4 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.
- "To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor; (2) was brought without probable cause; and (3) was initiated with malice." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50 [118 Cal.Rptr. 184, 529 P.2d 608], internal citations omitted.)
- "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118], internal citations omitted.)
- "The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings." (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 59 [75 Cal.Rptr.2d 83], internal citation omitted.)

- "[The litigation privilege of Civil Code section 47] has been interpreted to apply to virtually all torts except malicious prosecution." (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524].)
- "Liability for malicious prosecution is not limited to one who initiates an action. A person who did not file a complaint may be liable for malicious prosecution if he or she 'instigated' the suit or 'participated in it at a later time.' " (*Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 873 [193 Cal.Rptr.3d 912].)
- "[A] cause of action for malicious prosecution lies when predicated on a claim for affirmative relief asserted in a cross-pleading even though intimately related to a cause asserted in the complaint." (*Bertero, supra,* 13 Cal.3d at p. 53.)
- "A claim for malicious prosecution need not be addressed to an entire lawsuit; it may . . . be based upon only some of the causes of action alleged in the underlying lawsuit." (*Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 333 [109 Cal.Rptr.3d 143].)
- "[F]avorable termination requires favorable resolution of the underlying action in its entirety, not merely a single cause of action. '[I]f the defendant in the underlying action prevails on all of the plaintiff's claims, he or she may successfully sue for malicious prosecution if any one of those claims was subjectively malicious and objectively unreasonable. But if the underlying plaintiff succeeds on any of his or her claims, the favorable termination requirement is unsatisfied and the malicious prosecution action cannot be maintained.' " (*Citizens of Humanity, LLC v. Ramirez* (2021) 63 Cal.App.5th 117, 128 [277 Cal.Rptr.3d 501], internal citation omitted.)
- "[A] lawyer is not immune from liability for malicious prosecution simply because the general area of law at issue is complex and there is no case law with the same facts that establishes that the underlying claim was untenable. Lawyers are charged with the responsibility of acquiring a reasonable understanding of the law governing the claim to be alleged. That achieving such an understanding may be more difficult in a specialized field is no defense to alleging an objectively untenable claim." (*Franklin Mint Co.*, *supra*, 184 Cal.App.4th at p. 346.)
- "Our repeated references in *Bertero* to the types of harm suffered by an 'individual' who is forced to defend against a baseline suit do not indicate . . . that a malicious prosecution action can be brought only by an individual. On the contrary, there are valid policies which would be furthered by allowing nonindividuals to sue for malicious prosecution." (*City of Long Beach v. Bozek* (1982) 31 Cal.3d 527, 531 [183 Cal.Rptr. 86, 645 P.2d 137], reiterated on remand from United States Supreme Court at 33 Cal.3d 727 [but holding that public entity cannot sue for malicious prosecution].)
- "[T]he courts have refused to permit malicious prosecution claims when they are based on a prior proceeding that is (1) less formal or unlike the process in the superior court (i.e., a small claims hearing, an investigation or application not resulting in a formal proceeding), (2) purely defensive in nature, or (3) a

continuation of an existing proceeding." (*Merlet, supra,* 64 Cal.App.4th at p. 60.)

- "[I]t is not enough that the present plaintiff (former defendant) prevailed in the action. The termination must ' "reflect on the merits," ' and be such that it 'tended to indicate [the former defendant's] innocence of or lack of responsibility for the alleged misconduct.' " (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 450 [98 Cal.Rptr.3d 183], internal citations omitted.)
- " 'The entry of summary judgment for the defense on an underlying claim on grounds of insufficient evidence does not establish as a matter of law that the litigant necessarily can "state[] and substantiate[]" . . . a subsequent malicious prosecution claim.' " (*Cuevas-Martinez v. Sun Salt Sand, Inc*. (2019) 35 Cal.App.5th 1109, 1120 [248 Cal.Rptr.3d 200].)
- " '[A] voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity, does not constitute a favorable termination because it does not reflect on the substantive merits of the underlying claim. . . .' " (*Drummond, supra,* 176 Cal.App.4th at p. 456.)
- "[Code of Civil Procedure] Section 581c, subdivision (c) provides that where a motion for judgment of nonsuit is granted, 'unless the court in its order for judgment otherwise specifies, the judgment of nonsuit operates as an adjudication upon the merits.' . . . [¶] We acknowledge that not every judgment of nonsuit should be grounds for a subsequent malicious prosecution action. Some will be purely technical or procedural and will not reflect the merits of the action. In such cases, trial courts should exercise their discretion to specify that the judgment of nonsuit shall not operate as an adjudication upon the merits." (*Nunez, supra*, 241 Cal.App.4th at p. 874.)
- " ' "[T]hat a malicious prosecution suit may be maintained where only one of several claims in the prior action lacked probable cause [citation] does not alter the rule there must first be a favorable termination of the *entire* action." ' Thus, if the defendant in the underlying action prevails on *all* of the plaintiff's claims, he or she may successfully sue for malicious prosecution if any one of those claims was subjectively malicious and objectively unreasonable. But if the underlying plaintiff succeeds on any of his or her claims, the favorable termination requirement is unsatisfied and the malicious prosecution action cannot be maintained." (*Lane v. Bell* (2018) 20 Cal.App.5th 61, 64 [228 Cal.Rptr.3d 605], original italics, internal citation omitted.)
- "We hold that a malicious prosecution plaintiff, who has succeeded in all respects in defending a multiple-claim case, need not show that *all* such claims were resolved on the merits as long as *at least one claim* was terminated on the merits." (*Maleti v. Wickers* (2022) 82 Cal.App.5th 181, 195 [298 Cal.Rptr.3d 284], original italics, additional emphasis omitted.)
- " ' "A voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may constitute a decision on the merits. [Citations.] 'It is not enough, however, merely to show that the proceeding was dismissed.' [Citation.] The reasons for the dismissal of the action must be

examined to determine whether the termination reflected on the merits." [Citations.]' Whether that dismissal is a favorable termination for purposes of a malicious prosecution claim depends on whether the dismissal of the [earlier] Lawsuit is considered to be on the merits reflecting [plaintiff's 'innocence' of the misconduct alleged." (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1524 [141 Cal.Rptr.3d 338], internal citations omitted.)

- "If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)
- "[W]hen a dismissal results from negotiation, settlement, or consent, a favorable termination is normally not recognized. Under these latter circumstances, the dismissal reflects ambiguously on the merits of the action." (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 184–185 [156 Cal.Rptr. 745], internal citations omitted, disapproved on other grounds in *Sheldon Appel Co., supra,* 47 Cal.3d at p. 882.)
- "Not every case in which a terminating sanctions motion is granted necessarily results in a 'favorable termination.' But where the record from the underlying action is devoid of any attempt during discovery to substantiate allegations in the complaint, and the court's dismissal is justified by the plaintiff's lack of evidence to submit the case to a jury at trial, a prima facie showing of facts sufficient to satisfy the 'favorable termination' element of a malicious prosecution claim is established . . . ." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 219 [105 Cal.Rptr.3d 683].)
- "[T]he existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury . . . . [¶] [It] requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors . . . ." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 875.)
- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, . . . the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when . . . there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 881, internal citations omitted.)
- "Whereas the malice element is directly concerned with the *subjective* mental state of the defendant in instituting the prior action, the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was

legally tenable." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 878, original italics.)

- " 'The benchmark for legal tenability is whether any reasonable attorney would have thought the claim was tenable. [Citation.]' " (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 114 [151 Cal.Rptr.3d 117], internal citation omitted.)
- " 'The facts to be analyzed for probable cause are those known to the defendant [in the malicious prosecution action] at the time the underlying action was filed.' " (*Walsh v. Bronson* (1988) 200 Cal.App.3d 259, 264 [245 Cal.Rptr. 888], internal citations omitted.)
- "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 [46 Cal.Rptr.3d 638, 139 P.3d 30].)
- "[W]e reject their contention that unpled hidden theories of liability are sufficient to create probable cause." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1542 [161 Cal.Rptr.3d 700].)
- "California courts have held that victory at *trial*, though reversed on appeal, conclusively establishes probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 383 [90 Cal.Rptr.2d 408], original italics.)
- "California courts have long embraced the so-called interim adverse judgment rule, under which 'a trial court judgment or verdict in favor of the plaintiff or prosecutor in the underlying case, unless obtained by means of fraud or perjury, establishes probable cause to bring the underlying action, even though the judgment or verdict is overturned on appeal or by later ruling of the trial court.' This rule reflects a recognition that '[c]laims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness.' That is to say, if a claim succeeds at a hearing on the merits, then, unless that success has been procured by certain improper means, the claim cannot be 'totally and completely without merit.' Although the rule arose from cases that had been resolved after trial, the rule has also been applied to the 'denial of defense summary judgment motions, directed verdict motions, and similar efforts at pretrial termination of the underlying case.' " (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 776–777 [221 Cal.Rptr.3d 432, 400 P.3d 1], internal citations omitted.)
- "[T]he fraud exception requires ' "knowing use of false and perjured testimony." ' " (*Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 452 [117 Cal.Rptr.3d 3].)
- "Probable cause may be present even where a suit lacks merit. . . . Suits which all reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this

subgroup of meritless suits present[s] no probable cause." (*Roberts, supra,* 76 Cal.App.4th at p. 382.)

- "[A]n attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54, 87 P.3d 802].)
- "Although attorneys may rely on their clients' allegations at the outset of a case, they may not continue to do so if the evidence developed through discovery indicates the allegations are unfounded or unreliable." (*Cuevas-Martinez, supra*, 35 Cal.App.5th at p. 1121.)
- "[W]here several claims are advanced in the underlying action, each must be based on probable cause." (*Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 459 [197 Cal.Rptr.3d 227].)
- "As an element of the tort of malicious prosecution, malice at its core refers to an improper *motive* for bringing the prior action. As an element of liability it reflects the core function of the tort, which is to secure compensation for harm inflicted by *misusing* the judicial system, i.e., using it for something other than to enforce legitimate rights and secure remedies to which the claimant may tenably claim an entitlement. Thus the cases speak of malice as being present when a suit is actuated by hostility or ill will, or for some purpose other than to secure relief. It is also said that a plaintiff acts with malice when he asserts a claim with knowledge of its falsity, because one who seeks to establish such a claim 'can only be motivated by an improper purpose.' A lack of probable cause will therefore support an inference of malice." (*Drummond, supra,* 176 Cal.App.4th at pp. 451–452, original italics, internal citations omitted.)
- "A lack of probable cause is a factor that may be considered in determining if the claim was prosecuted with malice [citation], but the lack of probable cause must be supplemented by other, additional evidence." (*Silas v. Arden* (2013) 213 Cal.App.4th 75, 90 [152 Cal.Rptr.3d 255].)
- "Because malice concerns the former plaintiff's actual mental state, it necessarily presents a question of fact." (*Drummond, supra,* 176 Cal.App.4th at p. 452.)
- " 'Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence.' '[M]alice can be inferred when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause.' " (*Cuevas-Martinez, supra*, 35 Cal.App.5th at p. 1122, original italics.)
- "Negligence does not equate with malice. Nor does the negligent filing of a case necessarily constitute the malicious prosecution of that case." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1468 [242 Cal.Rptr. 562].)
- "The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose." (*Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 494 [78 Cal.Rptr.2d 142], internal citations omitted.)

- "Malice does not require that the defendants harbor actual ill will toward the plaintiff in the malicious prosecution case, and liability attaches to attitudes that range ' "from open hostility to indifference. [Citations.]" ' " (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1113–1114 [142 Cal.Rptr.3d 646], internal citations omitted.)
- " ' "Suits with the hallmark of an improper purpose" include, but are not necessarily limited to, "those in which: ' ". . . (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim." ' " [Citation.] [¶] Evidence tending to show that the defendants did not subjectively believe that the action was tenable is relevant to whether an action was instituted or maintained with malice. [Citation.]' " (*Oviedo, supra,* 212 Cal.App.4th at pp. 113–114.)
- "Although *Zamos* [*supra*] did not explicitly address the malice element of a malicious prosecution case, its holding and reasoning compel us to conclude that malice formed after the filing of a complaint is actionable." (*Daniels, supra*, 182 Cal.App.4th at p. 226.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 554, 557, 562–569, 571–606

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 2-C, *Liability For Unfair Collection Practices—Tort Liability*, ¶ 2:428 (The Rutter Group)

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.10 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.10 et seq. (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, § 147.20 et seq. (Matthew Bender)

1502. Wrongful Use of Administrative Proceedings

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully brought an administrative proceeding against [him/her/***nonbinary pronoun***/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was actively involved in bringing [or continuing] the administrative proceeding;**
2. **That [***name of administrative body***] did not conduct an independent investigation;**

[3. That the proceeding ended in [*name of plaintiff***]'s favor;]**

[4. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were reasonable grounds to bring the proceeding against [***name of plaintiff***];]**

5. **That [***name of defendant***] acted primarily for a purpose other than succeeding on the merits of the claim;**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether the criminal proceeding ended in [his/her/***nonbinary pronoun***/its] favor. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 4 above, whether a reasonable person in [***name of defendant***]'s circumstances would have believed that there were reasonable grounds for bringing the proceeding against [***name of plaintiff***]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008

Directions for Use

Malicious prosecution requires that the proceeding have ended in the plaintiff's favor (element 3) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 4). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or didn't know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 4 and also the bracketed part of the instruction that refers to element 4.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury.

Element 5 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.
- " 'Where the prosecuting officer acts on an independent investigation of his own instead of on the statement of facts by the party making the complaint, the latter has not caused the prosecution and cannot be held liable in an action for malicious prosecution.' " (*Werner v. Hearst Publications, Inc.* (1944) 65 Cal.App.2d 667, 673 [151 P.2d 308], internal citation omitted.)
- "We adopt the rule set forth in section 680 of the Restatement of Torts and hold that an action for malicious prosecution may be founded upon the institution of a proceeding before an administrative agency." (*Hardy v. Vial* (1957) 48 Cal.2d 577, 581 [311 P.2d 494].)
- Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."
- " 'Where the prosecuting officer acts on an independent investigation of his own instead of on the statement of facts by the party making the complaint, the latter has not caused the prosecution and cannot be held liable in an action for malicious prosecution.' " (*Werner v. Hearst Publications, Inc.* (1944) 65

Cal.App.2d 667, 673 [151 P.2d 308], internal citation omitted.)

- "[W]e hold that the State Bar, not respondents, initiated, procured or continued the disciplinary proceedings of [plaintiff]. Therefore, [plaintiff] failed to allege the elements required for a malicious prosecution of an administrative proceeding against respondents." (*Stanwyck v. Horne* (1983) 146 Cal.App.3d 450, 459 [194 Cal.Rptr. 228].)
- "The [Board of Medical Quality Assurance] is similar to the State Bar Association. Each is empowered and directed to conduct an independent investigation of all complaints from the public prior to the filing of an accusation." (*Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125 [195 Cal.Rptr. 5], internal citation omitted.)
- "*Hogen* and *Stanwyck* placed an additional pleading burden upon the plaintiff in a malicious prosecution case based upon the favorable termination of an administrative proceeding. Those cases held that since it is the administrative body, and not the individual initiating the complaint, which actually files the disciplinary proceeding, a cause of action for malicious prosecution will not lie if the administrative body conducts an independent preliminary investigation prior to initiating disciplinary proceedings." (*Johnson v. Superior Court* (1994) 25 Cal.App.4th 1564, 1568 [31 Cal.Rptr.2d 199].)
- "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citation omitted.)
- The same rules for determining probable cause in the wrongful institution of civil proceedings apply to cases alleging the wrongful institution of administrative proceedings. (*Nicholson v. Lucas* (1994) 21 Cal.App.4th 1657, 1666, fn. 4 [26 Cal.Rptr.2d 778].)
- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, . . . the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when . . . there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 881, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 607–610

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, §§ 357.10–357.32 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.20–147.53 (Matthew Bender)

1503. Affirmative Defense—Proceeding Initiated by Public Employee Within Scope of Employment (Gov. Code, § 821.6)

[*Name of public entity defendant***] claims that it cannot be held responsible for [***name of plaintiff***]'s harm, if any, because the [***specify proceeding, e.g., civil action***] was initiated by its employee who was acting within the scope of [his/her/***nonbinary pronoun***] employment. To establish this defense, [***name of defendant***] must prove that [***name of employee***] was acting within the scope of [his/her/***nonbinary pronoun***] employment.**

New September 2003; Renumbered from CACI No. 1506 June 2013; Revised May 2018

Directions for Use

Give this instruction if there is an issue of fact as to whether the proceeding giving rise to the alleged malicious prosecution claim was initiated as a governmental action. Government Code section 821.6 provides immunity from liability for malicious prosecution for a public employee who is acting within the scope of employment, even if the employee acts maliciously and without probable cause. If the employee is immune, then there can be no vicarious liability on the entity. (Gov. Code, § 815.2.) This immunity is not unqualified, however; it applies only if the employee was acting within the scope of employment. (*Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 904 [59 Cal.Rptr.2d 470].)

For an instruction on scope of employment, see CACI No. 3720, *Scope of Employment*, in the Vicarious Responsibility series.

Sources and Authority

- Public Entity Vicarious Liability for Acts of Employee. Government Code section 815.2.
- Public Employee Immunity. Government Code section 821.6.
- "The defendants did not enjoy an unqualified immunity from suit. Their immunity would have depended on their proving by a preponderance of the evidence [that] they were acting within the scope of their employment in doing the acts alleged to constitute malicious prosecution." (*Tur*, *supra*, 51 Cal.App.4th at p. 904 [failure to instruct jury under section 821.6 was prejudicial error].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 434 et seq.

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* § 43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.23 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, § 147.31 (Matthew Bender)

1504. Former Criminal Proceeding—"Actively Involved" Explained

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[*Name of defendant*] was "actively involved" in causing [*name of plaintiff*] to be prosecuted [or in causing the continuation of the prosecution] if after learning that there was no probable cause that [*name of plaintiff*] had committed a crime, [he/she/*nonbinary pronoun*] sought out the police or prosecutorial authorities and falsely reported facts to them indicating that [*name of plaintiff*] had committed a crime. Merely giving testimony or responding to law enforcement inquiries is not active involvement.

New June 2015

Directions for Use

Give this instruction in a malicious prosecution case arising from an earlier criminal proceeding. This instruction explains what is meant by "active involvement" in a criminal prosecution, as used in element 1 of CACI No. 1500, *Former Criminal Proceeding—Essential Factual Elements*.

Sources and Authority

- "Although a criminal prosecution normally is commenced through the action of government authorities, a private person may be liable for malicious prosecution under certain circumstances based on his or her role in the criminal proceeding. 'The relevant law is clear: "One may be civilly liable for malicious prosecution without personally signing the complaint initiating the criminal proceeding." ' " (*Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1481 [178 Cal.Rptr.3d 363, internal citation omitted.)
- "Malicious prosecution consists of initiating or procuring the arrest and prosecution of another under *lawful process*, but from *malicious motives* and *without probable cause*. . . . . [Italics in original.] The test is whether the defendant was actively instrumental in causing the prosecution.' " (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720 [117 Cal. Rptr. 241, 527 P.2d 865], original italics.)
- "Cases dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime." (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 464 [156 Cal.Rptr.3d 901].)
- "Public policy requires that 'private persons who aid in the enforcement of the law should be given an effective protection against the prejudice which is likely to arise from the termination of the prosecution in favor of the accused.' " (*Cedars-Sinai Medical Ctr. v. Superior Court* (1988) 206 Cal.App.3d 414, 418 [253 Cal.Rptr. 561].)
- "[M]erely giving testimony and responding to law enforcement inquiries in an

active criminal proceeding does not constitute malicious prosecution." (*Zucchet*, *supra*, 229 Cal.App.4th at p. 1482.)

- "[T]o create liability for malicious prosecution . . . [t]he person must 'take [some affirmative action to encourage the prosecution by way of advice or pressure, as opposed to merely providing information.' " (*Zucchet*, *supra*, 229 Cal.App.4th at p. 1485.)
- "According to section 655 of the Restatement, '[a] private person who takes an active part in continuing or procuring the continuation of criminal proceedings initiated by himself or by another is subject to the same liability for malicious prosecution as if he had then initiated the proceedings.' " (*Zucchet*, *supra*, 229 Cal.App.4th at p. 1483.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 561

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.03 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.19 (Matthew Bender)

1505–1509. Reserved for Future Use

1510. Affirmative Defense—Reliance on Counsel

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] had reasonable grounds for [causing or continuing the criminal proceeding/ bringing or continuing a [lawsuit/administrative proceeding]] because [he/she/***nonbinary pronoun***] was relying on the advice of an attorney. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] made a full and honest disclosure of all the important facts known to [him/her/***nonbinary pronoun***] to the [district attorney/attorney]; and**
2. **That [he/she/***nonbinary pronoun***] reasonably relied on the [district attorney/attorney]'s advice.**

New September 2003; Renumbered from CACI No. 1505 June 2013

Sources and Authority

- " 'Good faith reliance on the advice of counsel, after truthful disclosure of all the relevant facts, is a complete defense to a malicious prosecution claim.' The burden of proving the advice of counsel defense is on [defendant]." (*Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 876–877 [193 Cal.Rptr.3d 912], internal citation omitted.)
- "[I]f the initiator acts in bad faith or withholds from counsel facts he knew or should have known would defeat a cause of action otherwise appearing from the information supplied, [the] defense fails." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 53–54 [118 Cal.Rptr. 184, 529 P.2d 608].)
- "[T]he defense that a criminal prosecution was commenced upon the advice of counsel is unavailing in an action for malicious prosecution if it appears . . . that the defendant did not believe that the accused was guilty of the crime charged." (*Singleton v. Singleton* (1945) 68 Cal.App.2d 681, 695 [157 P.2d 886].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 602, 604

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.07 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.23 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.37, 147.46 (Matthew Bender)

1511. Wrongful Use of Civil Proceedings—Affirmative Defense—Attorney's Reliance on Information Provided by Client

When filing a lawsuit for a client, an attorney is entitled to rely on the facts and information provided by the client.

[*Name of attorney defendant***] claims that [he/she/***nonbinary pronoun***] had reasonable grounds for bringing the lawsuit against [***name of plaintiff***] because [he/she/***nonbinary pronoun***] was relying on facts and information provided by [his/her/***nonbinary pronoun***] client. To succeed on this defense, [***name of attorney defendant***] must prove all of the following:**

1. **That [***name of client***] provided [***name of attorney defendant***] with the following information: [***specify information on which attorney relied***];**
2. **That [***name of attorney defendant***] did not know that this information was false or inaccurate; and**
3. **That [***name of attorney defendant***] relied on the facts and information provided by the client.**

New June 2013; Revised June 2014, May 2020

Directions for Use

Give this instruction if an attorney defendant alleges reliance on information provided by the client to establish probable cause. If a civil proceeding other than a lawsuit is involved, substitute the appropriate word for "lawsuit" throughout.

The presence or absence of probable cause on undisputed facts is a question of law for the court. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498]; CACI No. 1501, *Wrongful Use of Civil Proceedings*.) The questions here for the jury to resolve are what information was communicated to the attorney that established apparent probable cause, and whether the attorney knew that the information was inaccurate.

The attorney generally has no obligation to investigate the information provided by the client before filing suit. (See *Sheldon Appel Co., supra*, 47 Cal.3d at pp. 882–883.) Therefore, there is no liability under a theory that the attorney should have known that the information was false. Actual knowledge is required. But if the attorney later learns that the client has not been truthful, the attorney may no longer rely on the client's information to continue the lawsuit. (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 223 [105 Cal.Rptr.3d 683].)

Sources and Authority

- "In general, a lawyer 'is entitled to rely on information provided by the client.' If the lawyer discovers the client's statements are false, the lawyer cannot rely

on such statements in prosecuting an action." (*Daniels, supra*, 182 Cal.App.4th at p. 223, internal citation omitted.)

- "[W]hen evaluating a client's case and making an initial assessment of tenability, the attorney is entitled to rely on information provided by the client. An exception to this rule exists where the attorney is on notice of specific factual mistakes in the client's version of events. Absent such notice, an attorney 'may, without being guilty of malicious prosecution, vigorously pursue litigation in which he is unsure of whether his client or the client's adversary is truthful, so long as that issue is genuinely in doubt.' A respected authority has summed up the issue as follows: 'Usually, the client imparts information upon which the attorney relies in determining whether probable cause exists for initiating a proceeding. The rule is that the attorney may rely on those statements as a basis for exercising judgment and providing advice, unless the client's representations are known to be false.' " (*Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 512–513 [126 Cal.Rprt.2d 747], disapproved on other grounds in *Zamos v. Stroud* (2004) 32 Cal.4th 958, 972[12 Cal.Rptr.3d 54, 87 P.3d 802], internal citations omitted.)
- "The trial court found the undisputed facts establish that the lawyers had probable cause to assert the fraudulent inducement claim. We agree. It is undisputed that the allegations in the complaint accurately reflected the facts as given to the lawyers by [client] and that she never told them those facts were incorrect. The information provided to the lawyers, if true, was sufficient to state a cause of action . . . ." (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 625 [124 Cal.Rptr.2d 556], disapproved on other grounds in *Zamos, supra*, 32 Cal.4th at p. 972.)
- "Normally, the adequacy of a prefiling investigation is not relevant to the determination of probable cause." (*Swat-Fame, Inc., supra*, 101 Cal.App.4th at p. 627, disapproved on other grounds in *Zamos, supra*, 32 Cal.4th at p. 972.)
- "If the lawyer discovers the client's statements are false, the lawyer cannot rely on such statements in prosecuting an action." (*Daniels, supra*, 182 Cal.App.4th at p. 223.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 554, 603

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.05 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.23 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, § 147.27 et seq. (Matthew Bender)

1512–1519. Reserved for Future Use

1520. Abuse of Process—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully [***insert legal procedure, e.g., "took a deposition"***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***insert legal procedure, e.g., "took the deposition of [name of deponent]"***];**
2. **That [***name of defendant***] intentionally used this legal procedure to [***insert alleged improper purpose that procedure was not designed to achieve***];**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Sources and Authority

- " 'The common law tort of abuse of process arises when one uses the court's process for a purpose other than that for which the process was designed. [Citations.] It has been 'interpreted broadly to encompass the entire range of "procedures" incident to litigation.' [Citation.] [¶] '[T]he essence of the tort [is] . . . misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.' [Citation.]' " (*S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 41 [176 Cal.Rptr.3d 567].)
- "To establish a cause of action for abuse of process, a plaintiff must plead two essential elements: that the defendant (1) entertained an ulterior motive in using the process and (2) committed a wilful act in a wrongful manner." (*Coleman v. Gulf Insurance Group* (1986) 41 Cal.3d 782, 792 [226 Cal.Rptr. 90, 718 P.2d 77], internal citations omitted.)
- "A cause of action for abuse of process cannot be viable absent some harm to the plaintiff caused by the abuse of process." (*Yee v. Superior Court* (2019) 31 Cal. App. 5th 26, 37 [242 Cal.Rptr.3d 439].)
- "[Plaintiff]'s complaint indicates that he has pleaded the tort of abuse of process, long recognized at common law but infrequently utilized." (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1463 [246 Cal.Rptr. 815], internal citation omitted.)
- "Abuse of process is not just another name for malicious prosecution. *Simply filing or maintaining a lawsuit for an improper purpose* (such as might support a malicious prosecution cause of action) *is not abuse of process*. [Citation.] [¶] Malicious prosecution and abuse of process are distinct. The former concerns a

meritless lawsuit (and all the damage it inflicted). The latter *concerns the misuse of the tools the law affords litigants once they are in a lawsuit* (regardless of whether there was probable cause to commence that lawsuit in the first place). Hence, abuse of process claims typically arise for improper or excessive attachments [citation] or improper use of discovery [citation]." (*S.A., supra*, 229 Cal.App.4th at pp. 41–42, original italics.)

- "[W]hile a defendant's act of improperly instituting or maintaining an action may, in an appropriate case, give rise to a cause of action for malicious prosecution, the mere filing or maintenance of a lawsuit—even for an improper purpose—is not a proper basis for an abuse of process action." (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1523 [141 Cal.Rptr.3d 338].)
- "Some definite act or threat not authorized by the process or aimed at an objective not legitimate in the use of the process is required. And, generally, an action lies only where the process is used to obtain an unjustifiable collateral advantage. For this reason, mere vexation [and] harassment are not recognized as objectives sufficient to give rise to the tort." (*Younger v. Solomon* (1974) 38 Cal.App.3d 289, 297 [113 Cal.Rptr. 113], internal citations omitted.)
- "Process is action taken pursuant to judicial authority. It is not action taken without reference to the power of the court." (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 530 [3 Cal.Rptr.2d 49].)
- "This broad reach of the 'abuse of process' tort can be explained historically, since the tort evolved as a 'catch-all' category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution." (*Younger, supra,* 38 Cal.App.3d at p. 296, internal citations omitted.)
- " 'The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club.' " (*Spellens v. Spellens* (1957) 49 Cal.2d 210, 232–233 [317 P.2d 613], internal citation omitted.)
- "[A]n improper purpose may consist in achievement of a benefit totally extraneous to or of a result not within its legitimate scope. Mere ill will against the adverse party in the proceedings does not constitute an ulterior or improper motive." (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 876 [168 Cal.Rptr. 361], internal citations omitted.)
- "Merely obtaining or seeking process is not enough; there must be subsequent abuse, by a misuse of the judicial process for a purpose other than that which it was intended to serve. The gist of the tort is the improper use of the process after it is issued." (*Adams, supra,* 2 Cal.App.4th at pp. 530–531, internal citations omitted.)
- " ' "Some definite act or threat not authorized by the process, or aimed at an

objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." ' " (*Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 524 [154 Cal.Rptr. 874], internal citations omitted.)

- "[I]t is consistent with the purpose of section 47, subdivision (2) to exempt malicious prosecution while still applying the privilege to abuse of process causes of action." (*Abraham v. Lancaster Community Hospital* (1990) 217 Cal.App.3d 796, 824 [266 Cal.Rptr. 360].)
- "[T]he scope of 'publication or broadcast' includes noncommunicative conduct like the filing of a motion for a writ of sale, the filing of assessment liens, or the filing of a mechanic's lien. The privilege also applies to conduct or publications occurring outside the courtroom, to conduct or publications which are legally deficient for one reason or another, and even to malicious or fraudulent conduct or publications." (*O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 134 [100 Cal.Rptr.2d 602], internal citations omitted.)
- "The use of the machinery of the legal system for an ulterior motive is a classic indicia of the tort of abuse of process. However, the tort requires abuse of legal process, not just filing suit." (*Trear v. Sills* (1999) 69 Cal.App.4th 1341, 1359 [82 Cal.Rptr.2d 281], internal citations omitted.)
- "We have located no authority extending the tort of abuse of process to administrative proceedings. Application of the tort to administrative proceedings would not serve the purpose of the tort, which is to preserve the integrity of the court." (*Stolz v. Wong Communications Ltd. Partnership* (1994) 25 Cal.App.4th 1811, 1822–1823 [31 Cal.Rptr.2d 229], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 611–622

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.20–43.25 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.51 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, § 147.70 et seq. (Matthew Bender)

1521–1529. Reserved for Future Use

1530. Apportionment of Attorney Fees and Costs Between Proper and Improper Claims

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[*Name of plaintiff***] claims damages for attorney fees and costs reasonably and necessarily incurred in defending the underlying lawsuit**.

If you find that [*name of plaintiff***] is entitled to recover damages from [***name of defendant***], [***name of plaintiff***] is only entitled to attorney fees and costs reasonably and necessarily incurred in defending those claims that were brought without reasonable grounds. Those claims are [***specify***]. [***Name of plaintiff***] is not entitled to recover attorney fees and costs incurred in defending against the following claims: [***specify***]**.

[*Name of defendant***] must prove the amount of attorney fees and costs that should be apportioned to those claims for which recovery is not allowed.**

New June 2013

Directions for Use

Give this instruction if the court has found as a matter of law that some, but not all, of the claims in the underlying action were brought without probable cause. The elements of probable cause and favorable termination are to be decided by the court as a matter of law. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498] [probable cause]; *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [favorable termination]; see also the Directions for Use to CACI No. 1501, *Wrongful Use of Civil Proceedings*.)

If there are disputed facts that the jury must resolve before the court can make a finding on probable cause, this instruction should not be presented to the jury until after it has determined the facts on which the court's finding will be based.

Sources and Authority

- "Having established the liability of . . . defendants . . . , the [plaintiffs] were entitled to recover as part of their compensatory damage award the costs of defending the [underlying] action including their reasonable attorney fees." (*Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 90 [101 Cal.Rptr.3d 303].)
- "As in the case of the assertion of a maliciously prosecuted complaint with one for which there was probable cause, the burden of proving such an apportionment must rest with the party whose malicious conduct created the problem. To place the burden on the injured party rather than upon the wrongdoer would, in effect, clothe the transgressor with immunity when, because of the interrelationship of the defense and cross-action, the injured party could not apportion his damages."(*Bertero v. National General Corp.* (1974) 13 Cal.3d

43, 60 [118 Cal.Rptr. 184, 529 P.2d 608], internal citation omitted.)

- "Defendants also charge that under the *Bertero* rule the apportionment of damages between the theories of liability that are and are not supported by probable cause is difficult and 'highly speculative.' There is no showing, however, that juries cannot perform that task fairly and consistently if they are properly instructed—they draw more subtle distinctions every day. Moreover, any difficulty in this regard is chargeable to the tortfeasor . . . ." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 690 [34 Cal.Rptr.2d 386, 881 P.2d 1083].)
- "It was the defendants' burden, however, not the [plaintiffs]', to prove such an allocation, just as it generally is the burden of the defendant in a malicious prosecution action to prove certain attorney fees incurred in the underlying action are not recoverable because they are attributable to claims that had been properly pursued." (*Jackson, supra*, 179 Cal.App.4th at p. 96.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 554

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 17-D, *Costs*, ¶ 17:384 et seq. (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 17-E, *Attorney Fees As Costs*, ¶ 17:544 et seq. (The Rutter Group)

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.08 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.18 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, § 147.45 (Matthew Bender)

1531–1599. Reserved for Future Use

VF-1500. Malicious Prosecution—Former Criminal Proceeding

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] actively involved in causing [*name of plaintiff*] to be arrested [and prosecuted] [or in causing the continuation of the prosecution]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] act primarily for a purpose other than that of bringing [*name of plaintiff*] to justice?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2008, December 2010, December 2016, May 2018, May 2024

Directions for Use

This verdict form is based on CACI No. 1500, *Former Criminal Proceeding*. This form can be adapted to include the affirmative defense of reliance on counsel. See VF-1502 for a form that includes this affirmative defense.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

In question 1, include the bracketed reference to prosecution if the arrest was without a warrant.

If there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See CACI No. 1500, *Former Criminal Proceeding*, elements 2 and 3.)

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual

findings that are required in order to calculate the amount of prejudgment interest.

VF-1501. Malicious Prosecution—Wrongful Use of Civil Proceedings

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We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] actively involved in bringing [or continuing] a lawsuit against [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] act primarily for a purpose other than succeeding on the merits of the claim?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2008, December 2010, June 2011, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1501, *Wrongful Use of Civil Proceedings.* See VF-1502 for a form that includes the affirmative defense of reliance on counsel.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See CACI No. 1501, elements 2 and 3).

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1502. Malicious Prosecution—Wrongful Use of Civil Proceedings—Affirmative Defense—Reliance on Counsel

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We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] actively involved in bringing [or continuing] the lawsuit against [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] make a full and honest disclosure of all the important facts known to [him/her/*nonbinary pronoun*] to [his/her/*nonbinary pronoun*] attorney?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. **Did [*name of defendant*] reasonably rely on [his/her/*nonbinary pronoun*] attorney's advice?**

   _____ Yes _____ No

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of defendant*] act primarily for a purpose other than succeeding on the merits of the claim?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2008, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1501, *Wrongful Use of Civil Proceedings,* and CACI No. 1510, *Affirmative Defense—Reliance on Counsel.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See CACI No. 1501, elements 2 and 3.)

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages,

especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1503. Malicious Prosecution—Wrongful Use of Administrative Proceedings

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We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] actively involved in bringing [or continuing] an administrative proceeding against [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of administrative body*] conduct an independent investigation?**

   _____ Yes _____ No

   If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] act primarily for a purpose other than succeeding on the merits of the claim?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2008, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1502, *Wrongful Use of Administrative Proceedings.* See VF-1502 for a form that includes the affirmative defense of reliance on counsel.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See CACI No. 1502, elements 3 and 4.)

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual

forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1504. Abuse of Process

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [***insert legal procedure, e.g., "take the deposition of [name of deponent]"***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] intentionally use this legal procedure to [***insert alleged improper purpose that procedure was not designed to achieve***]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1520, *Abuse of Process—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1505–VF-1599. Reserved for Future Use

EMOTIONAL DISTRESS

1600. Intentional Infliction of Emotional Distress—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*]'s conduct caused [him/her/*nonbinary pronoun*] to suffer severe emotional distress. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*]'s conduct was outrageous;**
2. **[That [*name of defendant*] intended to cause [*name of plaintiff*] emotional distress;]**

   [or]

   [That [*name of defendant*] acted with reckless disregard of the probability that [*name of plaintiff*] would suffer emotional distress, knowing that [*name of plaintiff*] was present when the conduct occurred;]
3. **That [*name of plaintiff*] suffered severe emotional distress; and**
4. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s severe emotional distress.**

New September 2003

Directions for Use

CACI Nos. 1602–1604, regarding the elements of intentional infliction of emotional distress, should be given with this instruction.

Depending on the facts of the case, a plaintiff could choose one or both of the bracketed choices in element 2.

Sources and Authority

- "A cause of action for intentional infliction of emotional distress exists when there is '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' A defendant's conduct is 'outrageous' when it is so 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' And the defendant's conduct must be 'intended to inflict injury or engaged in with the realization that injury will result.' " (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–1051 [95 Cal.Rptr.3d 636, 209 P.3d 963])
- "[T]he trial court initially determines whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. Where reasonable men can differ, the jury determines whether the conduct has

been extreme and outrageous to result in liability. Otherwise stated, the court determines whether severe emotional distress can be found; the jury determines whether on the evidence it has, in fact, existed." (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1614 [146 Cal.Rptr.3d 585].)

- " '[I]t is generally held that there can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities or threats which are considered to amount to nothing more than mere annoyances.' " (*Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1128 [257 Cal.Rptr. 665], internal citations omitted.)
- "Liability for IIED does not extend to ' " 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' " ' Malicious or evil purpose is not essential to liability for IIED." (*Crouch v. Trinity Christian Center of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1007 [253 Cal.Rptr.3d 1], internal citations omitted.)
- "It is not enough that the conduct be intentional and outrageous. It must be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903–904 [2 Cal.Rptr.2d 79, 820 P.2d 181].)
- "A requirement of a special relationship does not appear in the California Supreme Court's formulation of the elements of IIED. To recover for negligent infliction of emotional distress, a plaintiff must prove a special relationship with the defendant but [the plaintiff] sought recovery for intentional infliction, for which proof of a special relationship is not required." (*Crouch, supra,* 39 Cal.App.5th at pp. 1009–1010.)
- "Severe emotional distress [is] emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." (*Fletcher v. Western Life Insurance Co*. (1970) 10 Cal.App.3d 376, 397 [89 Cal.Rptr. 78].)
- " 'The law limits claims of intentional infliction of emotional distress to egregious conduct toward plaintiff proximately caused by defendant.' The only exception to this rule is that recognized when the defendant is aware, but acts with reckless disregard of, the plaintiff and the probability that his or her conduct will cause severe emotional distress to that plaintiff. Where reckless disregard of the plaintiff's interests is the theory of recovery, the presence of the plaintiff at the time the outrageous conduct occurs is recognized as the element establishing a higher degree of culpability which, in turn, justifies recovery of greater damages by a broader group of plaintiffs than allowed on a negligent infliction of emotional distress theory." (*Christensen, supra,* 54 Cal.3d at pp. 905–906, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 525–528

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-E, *Intentional*

Infliction Of Emotional Distress, ¶ 11:61 et seq. (The Rutter Group)

4 Levy et al., California Torts, Ch. 44, *Intentional Infliction of Emotional Distress*, § 44.01 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.10 (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.20 et seq. (Matthew Bender)

1601. Intentional Infliction of Emotional Distress—Fear of Cancer, HIV, or AIDS

[*Name of plaintiff***] claims that [***name of defendant***]'s conduct caused [him/her/***nonbinary pronoun***] to suffer severe emotional distress by exposing [***name of plaintiff***] to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***]'s conduct was outrageous;**
2. **That [***name of defendant***]'s conduct exposed [***name of plaintiff***] to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***];**
3. **[That [***name of defendant***] intended to cause [***name of plaintiff***] emotional distress;] [or]**

   [That [*name of defendant***] acted with reckless disregard of the probability that [[***name of plaintiff***]/the group of individuals including [***name of plaintiff***]] would suffer emotional distress, knowing that [he/she/***nonbinary pronoun***/they] [was/were] present when the conduct occurred;]**
4. **That [***name of plaintiff***] suffered severe emotional distress from a reasonable fear of developing [***insert applicable cancer, HIV, or AIDS***]; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s severe emotional distress.**

A fear of developing [*insert applicable cancer, HIV, or AIDS***] is "reasonable" if the fear stems from the knowledge, confirmed by reliable medical or scientific opinion, that a person's risk of [***insert applicable cancer, HIV, or AIDS***] has significantly increased and that the resulting risk is significant.**

New September 2003

Directions for Use

CACI Nos. 1602–1604, regarding the elements of intentional infliction of emotional distress, should be given with the above instruction. Depending on the facts of the case, a plaintiff could choose one or both of the bracketed choices in element 3.

There may be other harmful agents and medical conditions that could support this cause of action.

See CACI Nos. 1622 and 1623 for claims of negligent infliction of emotional distress involving fear of cancer, HIV, or AIDS.

Sources and Authority

- "The elements of the tort of intentional infliction of emotional distress are: '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' " (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903 [2 Cal.Rptr.2d 79, 820 P.2d 181], internal citation omitted; *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 1001 [25 Cal.Rptr.2d 550, 863 P.2d 795].)
- " 'The law limits claims of intentional infliction of emotional distress to egregious conduct toward plaintiff proximately caused by defendant.' The only exception to this rule is that recognized when the defendant is aware of, but acts with reckless disregard of, the plaintiff and the probability that his or her conduct will cause severe emotional distress to that plaintiff. Where reckless disregard of the plaintiff's interests is the theory of recovery, the presence of the plaintiff at the time the outrageous conduct occurs is recognized as the element establishing a higher degree of culpability which, in turn, justifies recovery of greater damages by a broader group of plaintiffs than allowed on a negligent infliction of emotional distress theory." (*Christensen, supra*, 54 Cal.3d at pp. 905–906, internal citations omitted.)
- "Severe emotional distress [is] emotional distress of such substantial quantity or enduring quality that no reasonable [person] in a civilized society should be expected to endure it." (*Fletcher v. Western Life Insurance Co*. (1970) 10 Cal.App.3d 376, 397 [89 Cal.Rptr. 78]; *Potter, supra,* 6 Cal.4th at p. 1004.)
- "[I]t must . . . be established that plaintiff's fear of cancer is reasonable, that is, that the fear is based upon medically or scientifically corroborated knowledge that the defendant's conduct has significantly increased the plaintiff's risk of cancer and that the plaintiff's actual risk of the threatened cancer is significant." (*Potter, supra,* 6 Cal.4th at p. 1004.)
- The court in *Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 787–788 [31 Cal.Rptr.2d 709] held that the rules relating to recovery of damages for fear of cancer apply to fear of AIDS. See also *Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 1075 [33 Cal.Rptr.2d 172].

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 539, 1174

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11[3][c] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.38 (Matthew Bender)

1602. Intentional Infliction of Emotional Distress—"Outrageous Conduct" Defined

"Outrageous conduct" is conduct so extreme that it goes beyond all possible bounds of decency. Conduct is outrageous if a reasonable person would regard the conduct as intolerable in a civilized community. Outrageous conduct does not include trivialities such as indignities, annoyances, hurt feelings, or bad manners that a reasonable person is expected to endure.

In deciding whether [*name of defendant***]'s conduct was outrageous, you may consider, among other factors, the following:**

(a) Whether [*name of defendant***] abused a position of authority or a relationship that gave [him/her/***nonbinary pronoun***] real or apparent power to affect [***name of plaintiff***]'s interests;**

(b) Whether [*name of defendant***] knew that [***name of plaintiff***] was particularly vulnerable to emotional distress; and**

(c) Whether [*name of defendant***] knew that [his/her/***nonbinary pronoun***] conduct would likely result in harm due to mental distress.**

New September 2003

Directions for Use

Read the appropriate factors that apply to the facts of the case. Factors that do not apply may be deleted from this instruction.

Sources and Authority

- "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209 [185 Cal.Rptr. 252, 649 P.2d 894].)
- "[W]hether conduct is outrageous is 'usually a question of fact' . . . . [However] many cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235 [170 Cal.Rptr.3d 293], internal citations omitted.)
- "[L]iability 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. . . . There is no occasion for the law to intervene . . . where someone's feelings are hurt.' " (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946 [160 Cal.Rptr. 141, 603 P.2d 58], quoting Rest.2d Torts, § 46, com. d, overruled on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 579–580 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- " 'Behavior may be considered outrageous if a defendant (1) abuses a relation or position that gives him power to damage the plaintiff's interests; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress. . . .' " (*Molko v. Holy Spirit Ass'n* (1988) 46 Cal.3d 1092, 1122 [252 Cal.Rptr. 122, 762 P.2d 46], internal citation omitted.)
- Relationships that have been recognized as significantly contributing to the conclusion that particular conduct was outrageous include: employer-employee (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 498, fn.2 [86 Cal.Rptr. 88, 468 P.2d 216]), insurer-insured (*Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376, 403–404 [89 Cal.Rptr. 78]), landlord-tenant (*Aweeka v. Bonds* (1971) 20 Cal.App.3d 278, 281–282 [97 Cal.Rptr. 650]), hospital-patient (*Bundren v. Superior Court* (1983) 145 Cal.App.3d 784, 791–792 [193 Cal.Rptr. 671]), attorney-client (*McDaniel v. Gile* (1991) 230 Cal.App.3d 363, 373 [281 Cal.Rptr. 242]), collecting creditors (*Bundren, supra,* at p. 791, fn. 8), and religious institutions (*Molko, supra,* 46 Cal.3d at pp. 1122–1123).

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 525–528

4 Levy et al., California Torts, Ch. 44, *Intentional Infliction of Emotional Distress*, §§ 44.01, 44.03 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.10[3][c] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.20 (Matthew Bender)

1603. Intentional Infliction of Emotional Distress—"Reckless Disregard" Defined

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[*Name of defendant***] acted with reckless disregard in causing [***name of plaintiff***] emotional distress if:**

1. **[***Name of defendant***] knew that emotional distress would probably result from [his/her/***nonbinary pronoun***] conduct; or**
2. **[***Name of defendant***] gave little or no thought to the probable effects of [his/her/***nonbinary pronoun***] conduct.**

New September 2003

Sources and Authority

- "[I]t is not essential to liability that a trier of fact find a malicious or evil purpose. It is enough that defendant 'devoted little or no thought' to probable consequences of his conduct." (*KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1031–1032 [37 Cal.Rptr.2d 431], internal citation omitted.)
- The requirement of reckless conduct is satisfied by a showing that the defendant acted in reckless disregard of the probability that the plaintiff would suffer emotional distress. (*Little v. Stuyvesant Life Insurance Co.* (1977) 67 Cal.App.3d 451, 462 [136 Cal.Rptr. 653]; *Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 593 [156 Cal.Rptr. 198, 595 P.2d 975].)
- "Where reckless disregard of the plaintiff's interests is the theory of recovery, the presence of the plaintiff at the time the outrageous conduct occurs is recognized as the element establishing a higher degree of culpability which, in turn, justifies recovery of greater damages by a broader group of plaintiffs than allowed on a negligent infliction of emotional distress theory." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 905 [2 Cal.Rptr.2d 79, 820 P.2d 181].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 525, 527

4 Levy et al., California Torts, Ch. 44, *Intentional Infliction of Emotional Distress*, § 44.01 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.10[4] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.21 (Matthew Bender)

1604. Intentional Infliction of Emotional Distress—"Severe Emotional Distress" Defined

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Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame.

"Severe emotional distress" is not mild or brief; it must be so substantial or long lasting that no reasonable person in a civilized society should be expected to bear it. [*Name of plaintiff***] is not required to prove physical injury to recover damages for severe emotional distress.**

New September 2003

Sources and Authority

- " 'It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.' " (*Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376, 397 [89 Cal.Rptr. 78], internal citation omitted.)
- "Emotional distress" includes any "highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry." (*Fletcher, supra,* 10 Cal.App.3d at p. 397.)
- "With respect to the requirement that the plaintiff show severe emotional distress, this court has set a high bar. 'Severe emotional distress means "emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." ' " (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 [95 Cal.Rptr.3d 636, 209 P.3d 963].)
- " 'One who has wrongfully and intentionally [suffered severe emotional distress] may recover compensatory damages even though he or she has suffered no physical injury,' and 'the right to compensation exists even though no monetary loss has been sustained.' " (*Grimes v. Carter* (1966) 241 Cal.App.2d 694, 699 [50 Cal.Rptr. 808].)

Secondary Sources

4 Levy et al., California Torts, Ch. 44, *Intentional Infliction of Emotional Distress*, § 44.01 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.10 (Matthew Bender)

15 California Points and Authorities, Ch. 153*, Mental Suffering and Emotional Distress*, § 153.26 (Matthew Bender)

1605. Intentional Infliction of Emotional Distress—Affirmative Defense—Privileged Conduct

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[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] is not responsible for [***name of plaintiff***]'s harm, if any, because [***name of defendant***]'s conduct was permissible. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] was [exercising [his/her/***nonbinary pronoun***] legal right to [***insert legal right***]] [or] [protecting [his/her/***nonbinary pronoun***] economic interests];**
2. **That [***name of defendant***]'s conduct was lawful and consistent with community standards; and**
3. **That [***name of defendant***] had a good-faith belief that [he/she/***nonbinary pronoun***] had a legal right to engage in the conduct.**

If you find all of the above, then [*name of defendant***]'s conduct was permissible.**

New September 2003

Directions for Use

Whether a given communication is within the privileges afforded by Civil Code section 47 is a legal question for the judge.

Sources and Authority

- "Whether treated as an element of the prima facie case or as a matter of defense, it must also appear that the defendants' conduct was unprivileged." (*Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376, 394 [89 Cal.Rptr. 78].)
- The statutory privileges that Civil Code section 47 affords to certain oral and written communications are applicable to claims for intentional infliction of emotional distress. (*Agostini v. Strycula* (1965) 231 Cal.App.2d 804, 808 [42 Cal.Rptr. 314].)
- "The usual formulation is that the [litigation] privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 [266 Cal.Rptr. 638, 786 P.2d 365].)
- "Where an employer seeks to protect his own self-interest and that of his employees in good faith and without abusing the privilege afforded him, the

privilege obtains even though it is substantially certain that emotional distress will result from uttered statements." (*Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 849–850 [115 Cal.Rptr. 582].)

- "Nevertheless, the exercise of the privilege to assert one's legal rights must be done in a permissible way and with a good faith belief in the existence of the rights asserted. It is well established that one who, in exercising the privilege of asserting his own economic interests, acts in an outrageous manner may be held liable for intentional infliction of emotional distress." (*Fletcher, supra,* 10 Cal.App.3d at p. 395, internal citations omitted.)
- "While it is recognized that the creditor possesses a qualified privilege to protect its economic interest, the privilege may be lost should the creditor use outrageous and unreasonable means in seeking payment." (*Bundren v. Superior Court* (1983) 145 Cal.App.3d 784, 789 [193 Cal.Rptr. 671].)
- "In determining whether the conduct is sufficiently outrageous or unreasonable to become actionable, it is not enough that the creditor's behavior is rude or insolent. However, such conduct may rise to the level of outrageous conduct where the creditor knows the debtor is susceptible to emotional distress because of her physical or mental condition." (*Symonds v. Mercury Savings & Loan Assn.* (1990) 225 Cal.App.3d 1458, 1469 [275 Cal.Rptr. 871], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 529, 530

4 Levy et al., California Torts, Ch. 44, *Intentional Infliction of Emotional Distress*, § 44.06 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.10[8] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.27 (Matthew Bender)

1606–1619. Reserved for Future Use

1620. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*]'s conduct caused [him/her/*nonbinary pronoun*] to suffer serious emotional distress. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was negligent;**
2. **That [*name of plaintiff*] suffered serious emotional distress; and**
3. **That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s serious emotional distress.**

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

New September 2003; Revised June 2014, December 2014

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. The doctrine of "negligent infliction of emotional distress" is not a separate tort or cause of action. It simply allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

A "direct victim" case is one in which the plaintiff's claim of emotional distress is based on the violation of a duty that the defendant owes directly to the plaintiff. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 205 [147 Cal.Rptr.3d 41].) The California Supreme Court has allowed plaintiffs to recover damages as "direct victims" in only three types of factual situations: (1) the negligent mishandling of corpses (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 879 [2 Cal.Rptr.2d 79, 820 P.2d 181]); (2) the negligent misdiagnosis of a disease that could potentially harm another (*Molien, supra*, 27 Cal.3d at p. 923); and (3) the negligent breach of a duty arising out of a preexisting relationship (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1076 [9 Cal.Rptr.2d 615, 831 P.2d 1197]).

The judge will normally decide whether a duty was owed to the plaintiff as a direct victim. If the issue of whether the plaintiff is a direct victim is contested, a special instruction with the factual dispute laid out for the jury will need to be drafted.

This instruction should be read in conjunction with either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.

If the plaintiff witnesses the injury of another, use CACI No. 1621, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements.* For instructions for use for emotional distress arising from exposure to carcinogens, HIV, or AIDS, see CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements*, and CACI No. 1623, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements*.

Elements 1 and 3 of this instruction could be modified for use in a strict products liability case. A plaintiff may seek damages for the emotional shock of viewing the injuries of another when the incident is caused by defendant's defective product. (*Kately v. Wilkinson* (1983) 148 Cal.App.3d 576, 587 [195 Cal.Rptr. 902].)

The explanation in the last paragraph of what constitutes "serious" emotional distress comes from the California Supreme Court. (See *Molien*, *supra*, 27 Cal.3d at p. 928.) In *Wong v. Jing*, an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as "severe" emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)

Sources and Authority

- " '[The] negligent causing of emotional distress is not an independent tort but the tort of negligence . . . .' 'The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability.' " (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588 [257 Cal.Rptr. 98, 770 P.2d 278], internal citations omitted.)
- " 'Direct victim' cases are cases in which the plaintiff's claim of emotional distress is not based upon witnessing an injury to someone else, but rather is based upon the violation of a duty owed directly to the plaintiff." (*Ragland, supra*, 209 Cal.App.4th at p. 205.)
- "[D]uty is found where the plaintiff is a 'direct victim,' in that the emotional distress damages result from a duty owed the plaintiff 'that is "assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two." ' " (*McMahon v. Craig* (2009) 176 Cal.App.4th 1502, 1510 [97 Cal.Rptr.3d 555].)
- "We agree that the unqualified requirement of physical injury is no longer justifiable." (*Molien, supra,* 27 Cal.3d at p. 928.)
- "[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." (*Molien, supra,* 27 Cal.3d at pp. 927–928.)

- "In our view, this articulation of 'serious emotional distress' is functionally the same as the articulation of 'severe emotional distress' [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury." (*Wong*, *supra*, 189 Cal.App.4th at p. 1378.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1138 et seq.

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:899 et seq. (The Rutter Group)

1 California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.03 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11 (Matthew Bender)

15 California Points and Authorities, Ch. 153*, Mental Suffering and Emotional Distress*, § 153.31 et seq. (Matthew Bender)

1621. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] suffered serious emotional distress as a result of perceiving [an injury to/the death of] [***name of victim***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] negligently caused [injury to/the death of] [***name of victim***];**
2. **That when the [***describe event, e.g., traffic accident***] that caused [injury to/the death of] [***name of victim***] occurred, [***name of plaintiff***] was [virtually] present at the scene [through [***specify technological means***]];**
3. **That [***name of plaintiff***] was then aware that the [***e.g., traffic accident***] was causing [injury to/the death of] [***name of victim***];**
4. **That [***name of plaintiff***] suffered serious emotional distress; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s serious emotional distress.**

[*Name of plaintiff***] need not have been then aware that [***name of defendant***] had caused the [***e.g., traffic accident***].**

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

New September 2003; Revised December 2013, June 2014, December 2014, December 2015, May 2022

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. The doctrine of "negligent infliction of emotional distress" is not a separate tort or cause of action. It simply allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

A "bystander" case is one in which a plaintiff seeks recovery for damages for emotional distress suffered as a percipient witness of an injury to another person. If the plaintiff is a direct victim of tortious conduct, use CACI No. 1620, *Negligence—Recovery of Damages for Emotional Distress—No Physical*

Injury—Direct Victim—Essential Factual Elements. For instructions for use for emotional distress arising from exposure to carcinogens, HIV, or AIDS, see CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements*, and CACI No. 1623, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements*.

This instruction should be read in conjunction with instructions in the Negligence series (see CACI No. 400 et seq.) to further develop element 1.

Whether the plaintiff had a sufficiently close relationship with the victim should be determined as an issue of law because it is integral to the determination of whether a duty was owed to the plaintiff.

Include the optional language in element 2 only if the plaintiff claims virtual presence at the scene through technological means, and specify the technology used to assist the jury in understanding the concept of "virtual" presence. (See *Ko v. Maxim Healthcare Services, Inc.* (2020) 58 Cal.App.5th 1144, 1159 [272 Cal.Rptr.3d 906].)

There is some uncertainty as to how the "event" should be defined in element 2 and then just exactly what the plaintiff must perceive in element 3. When the event is something dramatic and visible, such as a traffic accident or a fire, it would seem that the plaintiff need not know anything about why the event occurred. (See *Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1271 [3 Cal.Rptr.2d 803].) And the California Supreme Court has stated that the bystander plaintiff need not contemporaneously understand the defendant's conduct as *negligent*, as opposed to *harmful*. (*Bird v. Saenz* (2002) 28 Cal.4th 910, 920 [123 Cal.Rptr.2d 465, 51 P.3d 324], original italics.)

But what constitutes perception of the event is less clear when the victim is clearly in observable distress, but the cause of that distress may not be observable. It has been held that the manufacture of a defective product is the event, which is not observable, despite the fact that the result was observable distress resulting in death. (See *Fortman v. Förvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 843–844 [151 Cal.Rptr.3d 320].) In another observable-distress case, medical negligence that led to distress resulting in death was found to be perceivable because the relatives who were present observed the decedent's acute respiratory distress and were aware that defendant's *inadequate* response caused her death. (See *Keys v. Alta Bates Summit Medical Center* (2015) 235 Cal.App.4th 484, 489–490 [185 Cal.Rptr.3d 313], emphasis added.) It might be argued that observable distress is the event and that the bystanders need not perceive anything about the cause of the distress. However, these cases indicate that is not the standard. But if it is not necessary to comprehend that negligence is causing the distress, it is not clear what it is that the bystander must perceive in element 3. Because of this uncertainty, the Advisory Committee has elected not to try to express element 3 any more specifically.

The explanation in the last paragraph of what constitutes "serious" emotional distress comes from the California Supreme Court. (See *Molien*, *supra*, 27 Cal.3d at p. 928.) In *Wong v. Jing*, an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as "severe" emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747]; but see *Keys, supra*, 235 Cal.App.4th at p. 491 [finding last sentence of this instruction to be a correct description of the distress required].)

Sources and Authority

- "California's rule that plaintiff's fear for his own safety is compensable also presents a strong argument for the same rule as to fear for others; otherwise, some plaintiffs will falsely claim to have feared for themselves, and the honest parties unwilling to do so will be penalized. Moreover, it is incongruous and somewhat revolting to sanction recovery for the mother if she suffers shock from fear for her own safety and to deny it for shock from the witnessed death of her own daughter." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 738, fn. 4 [69 Cal.Rptr. 72, 441 P.2d 912].)
- "As an introductory note, we observe that plaintiffs . . . framed both negligence and negligent infliction of emotional distress causes of action. To be precise, however, 'the [only] tort with which we are concerned is negligence. Negligent infliction of emotional distress is not an independent tort . . . .' " (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 875–876 [104 Cal.Rptr.3d 352].)
- "In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 [257 Cal.Rptr. 865, 771 P.2d 814].)
- "[T]o satisfy the second *Thing* requirement the plaintiff must experience a contemporaneous sensory awareness of the causal connection between the defendant's infliction of harm and the injuries suffered by the close relative." (*Fortman, supra,* 212 Cal.App.4th at p. 836.)
- "Where plaintiffs allege they were virtually present at the scene of an injury-producing event sufficient for them to have a contemporaneous sensory awareness of the event causing injury to their loved one, they satisfy the second *Thing* requirement to state a cause of action for NIED. Just as the Supreme Court has ruled a 'plaintiff may recover based on an event perceived by other senses so long as the event is contemporaneously understood as causing injury to a close relative', so too can the [plaintiffs] pursue an NIED claim where, as alleged, they contemporaneously saw and heard [their child's] abuse, but with their senses technologically extended beyond the walls of their home." (*Ko,*

supra, 58 Cal.App.5th at p. 1159, internal citation omitted.)

- "[A] plaintiff need not contemporaneously understand the defendant's conduct as *negligent*, as opposed to *harmful*. But the court confused awareness of negligence, a legal conclusion, with contemporaneous, understanding awareness of the event as causing harm to the victim." (*Bird, supra,* 28 Cal.4th at p. 920.)
- "*Bird* does not categorically bar plaintiffs who witness acts of medical negligence from pursuing NIED claims. 'This is not to say that a layperson can never perceive medical negligence or that one who does perceive it cannot assert a valid claim for NIED.' Particularly, a NIED claim may arise when . . . caregivers fail 'to respond significantly to symptoms obviously requiring immediate medical attention.' " (*Keys, supra*, 235 Cal.App.4th at p. 489.)
- "The injury-producing event here was defendant's lack of acuity and response to [decedent]'s inability to breathe, a condition the plaintiffs observed and were aware was causing her injury." (*Keys, supra*, 235 Cal.App.4th at p. 490.)
- "*Thing* does not require that the plaintiff have an awareness of what caused the injury-producing event, but the plaintiff must have an understanding perception of the 'event as causing harm to the victim.' " (*Fortman*, *supra*, 212 Cal.App.4th at p. 841, fn. 4.)
- "[W]e also reject [plaintiff]'s attempt to expand bystander recovery to hold a product manufacturer strictly liable for emotional distress when the plaintiff observes injuries sustained by a close relative arising from an unobservable product failure. To do so would eviscerate the second *Thing* requirement." (*Fortman*, *supra*, 212 Cal.App.4th at pp. 843–844.)
- "Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." (*Thing, supra,* 48 Cal.3d at p. 668, fn. 10.)
- "[A]n unmarried cohabitant may not recover damages for emotional distress based on such injury." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 273 [250 Cal.Rptr. 254, 758 P.2d 582].)
- "Although a plaintiff may establish presence at the scene through nonvisual sensory perception, 'someone who hears an accident but does not then know it is causing injury to a relative does not have a viable [bystander] claim for [negligent infliction of emotional distress], even if the missing knowledge is acquired moments later.' " (*Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 149 [64 Cal.Rptr.3d 539], internal citation omitted.)
- "[I]t is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child." (*Wilks, supra,* 2 Cal.App.4th at p. 1271.)
- " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress

engendered by the circumstances of the case.' " (*Molien, supra*, 27 Cal.3d at pp. 927–928.)

- "In our view, this articulation of 'serious emotional distress' is functionally the same as the articulation of 'severe emotional distress' [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury." (*Wong*, *supra*, 189 Cal.App.4th at p. 1378.)
- "We have no reason to question the jury's conclusion that [plaintiffs] suffered serious emotional distress as a result of watching [decedent]'s struggle to breathe that led to her death. The jury was properly instructed, as explained in *Thing*, that '[s]erious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.' The instructions clarify that 'Emotional distress includes suffering, anguish, fright, . . . nervousness, grief, anxiety, worry, shock . . . .' Viewed through this lens there is no question that [plaintiffs'] testimony provides sufficient proof of serious emotional distress." (*Keys, supra*, 235 Cal.App.4th at p. 491, internal citation omitted.)
- "[W]here a participant in a sport has expressly assumed the risk of injury from a defendant's conduct, the defendant no longer owes a duty of care to bystanders with respect to the risk expressly assumed by the participant. The defendant can therefore assert the participant's express assumption of the risk against the bystanders' NIED claims." (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 731 [183 Cal.Rptr.3d 234].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1144–1158

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-F, *Negligent Infliction Of Emotional Distress*, ¶ 11:101 (The Rutter Group)

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.04 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11 (Matthew Bender)

15 California Points and Authorities, Ch. 153*, Mental Suffering and Emotional Distress*, §§ 153.31 et seq., 153.45 et seq. (Matthew Bender)

1622. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***]'s conduct caused [him/her/***nonbinary pronoun***] to suffer serious emotional distress by exposing [***name of plaintiff***] to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was exposed to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***] as a result of [***name of defendant***]'s negligence;**
2. **That [***name of plaintiff***] suffered serious emotional distress from a fear that [he/she/***nonbinary pronoun***] will develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure;**
3. **That reliable medical or scientific opinion confirms that it is more likely than not that [***name of plaintiff***] will develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure; and**
4. **That [***name of defendant***]'s negligence was a substantial factor in causing [***name of plaintiff***]'s serious emotional distress.**

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

New September 2003; Revised June 2014, December 2014

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. The doctrine of "negligent infliction of emotional distress" is not a separate tort or cause of action. It simply allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise currently injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

Recovery for emotional distress without other current harm or injury is allowed for negligent exposure to a disease-causing substance, but only if the plaintiff can establish that it is more likely than not that the plaintiff will contract the disease. (See *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 997 [25 Cal.Rptr.2d 550, 863 P.2d 795.) There may be other harmful agents and medical conditions that could support this claim for damages.

This instruction should be read in conjunction with either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.

If plaintiff alleges that defendant's conduct constituted oppression, fraud, or malice, then CACI No. 1623, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements*, should be read.

The explanation in the last paragraph of what constitutes "serious" emotional distress comes from the California Supreme Court. (See *Molien*, *supra*, 27 Cal.3d at p. 928.) In *Wong v. Jing*, an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as "severe" emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)

Sources and Authority

- " '[D]amages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact . . . .' " (*Potter, supra*, 6 Cal.4th at p. 986, internal citation omitted.)
- "[T]he way to avoid damage awards for unreasonable fear, i.e., in those cases where the feared cancer is at best only remotely possible, is to require a showing of the actual likelihood of the feared cancer to establish its significance." (*Potter, supra,* 6 Cal.4th at p. 990.)
- "[D]amages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure." (*Potter, supra,* 6 Cal.4th at p. 997.)
- " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " (*Molien, supra*, 27 Cal.3d at pp. 927–928.)
- "In our view, this articulation of 'serious emotional distress' is functionally the same as the articulation of 'severe emotional distress' [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury." (*Wong*, *supra*, 189 Cal.App.4th at p. 1378.)
- "[W]e hold that the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring

is reasonable." (*Potter, supra,* 6 Cal.4th at p. 1009.)

- "All of the policy concerns expressed in *Potter* apply with equal force in the fear of AIDS context." (*Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 1074 [33 Cal.Rptr.2d 172].)
- "[Plaintiff parent] claims the likelihood of actual injury to [child] is immaterial and that, in short, the rule announced in *Potter* regarding fear of cancer should not be applied to a case involving fear of AIDS. We disagree." (*Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 786 [31 Cal.Rptr.2d 709].)
- "[W]hen a defendant demonstrates that a plaintiff's smoking is negligent and that a portion of the plaintiff's fear of developing cancer is attributable to the smoking, comparative fault principles may be applied in determining the extent to which the plaintiff's emotional distress damages for such fear should be reduced to reflect the proportion of such damages for which the plaintiff should properly bear the responsibility." (*Potter, supra,* 6 Cal.4th at pp. 965, 1011.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1174

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:218.6 (The Rutter Group)

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.02 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11[3][c] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.38 (Matthew Bender)

1623. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] acted with [malice/oppression/fraudulent intent] in exposing [***name of plaintiff***] to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***] and that this conduct caused [***name of plaintiff***] to suffer serious emotional distress. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was exposed to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***] as a result of [***name of defendant***]'s negligent conduct;**

2. **That [***name of defendant***] acted with [malice/oppression/fraudulent intent] because [***insert one or more of the following, as applicable***]:**

   [[*Name of defendant***] intended to cause injury to [***name of plaintiff***];] [or]**

   [[*Name of defendant***]'s conduct was despicable and was carried out with a willful or conscious disregard of [***name of plaintiff***]'s rights or safety;] [or]**

   [[*Name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in conscious disregard of [***name of plaintiff***]'s rights;] [or]**

   [[*Name of defendant***] intentionally misrepresented or concealed a material fact known to [***name of defendant***], intending to cause [***name of plaintiff***] harm;]**

3. **That [***name of plaintiff***] suffered serious emotional distress from a fear that [he/she/***nonbinary pronoun***] will develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure;**

4. **That reliable medical or scientific opinion confirms that [***name of plaintiff***]'s risk of developing [***insert applicable cancer, HIV, or AIDS***] was significantly increased by the exposure and has resulted in an actual risk that is significant; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s serious emotional distress.**

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

New September 2003; Revised June 2014, December 2014

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. There is no separate tort or cause of action for "negligent infliction of emotional distress." The doctrine is one that allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise currently injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

Recovery for emotional distress without other current harm or injury is allowed for negligent exposure to a disease-causing substance. If the plaintiff can prove oppression, fraud, or malice, it is not necessary to establish that it is more likely than not that the plaintiff will contract the disease. (See *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 998 [25 Cal.Rptr.2d 550, 863 P.2d 795.) Use CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements*, if plaintiff alleges exposure without oppression, fraud, or malice.

This instruction should be read in conjunction with either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.

"Oppression, fraud, or malice" is used here as defined by Civil Code section 3294, except that the higher "clear and convincing" burden of proof is not required in this context. (See *Potter, supra,* 6 Cal.4th at p. 1000.)

In some cases the judge should make clear that the defendant does not need to have known of the individual plaintiff where there is a broad exposure and plaintiff is a member of the class that was exposed.

The explanation in the next-to-last paragraph of what constitutes "serious" emotional distress comes from the California Supreme Court. (See *Molien*, *supra*, 27 Cal.3d at p. 928.) In *Wong v. Jing*, an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as "severe" emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)

Sources and Authority

- Punitive Damages: Malice, Oppression, and Fraud Defined. Civil Code section 3294(c).
- " '[D]amages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact . . . .' " (*Potter, supra*, 6 Cal.4th at p. 986.)
- "[A] toxic exposure plaintiff need not meet the more likely than not threshold

for fear of cancer recovery in a negligence action if the plaintiff pleads and proves that the defendant's conduct in causing the exposure amounts to 'oppression, fraud, or malice' as defined in Civil Code section 3294." (*Potter, supra,* 6 Cal.4th at p. 998.)

- " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " (*Molien, supra*, 27 Cal.3d at pp. 927–928.)
- "[D]amages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure." (*Potter, supra*, 6 Cal.4th at p. 997.)
- "In our view, this articulation of 'serious emotional distress' is functionally the same as the articulation of 'severe emotional distress' [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury." (*Wong*, *supra*, 189 Cal.App.4th at p. 1378.)
- "All of the policy concerns expressed in *Potter* apply with equal force in the fear of AIDS context." (*Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 1074 [33 Cal.Rptr.2d 172].)
- "[Plaintiff parent] claims the likelihood of actual injury to [child] is immaterial and that, in short, the rule announced in *Potter* regarding fear of cancer should not be applied to a case involving fear of AIDS. We disagree." (*Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 786 [31 Cal.Rptr.2d 709].)
- "Despicable conduct is conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." (*Mock v. Mich. Millers Mut. Ins. Co.* (1992) 4 Cal.App.4th 306, 331 [5 Cal.Rptr.2d 594].)
- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' " (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- "Civil Code section 3294 requires a plaintiff to prove oppression, fraud, or malice by 'clear and convincing evidence' for purposes of punitive damages recovery. We decline to impose this stringent burden of proof for recovery of fear of cancer damages in negligence cases for two reasons. First, we have

already adopted strict limitations on the availability of damages for negligently inflicted fear of cancer; an additional hurdle at this point is unnecessary for public policy purposes. Second, to recover compensatory damages in an action for intentional infliction of emotional distress, a plaintiff need only prove the fact that a defendant intentionally inflicted such distress by a preponderance of the evidence. It is therefore both logical and consistent to utilize the same burden of proof for recovery of compensatory damages when a defendant has acted with 'oppression, fraud or malice' to negligently inflict emotional distress." (*Potter*, *supra*, 6 Cal.4th at p. 1000, fn. 20.)

- "[W]hen a defendant demonstrates that a plaintiff's smoking is negligent and that a portion of the plaintiff's fear of developing cancer is attributable to the smoking, comparative fault principles may be applied in determining the extent to which the plaintiff's emotional distress damages for such fear should be reduced to reflect the proportion of such damages for which the plaintiff should properly bear the responsibility." (*Potter, supra*, 6 Cal.4th at p. 1011.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1174

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶¶ 3:881–3:883 (The Rutter Group)

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.02 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11[3][c] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.38 (Matthew Bender)

1624–1699. Reserved for Future Use

VF-1600. Intentional Infliction of Emotional Distress

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*]'s conduct outrageous?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[Did [*name of defendant*] intend to cause [*name of plaintiff*] emotional distress?] [or]**

   [Did [*name of defendant*] act with reckless disregard of the probability that [*name of plaintiff*] would suffer emotional distress, knowing that [*name of plaintiff*] was present when the conduct occurred?]

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of plaintiff*] suffer severe emotional distress?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s severe emotional distress?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1600, *Intentional Infliction of Emotional Distress—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*.

This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1601. Intentional Infliction of Emotional Distress—Affirmative Defense—Privileged Conduct

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We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] exercising [his/her/***nonbinary pronoun***] legal rights or protecting [his/her/***nonbinary pronoun***] economic interests?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, skip questions 2 and 3 and answer question 4.

2. **Was [***name of defendant***]'s conduct lawful and consistent with community standards?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. **Did [***name of defendant***] have a good-faith belief that [he/she/***nonbinary pronoun***] had a legal right to engage in the conduct?**

   _____ Yes _____ No

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s conduct outrageous?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **[Did [***name of defendant***] intend to cause [***name of plaintiff***] emotional distress?]**

   [or]

   [Did [*name of defendant***] act with reckless disregard of the probability that [***name of plaintiff***] would suffer emotional distress, knowing that [***name of plaintiff***] was present when the conduct occurred?]**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you

answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of plaintiff*] suffer severe emotional distress?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s severe emotional distress?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. [Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. [Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1600, *Intentional Infliction of Emotional Distress—Essential Factual Elements*, and CACI No. 1605, *Intentional Infliction of Emotional Distress—Affirmative Defense-Privileged Conduct*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1602. Intentional Infliction of Emotional Distress—Fear of Cancer, HIV, or AIDS

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*]'s conduct outrageous?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*]'s conduct expose [*name of plaintiff*] to [*insert applicable carcinogen, toxic substance, HIV, or AIDS*]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **[Did [*name of defendant*] intend to cause [*name of plaintiff*] emotional distress?] [or]**

   [Did [*name of defendant*] act with reckless disregard of the probability that [[*name of plaintiff*]/the group of individuals including [*name of plaintiff*]] would suffer emotional distress, knowing that [he/she/*nonbinary pronoun*/they] [was/were] present when the conduct occurred?]

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of plaintiff*] suffer severe emotional distress from a reasonable fear of developing [*insert cancer, HIV, or AIDS*]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s severe emotional distress?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you

answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1601, *Intentional Infliction of Emotional Distress—Fear of Cancer, HIV, or AIDS.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1603. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim

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We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] negligent?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] suffer serious emotional distress?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of defendant*]'s negligence a substantial factor in causing [*name of plaintiff*]'s serious emotional distress?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

   Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2014, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1620, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1604. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] negligently cause [injury to/the death of] [***name of victim***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **When the [***describe event, e.g., traffic accident***] that caused [injury to/the death of] [***name of victim***] occurred, was [***name of plaintiff***] [virtually] present at the scene [through [***specify technological means***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of plaintiff***] then aware that the [***e.g., traffic accident***] was causing [injury to/the death of] [***name of victim***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of plaintiff***] suffer serious emotional distress?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of defendant***]'s conduct a substantial factor in causing [***name of plaintiff***]'s serious emotional distress?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [***name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2014, December 2016, May 2022, May 2024

Directions for Use

This verdict form is based on CACI No. 1621, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages,

especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1605. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] exposed to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***] as a result of [***name of defendant***]'s negligence?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of plaintiff***] suffer serious emotional distress from a fear that [he/she/***nonbinary pronoun***] would develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Does reliable medical or scientific opinion confirm that it is more likely than not that [***name of plaintiff***] will develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s negligence a substantial factor in causing [***name of plaintiff***]'s serious emotional distress?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2014, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1606. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct

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We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] exposed to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***] as a result of [***name of defendant***]'s conduct?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] act with [malice/oppression/fraudulent intent] because [***insert one or more of the following, as applicable:***]**

   [[*name of defendant***] intended to cause injury to [***name of plaintiff***]?] [or]**

   [[*name of defendant***]'s conduct was despicable and was carried out with a willful or conscious disregard of [***name of plaintiff***]'s rights or safety?] [or]**

   [[*name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in conscious disregard of [***name of plaintiff***]'s rights?] [or]**

   [[*name of defendant***] intentionally misrepresented or concealed a material fact known to [***name of defendant***], intending to cause [***name of plaintiff***] harm?]**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] suffer serious emotional distress from a fear, confirmed by reliable medical or scientific opinion, that [***name of plaintiff***]'s risk of developing [***insert applicable cancer, HIV, or AIDS***] was significantly increased by the exposure and has resulted in an actual risk that is significant?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s serious emotional distress?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2014, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1623, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1607–VF-1699. Reserved for Future Use

DEFAMATION

1700. Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

[*Name of plaintiff*] claims that [*name of defendant*] harmed [him/her/*nonbinary pronoun*] by making [one or more of] the following statement(s): [*list all claimed per se defamatory statements*]. To establish this claim, [*name of plaintiff*] must prove that all of the following are more likely true than not true:

Liability

1. **That [*name of defendant*] made [one or more of] the statement(s) to [a person/persons] other than [*name of plaintiff*];**
2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [*name of plaintiff*];**
3. **[That [this person/these people] reasonably understood the statement(s) to mean that [*insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"*]]; and**
4. **That the statement(s) [was/were] false.**

In addition, [*name of plaintiff*] must prove by clear and convincing evidence that [*name of defendant*] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s).

Actual Damages

If [*name of plaintiff*] has proved all of the above, then [he/she/*nonbinary pronoun*] is entitled to recover [his/her/*nonbinary pronoun*] actual damages if [he/she/*nonbinary pronoun*] proves that [*name of defendant*]'s wrongful conduct was a substantial factor in causing any of the following:

a. **Harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation;**
b. **Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements;**
c. **Harm to [*name of plaintiff*]'s reputation; or**
d. **Shame, mortification, or hurt feelings.**

Assumed Damages

Even if [*name of plaintiff*] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings, the law nonetheless assumes that [he/she/*nonbinary pronoun*] has suffered this harm. Without presenting evidence of damage, [*name of plaintiff*] is entitled to receive compensation for this assumed harm in whatever sum

you believe is reasonable. You must award at least a nominal sum, such as one dollar.

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she/***nonbinary pronoun***] proves by clear and convincing evidence that [***name of defendant***] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, June 2016, December 2016, January 2018

Directions for Use

Special verdict form CACI No. VF-1700, *Defamation per se (Public Officer/Figure and Limited Public Figure)*, should be used in this type of case.

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege.* (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].)

Sources and Authority

- Defamation. Civil Code section 44.
- Libel Defined. Civil Code section 45.
- Libel per se. Civil Code section 45a.

- Slander Defined. Civil Code section 46.
- "Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage." (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486 [183 Cal.Rptr.3d 867].)
- "The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. 'In general, . . . a written communication that is false, that is not protected by any privilege, and that exposes a person to contempt or ridicule or certain other reputational injuries, constitutes libel.' The defamatory statement must specifically refer to, or be ' "of [or] concerning," ' the plaintiff." (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1259 [217 Cal.Rptr.3d 234], internal citations omitted.)
- " 'A statement is defamatory when it tends "directly to injure [a person] in respect to [that person's] office, profession, trade or business, either by imputing to [the person] general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to [the person's] office, profession, trade, or business that has a natural tendency to lessen its profits." ' " (*Issa v. Applegate* (2019) 31 Cal.App.5th 689, 702 [242 Cal.Rptr.3d 809], internal citation omitted.)
- "In a case in which a plaintiff seeks to maintain an action for defamation by implication, the plaintiff must demonstrate that (1) his or her interpretation of the statement is reasonable; (2) the implication or implications to be drawn convey defamatory facts, not opinions; (3) the challenged implications are not ' "substantially true" '; and (4) the identified reasonable implications could also be reasonably deemed defamatory." (*Issa, supra*, 31 Cal.App.5th at p. 707.)
- " 'If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence . . . , that the libelous statement was made with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." ' 'The rationale for such differential treatment is, first, that the public figure has greater access to the media and therefore greater opportunity to rebut defamatory statements, and second, that those who have become public figures have done so voluntarily and therefore "invite attention and comment." ' " (*Jackson, supra,* 10 Cal.App.5th at p. 1259, footnotes and internal citations omitted.)
- "[S]tatements cannot form the basis of a defamation action if they cannot be reasonably interpreted as stating actual facts about an individual. Thus, rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions of contempt and language used in a loose, figurative sense will not support a defamation action." (*Grenier, supra,* 234 Cal.App.4th at p. 486.)
- " ' "If no reasonable reader would perceive in a false and unprivileged publication a meaning which tended to injure the subject's reputation in any of the enumerated respects, then there is no libel at all. If such a reader would

perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense, then . . . there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons, then . . . the libel cannot be libel per se but will be libel per quod," requiring pleading and proof of special damages.' " (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351–352 [192 Cal.Rptr.3d 511].)

- "A slander that falls within the first four subdivisions of Civil Code section 46 is slander per se and requires no proof of actual damages. A slander that does not fit into those four subdivisions is slander per quod, and special damages are required for there to be any recovery for that slander." (*The Nethercutt Collection v. Regalia* (2009) 172 Cal.App.4th 361, 367 [90 Cal.Rptr.3d 882], internal citations omitted.)
- "With respect to slander per se, the trial court decides if the alleged statement falls within Civil Code section 46, subdivisions 1 through 4. It is then for the trier of fact to determine if the statement is defamatory. This allocation of responsibility may appear, at first glance, to result in an overlap of responsibilities because a trial court determination that the statement falls within those categories would seemingly suggest that the statement, if false, is necessarily defamatory. But a finder of fact might rely upon extraneous evidence to conclude that, under the circumstances, the statement was not defamatory." (*The Nethercutt Collection, supra*, 172 Cal.App.4th at pp. 368–369.)
- "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [¶] . . . [¶] . . . [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

- "In defamation actions generally, factual truth is a defense which it is the defendant's burden to prove. In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff. As a matter of constitutional law, therefore, media statements on matters of public interest, including statements of opinion which reasonably imply a knowledge of facts, 'must be provable as false before there can be liability under state defamation law.' " (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802], internal citations omitted.)
- In matters involving public concern, the First Amendment protection applies to nonmedia defendants, putting the burden of proving falsity of the statement on the plaintiff. (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)
- "Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the 'public' at large; communication to a single individual is sufficient." (*Smith, supra,* 72 Cal.App.4th at p. 645, internal citations omitted.)
- "[W]hen a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor." (*Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 26 [80 Cal.Rptr.2d 1], internal citation omitted.)
- "At common law, one who republishes a defamatory statement is deemed thereby to have adopted it and so may be held liable, together with the person who originated the statement, for resulting injury to the reputation of the defamation victim. California has adopted the common law in this regard, although by statute the republication of defamatory statements is privileged in certain defined situations." (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 268 [79 Cal.Rptr.2d 178, 965 P.2d 696], internal citations omitted.)
- The general rule is that "a plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant." There is an exception to this rule. [When it is foreseeable that the plaintiff] " 'will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he has read it or been informed of its contents.' " (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 [286 Cal.Rptr. 198], internal citations omitted.)
- Whether a plaintiff in a defamation action is a public figure is a question of law for the trial court. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252 [208 Cal.Rptr. 137, 690 P.2d 610].)
- "To qualify as a limited purpose public figure, a plaintiff 'must have undertaken some voluntary [affirmative] act[ion] through which he seeks to influence the resolution of the public issues involved.' " (*Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1190 [31 Cal.Rptr.2d 193]; see also *Mosesian v. McClatchy*

Newspapers (1991) 233 Cal.App.3d 1685, 1689 [285 Cal.Rptr. 430].)

- "Characterizing a plaintiff as a limited purpose public figure requires the presence of certain elements. First, there must be a public controversy about a topic that concerns a substantial number of people. In other words, the issue was publicly debated. Second, the plaintiff must have voluntarily acted to influence resolution of the issue of public interest. To satisfy this element, the plaintiff need only attempt to thrust himself or herself into the public eye. Once the plaintiff places himself or herself in the spotlight on a topic of public interest, his or her private words and acts relating to that topic become fair game. However, the alleged defamation must be germane to the plaintiff's participation in the public controversy." (*Grenier, supra,* 234 Cal.App.4th at p. 484, internal citations omitted.)
- "The First Amendment limits California's libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with 'knowledge that it was false or with reckless disregard of whether it was false or not.' Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author 'in fact entertained serious doubts as to the truth of his publication,' or acted with a 'high degree of awareness of . . . probable falsity.' " (*Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 510 [111 S.Ct. 2419, 115 L.Ed.2d 447], internal citations omitted; see *St. Amant v. Thompson* (1968) 390 U.S. 727, 731 [88 S.Ct. 1323, 20 L.Ed.2d 262]; *New York Times v. Sullivan* (1964) 376 U.S. 254, 279–280 [84 S.Ct. 710, 11 L.Ed.2d 686].)
- The *New York Times v. Sullivan* standard applies to private individuals with respect to presumed or punitive damages if the statement involves a matter of public concern. (*Gertz v. Robert Welch, Inc*. (1974) 418 U.S. 323, 349 [94 S.Ct. 2997, 41 L.Ed.2d 789].)
- "California . . . permits defamation liability so long as it is consistent with the requirements of the United States Constitution." (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1359 [78 Cal.Rptr.2d 627], citing *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 740–742 [257 Cal.Rptr. 708, 771 P.2d 406].)
- "Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. . . . In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." (*Masson, supra,* 501 U.S. at pp. 510–511, internal citations omitted.)
- Actual malice "does not require that the reporter hold a devout belief in the truth of the story being reported, only that he or she refrain from either reporting a story he or she knows to be false or acting in reckless disregard of the truth." (*Jackson, supra,* 68 Cal.App.4th at p. 35.)

- "The law is clear [that] the recklessness or doubt which gives rise to actual or constitutional malice is subjective recklessness or doubt." (*Melaleuca, Inc., supra,* 66 Cal.App.4th at p. 1365.)
- To show reckless disregard, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (*St. Amant, supra,* 390 U.S. at p. 731.)
- " 'A defamation plaintiff may rely on inferences drawn from circumstantial evidence to show actual malice. [Citation.] "A failure to investigate [fn. omitted] [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication." ' " (*Sanders v. Walsh* (2013) 219 Cal.App.4th 855, 873 [162 Cal.Rptr.3d 188].)
- " ' "[Evidence] of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." [Citations.] A failure to investigate [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication. [¶][] We emphasize that such evidence is relevant only to the extent that it reflects on the subjective attitude of the publisher. [Citations.] The failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy. [Citations.] Similarly, mere proof of ill will on the part of the publisher may likewise be insufficient. [Citation.]' " (*Young v. CBS Broadcasting, Inc.* (2012) 212 Cal.App.4th 551, 563 [151 Cal.Rptr.3d 237], quoting *Reader's Digest Assn.*, *supra*, 37 Cal.3d at pp. 257–258, footnote omitted.)
- "An entity other than a natural person may be libeled." (*Live Oak Publishing Co., supra,* 234 Cal.App.3d at p. 1283.)
- "A political challenger must be afforded leeway to characterize the conduct of his opponent, even if such characterization takes the most negative perspective, in order to ensure 'uninhibited, robust, and wide-open' debate on public issues. Again, '[h]yperbole, distortion, invective, and tirades' are 'a part of American politics,' and while providing protection for such speech may allow 'candidates and their supporters to express . . . the most vile sentiments,' it is nevertheless necessary in order to ensure the 'opportunity to criticize and comment upon government and the issues of the day.' " (*Issa, supra*, 31 Cal.App.5th at p. 709, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654, 705–718

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-E,

Employment Torts And Related Claims—Defamation, ¶¶ 5:472, 5:577 (The Rutter Group)

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.10 et seq. (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.24–142.27 (Matthew Bender)

California Civil Practice: Torts §§ 21:1–21:2, 21:22–21:25, 21:44–21:52 (Thomson Reuters)

1701. Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her/***nonbinary pronoun***] by making [one or more of] the following statement(s): [***list all claimed per quod defamatory statements***].**

Liability

To establish this claim, [*name of plaintiff***] must prove that all of the following are more likely true than not true:**

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**
2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**
3. **That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [***name of plaintiff***] in [his/her/***nonbinary pronoun***] occupation [or to expose [him/her/***nonbinary pronoun***] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her/***nonbinary pronoun***]];**
4. **That the statement(s) [was/were] false;**
5. **That [***name of plaintiff***] suffered harm to [his/her/***nonbinary pronoun***] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and**
6. **That the statement(s) [was/were] a substantial factor in causing [***name of plaintiff***]'s harm.**

In addition, [*name of plaintiff***] must prove by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s).**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she/***nonbinary pronoun***] is entitled to recover if [he/she/***nonbinary pronoun***] proves it is more likely true than not true that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**
b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**

c. Harm to [*name of plaintiff*]'s reputation; or

d. Shame, mortification, or hurt feelings.

Punitive Damages

[*Name of plaintiff*] may also recover damages to punish [*name of defendant*] if [he/she/*nonbinary pronoun*] proves by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud.

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, June 2016, December 2016, January 2018

Directions for Use

Special verdict form CACI No. VF-1701, *Defamation per quod (Public Officer/Figure and Limited Public Figure)*, should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege.* (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].)

See also the Sources and Authority to CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Sources and Authority

- Defamation. Civil Code section 44.
- Libel Defined. Civil Code section 45.
- Libel per se. Civil Code section 45a.

- Slander Defined. Civil Code section 46.
- Special Damages. Civil Code section 48a(4)(b).
- "The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Wong v. Jing* (2011) 189 Cal.App.4th 1354, 1369 [117 Cal.Rptr.3d 747].)
- " ' "If no reasonable reader would perceive in a false and unprivileged publication a meaning which tended to injure the subject's reputation in any of the enumerated respects, then there is no libel at all. If such a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense, then . . . there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons, then . . . the libel cannot be libel per se but will be libel per quod," requiring pleading and proof of special damages.' " (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351–352 [192 Cal.Rptr.3d 511].)
- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73], internal citation omitted.)
- "The question whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. However, . . . , some statements are ambiguous and cannot be characterized as factual or nonfactual as a matter of law. 'In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion . . . .' " (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244].)
- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7.)
- "A libel 'per quod,' . . . requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr. 244, 649 P.2d 886].)
- " 'The purpose of the rule requiring proof of special damages when the defamatory meaning does not appear on the face of the language used is to protect publishers who make statements innocent in themselves that are defamatory only because of extrinsic facts known to the reader.' 'In the libel

context, "inducement" and "innuendo" are terms of art: "[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the 'innuendo,' . . .); (2) support that interpretation by alleging *facts* showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the 'inducement')." [Citation.] "The office of an innuendo is to declare what the words *meant* to those to whom they were published." "In order to plead . . . ambiguous language into an actionable libel . . . it is incumbent upon the plaintiff also to plead an inducement, that is to say, circumstances which would indicate that the words *were understood* in a defamatory sense *showing that the situation or opinion of the readers was such that they derived a defamatory meaning* from them. [Citation.]" ' " (*Bartholomew v. YouTube, LLC.* (2017) 17 Cal.App.5th 1217, 1227 [225 Cal.Rptr.3d 917], original italics, internal citations omitted.)

- "For libel *per quod*, which [plaintiff] herself emphasizes is the cause of action at issue here, it is 'necessary that the words should have been published concerning the plaintiff and should have been understood by at least one third person to have concerned him [or her]. [Citations.] "Defamatory words to be actionable must refer to some ascertained or ascertainable person, and that person must be plaintiff [citations]. If the words used really contain no reflection upon any particular individual, no averment can make them defamatory. It is not necessary that plaintiff should be mentioned by name if the words used in describing the person meant, can be shown to have referred to him and to have been so understood [citation]." [Citation].' ' "It is the office of the inducement to narrate the extrinsic circumstances which, coupled with the language published, affect its construction and render it actionable, where, standing alone and not thus explained, the language would appear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously. [Citation.]" ' " (*Bartholomew*, *supra*, 17 Cal.App.5th at p. 1231, internal citation omitted.)
- "A slander that falls within the first four subdivisions of Civil Code section 46 is slander per se and requires no proof of actual damages. A slander that does not fit into those four subdivisions is slander per quod, and special damages are required for there to be any recovery for that slander." (*The Nethercutt Collection v. Regalia* (2009) 172 Cal.App.4th 361, 367 [90 Cal.Rptr.3d 882], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654, 705–718

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.10–340.75 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.24–142.27 (Matthew Bender)

California Civil Practice: Torts, §§ 21:1–21:2, 21:22–21:25, 21:44–21:52 (Thomson Reuters)

1702. Defamation per se—Essential Factual Elements (Private Figure—Matter of Public Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her/***nonbinary pronoun***] by making [one or more of] the following statement(s): [***list all claimed per se defamatory statement(s)***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**
2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**
3. **[That [this person/these people] reasonably understood the statement(s) to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***];]**
4. **That the statement(s) [was/were] false; and**
5. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s).**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she/***nonbinary pronoun***] is entitled to recover [his/her/***nonbinary pronoun***] actual damages if [he/she/***nonbinary pronoun***] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**
b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**
c. **Harm to [***name of plaintiff***]'s reputation; or**
d. **Shame, mortification, or hurt feelings.**

Assumed Damages

If [*name of plaintiff***] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings but proves by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or that [he/she/***nonbinary pronoun***] had serious doubts about the truth of the statement(s), then the law assumes that [***name of plaintiff***]'s reputation has been harmed and that [he/she/***nonbinary pronoun***] has suffered shame, mortification, or hurt feelings. Without**

presenting evidence of damage, [*name of plaintiff***] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.**

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she/***nonbinary pronoun***] proves by clear and convincing evidence that [***name of defendant***] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she/***nonbinary pronoun***] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, October 2008, December 2009, June 2016, December 2016, January 2018

Directions for Use

Special verdict form CACI No. VF-1702, *Defamation per se (Private Figure—Matter of Public Concern)*, should be used in this type of case.

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege.* (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b);

Argentieri v. Zuckerberg (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].)

Sources and Authority

- "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)
- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203–204 [35 Cal.Rptr.2d 740], internal citation omitted.)
- "Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*. This conclusion is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 348–349 [94 S.Ct. 2997, 41 L.Ed.2d 789].)
- " '[I]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.' " (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845 [52 Cal.Rptr.2d 831].)
- "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [¶¶] . . . [T]he instant instruction, which limits damages to 'those damages that necessarily result from the

publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

- The jury should be instructed that the defendant's negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)
- "When the speech involves a matter of public concern, a private-figure plaintiff has the burden of proving the falsity of the defamation." (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747 [257 Cal.Rptr. 708, 771 P.2d 406].)
- "Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." (*Gertz, supra,* 418 U.S. at p. 350.)
- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)
- "A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice . . . to recover presumed or punitive damages. This malice must be established by 'clear and convincing proof.' " (*Brown, supra,* 48 Cal.3d at p. 747, internal citations omitted.)
- When the court is instructing on punitive damages, it is error to fail to instruct that *New York Times* malice is required when the statements at issue involve matters of public concern. (*Carney, supra,* 221 Cal.App.3d at p. 1022.)
- "To prove actual malice . . . a plaintiff must 'demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement.' " (*Khawar, supra,* 19 Cal.4th at p. 275, internal citation omitted.)
- "Because actual malice is a higher fault standard than negligence, a finding of actual malice generally includes a finding of negligence . . . ." (*Khawar, supra,* 19 Cal.4th at p. 279.)
- "The inquiry into the protected status of speech is one of law, not fact." (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781], quoting *Connick v. Myers* (1983) 461 U.S. 138, 148, fn. 7 [103 S.Ct. 1684, 75 L.Ed.2d 708].)

- "For the *New York Times* standard to be met, 'the publisher must come close to willfully blinding itself to the falsity of its utterance.' " (*Brown, supra,* 48 Cal.3d at p. 747, internal citation omitted.)
- " 'While such speech is not totally unprotected by the First Amendment, its protections are less stringent' [than that applying to speech on matters of public concern]." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654, 719–721

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.12–340.13, 340.18 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.30–142.40, 142.87 et seq. (Matthew Bender)

California Civil Practice: Torts, §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1703. Defamation per quod—Essential Factual Elements (Private Figure—Matter of Public Concern)

[*Name of plaintiff*] claims that [*name of defendant*] harmed [him/her/*nonbinary pronoun*] by making [one or more of] the following statement(s): [*insert all claimed per quod defamatory statements*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

Liability

1. **That [*name of defendant*] made [one or more of] the statement(s) to [a person/persons] other than [*name of plaintiff*];**
2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [*name of plaintiff*];**
3. **That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [*name of plaintiff*] in [his/her/*nonbinary pronoun*] occupation [or to expose [him/her/*nonbinary pronoun*] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her/*nonbinary pronoun*]];**
4. **That the statement(s) [was/were] false;**
5. **That [*name of defendant*] failed to use reasonable care to determine the truth or falsity of the statement(s);**
6. **That [*name of plaintiff*] suffered harm to [his/her/*nonbinary pronoun*] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and**
7. **That the statements [was/were] a substantial factor in causing [*name of plaintiff*]'s harm.**

Actual Damages

If [*name of plaintiff*] has proved all of the above, then [he/she/*nonbinary pronoun*] is entitled to recover if [he/she/*nonbinary pronoun*] proves that [*name of defendant*]'s wrongful conduct was a substantial factor in causing any of the following actual damages:

a. **Harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation;**
b. **Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements;**
c. **Harm to [*name of plaintiff*]'s reputation; or**
d. **Shame, mortification, or hurt feelings.**

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she/***nonbinary pronoun***] proves by clear and convincing evidence that [***name of defendant***] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she/***nonbinary pronoun***] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, December 2009, June 2016, December 2016, January 2018

Directions for Use

Special verdict form VF-1703, *Defamation per quod (Private Figure—Matter of Public Concern)*, should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege.* (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].)

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1701, *Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Sources and Authority

- Libel per se. Civil Code section 45a.
- Special Damages. Civil Code section 48a(4)(b).

- "Libel is recognized as either being per se (on its face), or per quod (literally meaning, 'whereby'), and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)
- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 5, internal citation omitted.)
- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7, footnote omitted.)
- "A libel 'per quod' . . . requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr. 244, 649 P.2d 886].)
- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the "innuendo," . . .); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement").' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354].)
- "A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof." (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)
- "The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397], internal citations omitted.)
- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)
- " '[I]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.' " (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845 [52 Cal.Rptr.2d 831], quoting *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1297.)

- If the language is not defamatory on its face, there is no distinction between libel and slander: "In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305].)
- A plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345–347 [94 S.Ct. 2997, 41 L.Ed.2d 789].)
- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203–204 [35 Cal.Rptr.2d 740], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654, 719–721

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.11, 340.13 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.30–142.40 (Matthew Bender)

California Civil Practice: Torts §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1704. Defamation per se—Essential Factual Elements (Private Figure—Matter of Private Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her/***nonbinary pronoun***] by making [one or more of] the following statement(s): [***list all claimed per se defamatory statement(s)***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**
2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**
3. **[That [this person/these people] reasonably understood the statement(s) to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]];**
4. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s).**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she/***nonbinary pronoun***] is entitled to recover [his/her/***nonbinary pronoun***] actual damages if [he/she/***nonbinary pronoun***] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**
b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**
c. **Harm to [***name of plaintiff***]'s reputation; or**
d. **Shame, mortification, or hurt feelings.**

Assumed Damages

Even if [*name of plaintiff***] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings, the law assumes that [he/she/***nonbinary pronoun***] has suffered this harm. Without presenting evidence of damage, [***name of plaintiff***] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.**

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of***

***defendant*] if [he/she/*nonbinary pronoun*] proves by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, December 2009, June 2016, December 2016, January 2018

Directions for Use

Special verdict form VF-1704, *Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Private Concern)*, may be used in this type of case.

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege.* (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].)

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Sources and Authority

- "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado*

(1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)

- "The question whether a plaintiff is a public figure [or not] is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203–204 [35 Cal.Rptr.2d 740], internal citation omitted.)
- The jury should be instructed that the defendant's negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)
- "A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice . . . to recover presumed or punitive damages." (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747 [257 Cal.Rptr. 708, 771 P.2d 406].)
- "The First Amendment trumps the common law presumption of falsity in defamation cases involving private-figure plaintiffs when the allegedly defamatory statements pertain to a matter of public interest." (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)
- "Thus, in a defamation action the burden is normally on the defendant to prove the truth of the allegedly defamatory communications. However, in accommodation of First Amendment considerations (which are implicated by state defamation laws), where the plaintiff is a public figure, the 'public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.' " (*Stolz, supra,* 30 Cal.App.4th at p. 202, internal citations omitted.)
- "Since the statements at issue here involved a matter of purely private concern communicated between private individuals, we do not regard them as raising a First Amendment issue. 'While such speech is not totally unprotected by the First Amendment, its protections are less stringent' [than that applying to speech on matters of public concern]." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305], quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 760 [105 S.Ct. 2939, 86 L.Ed.2d 593], internal citation omitted.)
- "We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." (*Dun & Bradstreet, Inc., supra,* 472 U.S. at p. 763.)
- "When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet,* the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 775 [106 S.Ct. 1558, 89 L.Ed.2d 783].)
- "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that

defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [¶¶] . . . [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

- "In defamation actions generally, factual truth is a defense which it is the defendant's burden to prove. In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff." (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654, 721

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.18 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.87 (Matthew Bender)

California Civil Practice: Torts, §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1705. Defamation per quod—Essential Factual Elements (Private Figure—Matter of Private Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her/***nonbinary pronoun***] by making [one or more of] the following statement(s): [***insert all claimed per quod defamatory statements***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**
2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**
3. **That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [***name of plaintiff***] in [his/her/***nonbinary pronoun***] occupation [or to expose [him/her/***nonbinary pronoun***] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her/***nonbinary pronoun***]];**
4. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s);**
5. **That [***name of plaintiff***] suffered harm to [his/her/***nonbinary pronoun***] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and**
6. **That the statement(s) [was/were] a substantial factor in causing [***name of plaintiff***]'s harm.**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she/***nonbinary pronoun***] is entitled to recover if [he/she/***nonbinary pronoun***] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

a. **Harm to [***name of plaintiff***]'s property, business, trade, profession, or occupation;**
b. **Expenses [***name of plaintiff***] had to pay as a result of the defamatory statements;**
c. **Harm to [***name of plaintiff***]'s reputation; or**
d. **Shame, mortification, or hurt feelings.**

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of***

***defendant*] if [he/she/*nonbinary pronoun*] proves by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, December 2009, June 2016, December 2016, January 2018

Directions for Use

Special verdict form VF-1705, *Defamation per quod (Private Figure—Matter of Private Concern)*, should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege.* (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].)

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1701, *Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Sources and Authority

- Libel per se. Civil Code section 45a.
- Special Damages. Civil Code section 48a(4)(b).
- "Libel is recognized as either being per se (on its face), or per quod (literally meaning, 'whereby'), and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)
- "If [a] defamatory meaning would appear only to readers who might be able to

recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 5, internal citation omitted.)

- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7, footnote omitted.)
- "A libel 'per quod' . . . requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr. 244, 649 P.2d 886].)
- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) allege his interpretation of the defamatory meaning of the language (the "innuendo," . . .); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement").' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354].)
- "A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof." (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)
- "The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397], internal citations omitted.)
- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are required to prove only negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)
- If the language is not defamatory on its face, there is no distinction between libel and slander: "In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305].)
- A plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345–347 [94 S.Ct. 2997, 41 L.Ed.2d 789].)

- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203–204 [35 Cal.Rptr.2d 740], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654, 721

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.12–340.13 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.20–142.32 (Matthew Bender)

California Civil Practice: Torts §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1706. Definition of Statement

The word "statement" in these instructions refers to any form of communication or representation, including spoken or written words [or] pictures [or] [*insert audible or visual representations***].**

New September 2003

Directions for Use

This instruction may be necessary in every case, but could be useful in cases where defamatory material is not written or verbal.

Sources and Authority

- Libel. Civil Code section 45.
- Slander. Civil Code section 46.

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.02 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.18 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.21 (Matthew Bender)

California Civil Practice: Torts § 21:2 (Thomson Reuters)

1707. Fact Versus Opinion

For [*name of plaintiff*] to recover, [*name of defendant*]'s statement(s) must have been [a] statement(s) of fact, not opinion. A statement of fact is one that can be proved to be true or false. In some circumstances, [*name of plaintiff*] may recover if a statement phrased as an opinion implies that a false statement of fact is true.

In deciding this issue, you should consider whether the average [reader/listener] would conclude from the language of the statement and its context that [*name of defendant*] was implying that a false statement of fact is true.

New September 2003; Revised June 2013

Directions for Use

Give this instruction only if the court concludes that a statement could reasonably be construed as implying a false assertion of fact. (See *Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 572, 578 [51 Cal.Rptr.2d 891].)

Sources and Authority

- " 'Because [a defamatory] statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected. [Citation.]' That does not mean that statements of opinion enjoy blanket protection. On the contrary, where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation. The 'crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. [Citation.]' 'Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood. [Citations.]' " (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 695–696 [142 Cal.Rptr.3d 40], internal citations omitted.)
- " 'In determining whether a statement is libelous we look to what is explicitly stated as well as what insinuation and implication can be reasonably drawn from the communication.' ' " '[I]f the defendant juxtaposes [a] series of facts so as to imply a defamatory connection between them, or [otherwise] creates a defamatory implication . . . he may be held responsible for the defamatory implication, . . . even though the particular facts are correct.' " ' The 'pertinent question' is whether a 'reasonable fact finder' could conclude that the statements 'as a whole, or any of its parts, directly made or sufficiently implied a false assertion of defamatory fact that tended to injure' plaintiff's reputation." (*Issa v.*

Applegate (2019) 31 Cal.App.5th 689, 703 [242 Cal.Rptr.3d 809], internal citations omitted.)

- "In defining libel and slander, Civil Code sections 45 and 46 both refer to a 'false . . . publication . . . .' This statutory definition can be meaningfully applied only to statements that are capable of being proved as false or true." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305].)
- "Thus, 'rhetorical hyperbole,' 'vigorous epithet[s],' 'lusty and imaginative expressions[s] of . . . contempt,' and language used 'in a loose, figurative sense' have all been accorded constitutional protection." (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401 [88 Cal.Rptr.2d 843].)
- "Deprecatory statements regarding the merits of litigation are "nothing more than 'the predictable opinion' of one side to the lawsuit" and cannot be the basis for a defamation claim." (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 156 [162 Cal.Rptr.3d 831].)
- "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18 [110 S.Ct. 2695, 111 L.Ed.2d 1].)
- "[W]hen a communication identifies non-defamatory facts underlying an opinion, or the recipient is otherwise aware of those facts, a negative statement of opinion is not defamatory. As explained in the Restatement Second of Torts, a 'pure type of expression of opinion' occurs 'when both parties to the communication know the facts or assume their existence and the comment is clearly based on those assumed facts and does not imply the existence of other facts in order to justify the comment. The assumption of the facts may come about because someone else has stated them or because they were assumed by both parties as a result of their notoriety or otherwise.' Actionable statements of opinion are 'the mixed type, [where] an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant [but] gives rise to the inference that there are undisclosed facts that justify the forming of the opinion.' " (*John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1314 [206 Cal.Rptr.3d 60], internal citation omitted.)
- "Even if an opinion can be understood as implying facts capable of being proved true or false, however, it is not actionable if it also discloses the underlying factual bases for the opinion and those statements are true." (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 100 [201 Cal.Rptr.3d 782].)
- "California courts have developed a 'totality of the circumstances' test to determine whether an alleged defamatory statement is one of fact or of opinion. First, the language of the statement is examined. For words to be defamatory,

they must be understood in a defamatory sense. Where the language of the statement is 'cautiously phrased in terms of apparency,' the statement is less likely to be reasonably understood as a statement of fact rather than opinion." (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260 [228 Cal.Rptr. 206, 721 P.2d 87].)

- "The court must put itself in the place of an average reader and decide the natural and probable effect of the statement." (*Hofmann Co. v. E.I. Du Pont de Nemors & Co.* (1988) 202 Cal.App.3d 390, 398 [248 Cal.Rptr. 384].)
- "[S]ome statements are ambiguous and cannot be characterized as factual or nonfactual as a matter of law. 'In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion . . . .' " (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244], internal citations omitted.)
- "Use of 'hyperbolic, informal' ' "crude, [or] ungrammatical" language, satirical tone, [or] vituperative, "juvenile name-calling" ' provide support for the conclusion that offensive comments were nonactionable opinion. Similarly, overly vague statements, and ' "generalized" comments . . . "lack[ing] any specificity as to the time or place of" alleged conduct may be a "further signal to the reader there is no factual basis for the accusations." ' On the other hand, if a statement is 'factually specific,' 'earnest', or 'serious' in tone, or the speaker 'represents himself as "unbiased," ' ' "having specialized" ' or ' "first-hand experience," ' or ' "hav[ing] personally witnessed . . . abhorrent behavior" ', this may signal the opposite, rendering the statement actionable." (*ZL Technologies, Inc. v. Does 1–7* (2017) 13 Cal.App.5th 603, 624 [220 Cal.Rptr.3d 569], internal citations omitted.)
- "Whether a challenged statement 'declares or implies a provable false assertion of fact is a question of law for the court to decide . . . , unless the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood.' " (*Overhill Farms, Inc. v. Lopez* (2010) 190 Cal.App.4th 1248, 1261 [119 Cal.Rptr.3d 127].)
- "We next turn to the broader context of his statements—posting on an Internet site under an assumed user name. [Defendant] contends Internet fora are notorious as 'places where readers expect to see strongly worded opinions rather than objective facts,' and that 'anonymous, or pseudonymous,' opinions should be ' "discount[ed] . . . accordingly." ' However, the mere fact speech is broadcast across the Internet by an anonymous speaker does not ipso facto make it nonactionable opinion and immune from defamation law." (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 429 [160 Cal.Rptr.3d 423], internal citation omitted.)
- "Rather, a defendant's anonymity, the name of the Internet forum, the nature, language, tone, and complete content of the remarks all are relevant." (*ZL Technologies, Inc., supra,* 13 Cal.App.5th at p. 625.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 643–646

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.05–45.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.16 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.86 (Matthew Bender)

California Civil Practice: Torts §§ 21:20–21:21 (Thomson Reuters)

1708. Coerced Self-Publication

[*Name of plaintiff***] claims that [***name of defendant***] is responsible for [his/her/***nonbinary pronoun***] harm even though [***name of defendant***] did not communicate the statement(s) to anyone other than [***name of plaintiff***]. To succeed, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] made the statement(s) to [***name of plaintiff***];**
2. **That [***name of plaintiff***] was under strong pressure to communicate [***name of defendant***]'s statement(s) to another person; and**
3. **That when [***name of defendant***] made the statements, [he/she/***nonbinary pronoun***] should have known that [***name of plaintiff***] would be under strong pressure to communicate them to another person.**

If [*name of plaintiff***] has proved all of the above, then you must find that [***name of defendant***] was responsible for the communication of the statement(s).**

New September 2003

Sources and Authority

- The general rule is that "[a] plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant." The exception to the rule occurs "when it [is] foreseeable that the defendant's act would result in plaintiff's publication to a third person." (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 [286 Cal.Rptr. 198].)
- [A] "self-publication of the alleged defamatory statement may be imputed to the originator of the statement if 'the person defamed is operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed.' " (*Davis v. Consolidated Freightways* (1994) 29 Cal.App.4th 354, 373 [34 Cal.Rptr.2d 438], quoting *McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787, 797–798 [168 Cal.Rptr. 89].)
- "This exception has been limited to a narrow class of cases, usually where a plaintiff is compelled to republish the statements in aid of disproving them." (*Live Oak Publishing Co., supra,* 234 Cal.App.3d at p. 1285.)
- To determine if the coercion exception applies, the test is "whether 'because of some necessity he was under to communicate the matter to others, it was

reasonably to be anticipated that he would do so.' " (*Live Oak Publishing Co., supra,* 234 Cal.App.3d at p. 1285.)

- "[W]hile compelled self-published defamation per se technically eliminates the need for publication by the defendant to a third party, a plaintiff cannot manufacture the defamation claim by simply publishing statements to a third party because the plaintiff must disclose contents of the employer's statement to a third party *after* reading or being informed of the contents. The originator of the statement is liable for the foreseeable repetition because of the causal link between the originator and the presumed damage to the plaintiff's reputation, but the publication must be foreseeable. The presumed injury is no less damaging because the plaintiff was compelled to make the statement instead of the employer making it directly to the third party." (*Tilkey v. Allstate Ins. Co.* (2020) 56 Cal.App.5th 521, 542 [270 Cal.Rptr.3d 559], original italics, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 633, 722

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.22 (Matthew Bender)

California Civil Practice: Torts § 21:15 (Thomson Reuters)

1709. Retraction: News Publication or Broadcast (Civ. Code, § 48a)

Because [*name of defendant*] is a [[daily/weekly] news publication/broadcaster], [*name of plaintiff*] may recover only the following:

(a) Damages to property, business, trade, profession, or occupation; and

(b) Damages for money spent as a result of the defamation.

However, this limitation does not apply if [*name of plaintiff*] proves both of the following:

1. **That [*name of plaintiff*] demanded a correction of the statement within 20 days of discovering the statement; and**
2. **That [*name of defendant*] did not publish an adequate correction;**

   [or]

   That [*name of defendant*]'s correction was not substantially as conspicuous as the original [publication/broadcast];

   [or]

   That [*name of defendant*]'s correction was not [published/broadcast] within three weeks of [*name of plaintiff*]'s demand.

New September 2003; Revised June 2016, May 2017; Renumbered from CACI No. 1722 November 2017

Directions for Use

The judge should decide whether the demand for a retraction was served in compliance with the statute. (*O'Hara v. Storer Communications, Inc.* (1991) 231 Cal.App.3d 1101, 1110 [282 Cal.Rptr. 712].)

The statute is limited to actions "for damages for the publication of a libel in a daily or weekly news publication, or of a slander by radio broadcast." (Civ. Code, § 48a(a).) However, a "radio broadcast" includes television. (Civ. Code, § 48.5(4) [the terms "radio," "radio broadcast," and "broadcast," are defined to include both visual and sound radio broadcasting]; *Kalpoe v. Superior Court* (2013) 222 Cal.App.4th 206, 210, 166 Cal.Rptr.3d 80].)

Sources and Authority

- Demand for Correction. Civil Code section 48a.
- "Under California law, a newspaper gains immunity from liability for all but

'special damages' when it prints a retraction satisfying the requirements of section 48a." (*Pierce v. San Jose Mercury News* (1989) 214 Cal.App.3d 1626, 1631 [263 Cal.Rptr. 410]; see also *Twin Coast Newspapers, Inc. v. Superior Court* (1989) 208 Cal.App.3d 656, 660–661 [256 Cal.Rptr. 310].)

- "An equivocal or incomplete retraction obviously serves no purpose even if it is published in 'substantially as conspicuous a manner . . . as were the statements claimed to be libelous.' " (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1011 [283 Cal.Rptr. 644].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 735–744

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.24 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.53 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.37 (Matthew Bender)

California Civil Practice: Torts §§ 21:55–21:57 (Thomson Reuters)

1710–1719. Reserved for Future Use

1720. Affirmative Defense—Truth

[*Name of defendant*] is not responsible for [*name of plaintiff*]'s harm, if any, if [*name of defendant*] proves that [his/her/*nonbinary pronoun*/its] statement(s) about [*name of plaintiff*] [was/were] true. [*Name of defendant*] does not have to prove that the statement(s) [was/were] true in every detail, so long as the statement(s) [was/were] substantially true.

New September 2003; Revised October 2008, May 2017

Directions for Use

This instruction is to be used only in cases involving private plaintiffs on matters of private concern. In cases involving public figures or matters of public concern, the burden of proving falsity is on the plaintiff. (*Sonoma Media Investments, LLC v. Superior Court* (2019) 34 Cal.App.5th 24, 37 [247 Cal.Rptr.3d 5].)

Sources and Authority

- "Truth, of course, is an absolute defense to any libel action." (*Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 572, 581–582 [51 Cal.Rptr.2d 891].)
- "California law permits the defense of substantial truth and would absolve a defendant even if she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' 'Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' " (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 154 [162 Cal.Rptr.3d 831], internal citation omitted.)
- "Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' " (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1262–1263 [217 Cal.Rptr.3d 234].)
- "In defamation actions generally, factual truth is a defense which it is the defendant's burden to prove. [¶] In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the *plaintiff*. As a matter of constitutional law, therefore, media statements on matters of public interest, including statements of opinion which reasonably imply a knowledge of facts, 'must be provable as false before there can be liability under state defamation law.' " (*Eisenberg v. Alameda Newspapers*, (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802], original italics, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 655–659, 720

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.10 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.55 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.39 (Matthew Bender)

1 California Civil Practice: Torts §§ 21:19, 21:52 (Thomson Reuters)

1721. Affirmative Defense—Consent

[*Name of defendant*] is not responsible for [*name of plaintiff*]'s harm, if any, if [he/she/*nonbinary pronoun*] proves that [*name of plaintiff*] consented, by words or conduct, to [*name of defendant*]'s communication of the statement(s) to others. In deciding whether [*name of plaintiff*] consented to the communication, you should consider the circumstances surrounding the words or conduct.

New September 2003; Revised October 2008

Sources and Authority

- Restatement Second of Torts, section 583, provides, in part: "[T]he consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation."
- "One of the oldest and most widely recognized defenses to the publication of defamatory matter is the doctrine of consent, which has been classified as a form of absolute privilege." (*Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 498 [153 Cal.Rptr. 499].)
- "One of the primary purposes of the doctrine of consent in defamation law is to prevent a party from inviting or inducing indiscretion and thereby laying the foundation of a lawsuit for his own pecuniary gain." (*Royer, supra,* 90 Cal.App.3d at p. 499.)
- This rule applies when the plaintiff asks the defendant to repeat the statement to others and when the plaintiff himself repeats the statements to others. (*Royer, supra,* 90 Cal.App.3d at p. 498 [but see CACI No. 1708, *Coerced Self-Publication*].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 694

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.68 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.54 (Matthew Bender)

California Civil Practice: Torts § 21:28 (Thomson Reuters)

1722. Affirmative Defense—Statute of Limitations—Defamation

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [he/she/***nonbinary pronoun***/it] first communicated the alleged defamatory statement to a person other than [***name of plaintiff***] before [***insert date one year before date of filing***]. [For statements made in a publication, the claimed harm occurred when the publication was first generally distributed to the public.]**

[If, however, [*name of plaintiff***] proves that on [***insert date one year before date of filing***] [he/she/***nonbinary pronoun***/it] had not discovered the facts constituting the defamation, and with reasonable diligence could not have discovered those facts, the lawsuit was filed on time.]**

New April 2009; Renumbered from CACI No. 1724 November 2017

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable one-year limitation period for defamation. (See Code Civ. Proc., § 340(c).)

If the defamation was published in a publication such as a book, newspaper, or magazine, include the last sentence of the first paragraph, and do not include the second paragraph The delayed-discovery rule does not apply to these statements. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1250–1251 [7 Cal.Rptr.3d 576, 80 P.3d 676].) Otherwise, include the second paragraph if the plaintiff alleges that the delayed-discovery rule avoids the limitation defense.

The plaintiff bears the burden of pleading and proving delayed discovery. (See *McKelvey v. Boeing North Am. Inc.* (1999) 74 Cal.App.4th 151, 160 [86 Cal.Rptr.2d 645].) See also the Sources and Authority to CACI No. 455, *Statute of Limitations—Delayed Discovery*.

The delayed discovery rule can apply to matters published in an inherently secretive manner. (*Hebrew Academy of San Francisco v. Goldman* (2007) 42 Cal.4th 883, 894 [70 Cal.Rptr.3d 178, 173 P.3d 1004]. Modify the instruction if inherent secrecy is at issue and depends on disputed facts. It is not clear whether the plaintiff has the burden of proving inherent secrecy or the defendant has the burden of proving its absence.

Sources and Authority

- One-Year Statute of Limitations. Code of Civil Procedure section 340.
- "In a claim for defamation, as with other tort claims, the period of limitations commences when the cause of action accrues. . . . [A] cause of action for defamation accrues at the time the defamatory statement is 'published' (using the

term 'published' in its technical sense). [¶] [I]n defamation actions the general rule is that publication occurs when the defendant communicates the defamatory statement to a person other than the person being defamed. As also has been noted, with respect to books and newspapers, publication occurs (and the cause of action accrues) when the book or newspaper is first generally distributed to the public." (*Shively, supra,* 31 Cal.4th at pp. 1246–1247, internal citations omitted.)

- "This court and other courts in California and elsewhere have recognized that in certain circumstances it may be appropriate to apply the discovery rule to delay the accrual of a cause of action for defamation or to impose an equitable estoppel against defendants who assert the defense after the limitations period has expired." (*Shively, supra,* 31 Cal.4th at pp. 1248–1249.)
- "[A]pplication of the discovery rule to statements contained in books and newspapers would undermine the single-publication rule and reinstate the indefinite tolling of the statute of limitations intended to be cured by the adoption of the single-publication rule. If we were to recognize delayed accrual of a cause of action based upon the allegedly defamatory statement contained in the book . . . on the basis that plaintiff did not happen to come across the statement until some time after the book was first generally distributed to the public, we would be adopting a rule subjecting publishers and authors to potential liability during the entire period in which a single copy of the book or newspaper might exist and fall into the hands of the subject of a defamatory remark. Inquiry into whether delay in discovering the publication was reasonable has not been permitted for publications governed by the single-publication rule. Nor is adoption of the rule proposed by plaintiff appropriate simply because the originator of a privately communicated defamatory statement may, together with the author and the publisher of a book, be liable for the defamation contained in the book. Under the rationale for the single-publication rule, the originator, who is jointly responsible along with the author and the publisher, should not be liable for millions of causes of action for a single edition of the book. Similarly, consistent with that rationale, the originator, like the author or the publisher, should not be subject to suit many years after the edition is published." (*Shively, supra,* 31 Cal.4th at p. 1251.)
- "The single-publication rule as described in our opinion in *Shively* and as codified in Civil Code section 3425.3 applies without limitation to all publications." (*Hebrew Academy of San Francisco, supra,* 42 Cal.4th at p. 893.)
- "[T]he single-publication rule applies not only to books and newspapers that are published with general circulation (as we addressed in *Shively*), but also to publications like that in the present case that are given only limited circulation and, thus, are not generally distributed to the public. Further, the discovery rule, which we held in *Shively* does not apply when a book or newspaper is generally distributed to the public, does not apply even when, as in the present case, a publication is given only limited distribution." (*Hebrew Academy of San Francisco, supra,* 42 Cal.4th at p. 890.)

- " '. . . [C]ourts uniformly have *rejected* the application of the discovery rule to libels published in books, magazines, and newspapers,' stating that 'although application of the discovery rule may be justified when the defamation was communicated in confidence, that is, "in an inherently secretive manner," the justification does not apply when the defamation occurred by means of a book, magazine, or newspaper that was distributed to the public. [Citation.]' " (*Hebrew Academy of San Francisco, supra,* 42 Cal.4th at p. 894, original italics, internal citations omitted.)

Secondary Sources

Haning et al., California Practice Guide: Personal Injury, Ch. 5-B, *Filing Suit: Time Bars and Pleading Concerns*, ¶ 5:176.10 (The Rutter Group)

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.21 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.290 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.56 (Matthew Bender)

1723. Common Interest Privilege—Malice (Civ. Code, § 47(c))

[*Name of plaintiff***] cannot recover damages from [***name of defendant***], even if the statement(s) [was/were] false, unless [***name of plaintiff***] also proves either:**

1. **That in making the statement(s), [***name of defendant***] acted with hatred or ill will toward [him/her/***nonbinary pronoun***], showing [***name of defendant***]'s willingness to vex, annoy, or injure [him/her/***nonbinary pronoun***]; or**
2. **That [***name of defendant***] had no reasonable grounds for believing the truth of the statement(s).**

New September 2003; Revised June 2014

Directions for Use

This instruction involves what is referred to as the "common interest" privilege of Civil Code section 47(c). This statute grants a privilege against defamation to communications made without malice on subjects of mutual interest. The defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].)

Sources and Authority

- Common-Interest Privilege: Civil Code section 47(c).
- Malice Not Inferred: Civil Code section 48.
- "So, defendants contended, any publication was protected by the common interest privilege in Civil Code section 47, subdivision (c), which extends a privilege to statements made 'without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.' " (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 353 [192 Cal.Rptr.3d 511].)
- "Civil Code section 47 'extends a conditional privilege against defamation to statements made without malice on subjects of mutual interests. [Citation.] This privilege is "recognized where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest." [Citation.] The "interest" must be something other than mere general or idle curiosity, such as where the parties to the communication share a contractual, business or similar relationship or the defendant is protecting his own pecuniary interest. [Citation.] Rather, it is restricted to 'proprietary or narrow private interests." [Citations.]' " (*Hui v.*

Sturbaum (2014) 222 Cal.App.4th 1109, 1118–1119 [166 Cal.Rptr.3d 569].)

- "This definition is not exclusive, however, and the cases have taken an 'eclectic approach' toward interpreting the statute." (*Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 617 [225 Cal.Rptr.3d 711].)
- "Communications made in a commercial setting relating to the conduct of an employee have been held to fall squarely within the qualified privilege for communications to interested persons." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 949 [227 Cal.Rptr.3d 286].)
- " 'Ordinarily, the common interest of the members of a church in church matters is sufficient to give rise to a qualified privilege to communications between members on subjects relating to the church's interest.' This reasoning applies by analogy to communications between parents of parochial school children and church authorities overseeing the school on subjects relating to the school." (*Hicks v. Richard* (2019) 39 Cal.App.5th 1167, 1177 [252 Cal.Rptr.3d 578].)
- "For the purposes of section 47's qualified privilege, 'malice' means that the defendant (1) ' "was motivated by hatred or ill will towards the plaintiff," ' or (2) ' "lacked reasonable grounds for [its] belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights." ' " (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1337 [220 Cal.Rptr.3d 408].)
- "The malice required to defeat the common interest privilege is actual malice." (*Hicks, supra,* 39 Cal.App.5th at p. 1178.)
- "[M]alice [as used in Civil Code section 47(c)] has been defined as 'a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person.' " (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 [257 Cal.Rptr. 708, 771 P.2d 406], internal citation omitted.)
- "[M]alice focuses upon the defendant's state of mind, not his [or her] conduct." (*Cornell, supra,* 18 Cal.App.5th at p. 951.)
- "[M]alice may not be inferred from the mere fact of the communication." (*Barker, supra,* 240 Cal.App.4th at p. 354.)
- "For purposes of establishing a triable issue of malice, 'the issue is not the truth or falsity of the statements but whether they were made recklessly without reasonable belief in their truth.' A triable issue of malice would exist if [defendant] made a statement in reckless disregard of Employee's rights that [defendant] either did not believe to be true (i.e., he actually knew better) or unreasonably believed to be true (i.e., he should have known better). In either case, a fact finder would have to ascertain what [defendant] subjectively knew and believed about the topic at the time he spoke." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1540 [152 Cal.Rptr.3d 154], internal citation omitted.)
- "[M]aliciousness cannot be derived from negligence. Malice entails more than sloppiness or, as in this case, an easily explained typo." (*Bierbower v. FHP, Inc.* (1999) 70 Cal.App.4th 1, 9 [82 Cal.Rptr.2d 393].)

- "[I]f malice is shown, the privilege is not merely overcome; it never arises in the first instance. . . . [T]he characterization of the privilege as qualified or conditional is incorrect to the extent that it suggests the privilege is defeasible." (*Brown, supra,* 48 Cal.3d at p. 723, fn. 7.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 92, 655, 690–704

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-E, *Employment Torts And Related Claims—Defamation,* ¶ 5:471 et seq. (The Rutter Group)

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.12 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.66 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.53 (Matthew Bender)

California Civil Practice: Torts §§ 21:40–21:41 (Thomson Reuters)

1724. Fair and True Reporting Privilege (Civ. Code, § 47(d))

[*Name of plaintiff***] cannot recover damages from [***name of defendant***] if [***name of defendant***] proves all of the following:**

1. **That [***name of defendant***]'s statement(s) [was/were] [reported in/communicated to] [***specify public journal in which statement(s) appeared***];**
2. **The [report/communication] was of [***select the applicable statutory context***]**

   [a judicial, legislative, or other public official proceeding;]

   [something said in the course of a judicial, legislative, or other public official proceeding;]

   [a verified charge or complaint made by any person to a public official on which a warrant was issued;]

   and

3. **The [report/communication] was both fair and true.**

New November 2017

Directions for Use

This instruction involves what is referred to as the "fair and true reporting privilege" of Civil Code section 47(d). This statute grants an absolute privilege against defamation for a fair and true report in, or a communication to, a public journal, of a judicial, legislative, or other public official proceeding; or for anything said in the course of the proceeding; or for a verified charge or complaint made by any person to a public official, on which complaint a warrant has been issued.

An element of defamation is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) That would seem to suggest that the plaintiff must prove that a privilege does not apply. Nevertheless, courts have held that it is the defendant's burden to prove that the statement is within the scope of the privilege, including that it was fair and true. (*Burrill v. Nair* (2013) 217 Cal.App.4th 357, 396 [158 Cal.Rptr.3d 332], disapproved on another ground in *Baral v. Schnitt* (2016) 1 Cal.5th 376, 396, fn. 11 [205 Cal.Rptr.3d 475, 376 P.3d 604].)

Sources and Authority

- Fair and True Reporting Privilege. Civil Code section 47(d).
- "Under section 47, subdivision (d), the fair and true reporting privilege protects a 'fair and true report in, or a communication to, a public journal, of . . . a judicial . . . proceeding, or . . . anything said in the course thereof.' It too is an

absolute privilege—that is, it applies regardless of the defendants' motive for making the report—and forecloses a plaintiff from showing a probability of prevailing on the merits." (*Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 787 [214 Cal.Rptr.3d 358].)

- "The purpose of this privilege is to ensure the public interest is served by the dissemination of information about events occurring in official proceedings and with respect to verified charges or complaints resulting in the issuance of a warrant." (*Burrill, supra,* 217 Cal.App.4th at p. 397.)
- "Prior to 1997 subdivision (d) applied only to a fair and true report *in a* public journal. Senate Bill No. 1540 (1995–1996 Reg. Sess.), sponsored by the California Newspapers Publishers Association, amended the provision, effective January 1, 1997, to add 'or a communication to,' so the privilege would extend, as it does now, to both a fair and true report in and a communication to a public journal concerning judicial, legislative or other public proceedings." (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 97 [201 Cal.Rptr.3d 782], original italics.)
- "The privilege applies if the substance of the publication or broadcast captures the gist or sting of the statements made in the official proceedings." (*Burrill, supra,* 217 Cal.App.4th at p. 398.)
- "The defendant is entitled to a certain degree of ' "flexibility/literary license" ' in this regard, such that the privilege will apply even if there is a slight inaccuracy in details—one that does not lead the reader to be affected differently by the report than he or she would be by the actual truth." (*Argentieri, supra,* 8 Cal.App.5th at pp. 787–788.)
- "[Plaintiff] further contends it was for a jury, not the trial court, to decide whether [defendant]'s Statement was a fair and true report. Courts have stated that the fairness and truth of a report is an issue of fact for the jury, *if* there is any material factual dispute on the issue." (*Argentieri, supra,* 8 Cal.App.5th at p. 791, original italics.)
- " '[W]hether or not a privileged occasion exists is for the court to decide, while the effect produced by the particular words used in an article [or broadcast] and the fairness of the report is a question of fact for the jury [citation].' '[T]he publication is to be measured by the natural and probable effect it would have on the mind of the average reader [citations]. The standard of interpretation to be used in testing alleged defamatory language is how those in the community where the matter was published would reasonably understand it [citation]. In determining whether the report was fair and true, the article [or broadcast] must be regarded from the standpoint of persons whose function is to give the public a fair report of what has taken place. The report is not to be judged by the standard of accuracy that would be adopted if it were the report of a professional law reporter or a trained lawyer [citation].' " (*Burrill, supra,* 217 Cal.App.4th at p. 398, internal citation omitted.)
- "At the very least, the difference between these accusations presents a question

of fact with respect to whether the average listener would understand the broadcast to capture the gist or sting of the citizen's complaint, or whether the charge made in the broadcast would affect the listener differently than that made in the citizen's complaint." (*Burrill, supra,* 217 Cal.App.4th at p. 398.)

- "In evaluating the effect a publication has on the average reader, the challenged language must be viewed in context to determine whether, applying a 'totality of the circumstances' test, it is reasonably susceptible to the defamatory meaning alleged by the plaintiff: ' "[A] defamatory meaning must be found, if at all, in a reading of the publication as a whole." [Citation.] "This is a rule of reason. Defamation actions cannot be based on snippets taken out of context." ' (*J-M Manufacturing Co., Inc., supra,* 247 Cal.App.4th at p. 97, internal citations omitted.)
- "[Defendant] bears the burden of proving the privilege applies." (*Burrill, supra,* 217 Cal.App.4th at p. 396.)
- " 'A report of a judicial proceeding implies that some official action has been taken by the officer or body whose proceedings are thus reported. The publication, therefore, of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken is not within the rule stated in this Section. An important reason for this position has been to prevent implementation of a scheme to file a complaint for the purpose of establishing a privilege to publicize its content and then dropping the action. (See Comment c). It is not necessary, however, that a final disposition be made of the matter in question; it is enough that some judicial action has been taken so that, in the normal progress of the proceeding, a final decision will be rendered.' " (*Burrill, supra,* at p. 397, quoting Restatement 2d of Torts, § 611, comment e.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 691

4 Levy et al., California Torts, Ch. 45, *Intentional Torts and Other Theories of Recovery*, § 45.11 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.64 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander*, § 142.51 (Matthew Bender)

1725–1729. Reserved for Future Use

1730. Slander of Title—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her/***nonbinary pronoun***] by [making a statement/taking an action] that cast doubts about [***name of plaintiff***]'s ownership of [***describe real or personal property, e.g., the residence located at [address]***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That** [*name of defendant*] **[made a statement/[***specify other act, e.g., recorded a deed***] that cast doubts about [***name of plaintiff***]'s ownership of the property;**
2. **That the [statement was made to a person other than [***name of plaintiff***]/[***specify other publication, e.g., deed became a public record***]];**
3. **That [the statement was untrue and] [***name of plaintiff***] did in fact own the property;**
4. **That [***name of defendant***] [knew that/acted with reckless disregard of the truth or falsity as to whether] [***name of plaintiff***] owned the property;**
5. **That [***name of defendant***] knew or should have recognized that someone else might act in reliance on the [statement/***e.g., deed***], causing [***name of plaintiff***] financial loss;**
6. **That [***name of plaintiff***] did in fact suffer immediate and direct financial harm [because someone else acted in reliance on the [statement/***e.g., deed***]/ [or] by incurring legal expenses necessary to remove the doubt cast by the [statement/***e.g., deed***] and to clear title];**
7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2012; Revised May 2018, November 2018

Directions for Use

Slander of title may be either by words or an act that clouds title to the property. (See, e.g., *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 661 [132 Cal.Rptr.3d 781] [filing of lis pendens].) If the slander is by means other than words, specify the means in element 1. If the slander is by words, select the first option in element 2.

An additional element of a slander of title claim is that the alleged slanderous statement was without privilege or justification. (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1336 [220 Cal.Rptr.3d 408].) If this element presents an issue

for the jury, an instruction on it must be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is alleged, give CACI No. 1724, *Fair and True Reporting Privilege.* (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

Beyond the privilege of Civil Code section 47(c), it would appear that actual malice in the sense of ill will toward and intent to harm the plaintiff is not required and that malice may be implied in law from absence of privilege (see *Gudger v. Manton* (1943) 21 Cal.2d 537, 543–544 [134 P.2d 217], disapproved on other grounds in *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381 [295 P.2d 405]) or from the attempt to secure property to which the defendant had no legitimate claim (see *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 623 [44 Cal.Rptr. 683]) or from accusations made without foundation (element 4). (See *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 67 [7 Cal.Rptr. 358].)

Sources and Authority

- "[S]lander of title is not a form of deceit. It is a form of the separate common law tort of disparagement, also sometimes referred to as injurious falsehood." (*Finch Aerospace Corp. v. City of San Diego* (2017) 8 Cal.App.5th 1248, 1253 [214 Cal.Rptr.3d 628].)
- "The Supreme Court has recently determined a viable disparagement claim, which necessarily includes a slander of title claim, requires the existence of a 'misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication.' " (*Finch Aerospace Corp., supra,* 8 Cal.App.5th at p. 1253.)
- " 'Slander of title is effected by one who without privilege publishes untrue and disparaging statements with respect to the property of another under such circumstances as would lead a reasonable person to foresee that a prospective purchaser or lessee thereof might abandon his intentions. It is an invasion of the interest in the vendibility of property. In order to commit the tort actual malice or ill will is unnecessary. Damages usually consist of loss of a prospective purchaser. To be disparaging a statement need not be a complete denial of title in others, but may be any unfounded claim of an interest in the property which throws doubt upon its ownership.' 'However, it is not necessary to show that a particular pending deal was hampered or prevented, since recovery may be had

for the depreciation in the market value of the property.' " (*M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 198–199 [143 Cal.Rptr.3d 160], internal citations omitted.)

- "Slander of title 'occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes pecuniary loss. [Citation.]' The false statement must be ' "maliciously made with the intent to defame." ' " (*Cyr v. McGovran* (2012) 206 Cal.App.4th 645, 651 [142 Cal.Rptr.3d 34], internal citations omitted.)
- "One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity." (*Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214 [206 Cal.Rptr. 259], quoting Rest. 2d Torts § 623A.)
- "One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused." (*Chrysler Credit Corp. v. Ostly* (1974) 42 Cal.App.3d 663, 674 [117 Cal.Rptr. 167], quoting Rest. Torts, § 624 [motor vehicle case].)
- "Sections 623A, 624 and 633 of the Restatement Second of Torts further refine the definition so it is clear included elements of the tort are that there must be (a) a publication, (b) which is without privilege or justification and thus with malice, express or implied, and (c) is false, either knowingly so or made without regard to its truthfulness, and (d) causes direct and immediate pecuniary loss." (*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 263–264 [169 Cal.Rptr. 678], footnote and internal citations omitted.)
- "In an action for wrongful disparagement of title, a plaintiff may recover (1) the expense of legal proceedings necessary to remove the doubt cast by the disparagement, (2) financial loss resulting from the impairment of vendibility of the property, and (3) general damages for the time and inconvenience suffered by plaintiff in removing the doubt cast upon his property." (*Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 624 [225 Cal.Rptr.3d 711].)
- "While it is true that an essential element of a cause of action for slander of title is that the plaintiff suffered pecuniary damage as a result of the disparagement of title, the law is equally clear that the expense of legal proceedings necessary to remove the doubt cast by the disparagement and to clear title is a recognized form of pecuniary damage in such cases." (*Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1032 [141 Cal.Rptr.3d 109], internal citations omitted; see Rest.2d Torts, § 633, subd. (1)(b).)
- "Although attorney fees and litigation expenses reasonably necessary to remove

the memorandum from the record were recoverable, those incurred merely in pursuit of damages against . . . defendants were not." (*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 865–866 [237 Cal.Rptr. 282].)

- "Although the gravamen of an action for disparagement of title is different from that of an action for personal defamation, substantially the same privileges are recognized in relation to both torts in the absence of statute. Questions of privilege relating to both torts are now resolved in the light of section 47 of the Civil Code." (*Albertson, supra,* 46 Cal.2d at pp. 378–379, internal citations omitted.)
- "[The privilege of Civil Code section 47(c)] is lost, however, where the person making the communication acts with malice. Malice exists where the person making the statement acts out of hatred or ill will, or has no reasonable grounds for believing the statement to be true, or makes the statement for any reason other than to protect the interest for the protection of which the privilege is given." (*Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 285 [175 Cal.Rptr. 767], disapproved on other grounds in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219 [266 Cal.Rptr. 638, 786 P.2d 365].)
- "The existence of privilege is a defense to an action for defamation. Therefore, the burden is on the defendant to plead and prove the challenged publication was made under circumstances that conferred the privilege." (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1380 [1 Cal.Rptr.3d 116] [applying rule to slander of title].)
- "The principal issue presented in this case is whether the trial court properly instructed the jury that, in the jury's determination whether the common-interest privilege set forth in section 47(c) has been established, defendants bore the burden of proving not only that the allegedly defamatory statement was made upon an occasion that falls within the common-interest privilege, but also that the statement was made without malice. Defendants contend that, in California and throughout the United States, the general rule is that, although a defendant bears the initial burden of establishing that the allegedly defamatory statement was made upon an occasion falling within the purview of the common-interest privilege, once it is established that the statement was made upon such a privileged occasion, the plaintiff may recover damages for defamation only if the plaintiff successfully meets the burden of proving that the statement was made with malice. As stated above, the Court of Appeal agreed with defendants on this point. Although, as we shall explain, there are a few (primarily early) California decisions that state a contrary rule, both the legislative history of section 47(c) and the overwhelming majority of recent California decisions support the Court of Appeal's conclusion. Accordingly, we agree with the Court of Appeal insofar as it concluded that the trial court erred in instructing the jury that defendants bore the burden of proof upon the issue of malice, for purposes of section 47(c)." (*Lundquist, supra,* 7 Cal.4th at pp. 1202–1203, internal citations omitted.)
- "Civil Code section 47(b)(4) clearly describes the conditions for application of the [litigation] privilege to a recorded lis pendens as follows: 'A recorded lis

pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.' Those conditions are (1) the lis pendens must identify a previously filed action and (2) the previously filed action must be one that affects title or right of possession of real property. We decline to add a third requirement that there must also be evidentiary merit." (*La Jolla Group II v. Bruce* (2012) 211 Cal.App.4th 461, 476 [149 Cal.Rptr.3d 716], internal citation omitted.)

- "[T]he property owner may recover for the impairment of the vendibility 'of his property' without showing that the loss was caused by prevention of a particular sale. 'The most usual manner in which a third person's reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser. . . . The disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, his land or other thing might with reasonable certainty have found a purchaser.' " (*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 424 [96 Cal.Rptr. 902].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts §§ 747, 1886

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.80 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.90 (Matthew Bender)

1731. Trade Libel—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her/***nonbinary pronoun***] by making a statement that disparaged [***name of plaintiff***]'s [***specify product***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] made a statement that [would be clearly or necessarily understood to have] disparaged the quality of [***name of plaintiff***]'s [***product/service***];**
2. **That the statement was made to a person other than [***name of plaintiff***];**
3. **That the statement was untrue;**
4. **That [***name of defendant***] [knew that the statement was untrue/ acted with reckless disregard of the truth or falsity of the statement];**
5. **That [***name of defendant***] knew or should have recognized that someone else might act in reliance on the statement, causing [***name of plaintiff***] financial loss;**
6. **That [***name of plaintiff***] suffered direct financial harm because someone else acted in reliance on the statement; and**
7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2013; Revised June 2015, May 2018

Directions for Use

The tort of trade libel is a form of injurious falsehood similar to slander of title. (See *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 548 [216 Cal.Rptr. 252]; *Erlich v. Etner* (1964) 224 Cal.App.2d 69, 74 [36 Cal.Rptr. 256].) The tort has not often reached the attention of California's appellate courts (see *Polygram Records, Inc., supra*, 170 Cal.App.3d at p. 548), perhaps because of the difficulty in proving damages. (See *Erlich*, *supra*, 224 Cal.App.2d at pp. 73–74.)

Include the optional language in element 1 if the plaintiff alleges that disparagement may be reasonably implied from the defendant's words. Disparagement by reasonable implication requires more than a statement that may conceivably or plausibly be construed as derogatory. A "reasonable implication" means a clear or necessary inference. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 295 [172 Cal.Rptr.3d 653, 326 P.3d 253].)

Elements 4 and 5 are supported by section 623A of the Restatement 2d of Torts,

which has been accepted in California. (See *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1360–1361 [78 Cal.Rptr.2d 627].) There is some authority, however, for the proposition that no intent or reckless disregard is required (element 4) if the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher. (See *Nichols v. Great Am. Ins. Cos.* (1985) 169 Cal.App.3d 766, 773 [215 Cal.Rptr. 416].)

The privileges of Civil Code section 47 almost certainly apply to actions for trade libel. (See *Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405] [slander-of-title case]; *117 Sales Corp. v. Olsen* (1978) 80 Cal.App.3d 645, 651 [145 Cal.Rptr. 778] [publication by filing small claims suit is absolutely privileged].) If a privilege is claimed, additional instructions will be necessary to frame the privilege.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege.* (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

Limitations on liability arising from the First Amendment apply. (*Hofmann Co. v. E. I. du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 397 [248 Cal.Rptr. 384]; see CACI Nos. 1700–1703, instructions on public figures and matters of public concern.) See also CACI No. 1707, *Fact Versus Opinion*.

Sources and Authority

- "Trade libel is the publication of matter disparaging the quality of another's property, which the publisher should recognize is likely to cause pecuniary loss to the owner. [Citation.] The tort encompasses 'all false statements concerning the quality of services or product of a business which are intended to cause that business financial harm and in fact do so.' [Citation.] [¶] To constitute trade libel, a statement must be false." (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 376 [154 Cal.Rptr.3d 698].)
- "To constitute trade libel the statement must be made with actual malice, that is, with knowledge it was false or with reckless disregard for whether it was true or false." (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 97 [201 Cal.Rptr.3d 782].)
- "The distinction between libel and trade libel is that the former concerns the person or reputation of plaintiff and the latter relates to his goods." (*Shores v.*

Chip Steak Co. (1955) 130 Cal.App.2d 627, 630 [279 P.2d 595].)

- "[A]n action for 'slander of title' . . . is a form of action somewhat related to trade libel . . . ." (*Erlich, supra,* 224 Cal.App.2d at p. 74.)
- "Confusion surrounds the tort of 'commercial disparagement' because not only is its content blurred and uncertain, so also is its very name. The tort has received various labels, such as 'commercial disparagement,' 'injurious falsehood,' 'product disparagement,' 'trade libel,' 'disparagement of property,' and 'slander of goods.' These shifting names have led counsel and the courts into confusion, thinking that they were dealing with different bodies of law. In fact, all these labels denominate the same basic legal claim." (*Hartford Casualty Ins. Co., supra*, 59 Cal.4th at p. 289.)
- "The protection the common law provides statements which disparage products as opposed to reputations is set forth in the Restatement Second of Torts sections 623A and 626. Section 623A provides: 'One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if [P] (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and [P]*(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity*.' [¶] Section 626 of Restatement Second of Torts in turn states: 'The rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of matter disparaging the quality of another's land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other's interests in the property.' " (*Melaleuca, Inc., supra,* 66 Cal.App.4th at pp. 1360–1361, original italics.)
- "According to section 629 of the Restatement Second of Torts (1977), '[a] statement is disparaging if it is understood to cast doubt upon the quality of another's land, chattels or intangible things, or upon the existence or extent of his property in them, and [¶] (a) the publisher intends the statement to cast the doubt, or [¶] (b) the recipient's understanding of it as casting the doubt was reasonable.' " (*Hartford Casualty Ins. Co.*, *supra*, 59 Cal.4th at p. 288.)
- "What distinguishes a claim of disparagement is that an injurious falsehood has been directed *specifically* at the plaintiff's business or product, derogating that business or product and thereby causing that plaintiff special damages." (*Hartford Casualty Ins. Co.*, *supra*, 59 Cal.4th at p. 294, original italics.)
- "The Restatement [2d Torts] view is that, like slander of title, what is commonly called 'trade libel' is a particular form of the tort of injurious falsehood and need not be in writing." (*Polygram Records, Inc., supra*, 170 Cal.App.3d at p. 548.)
- "While . . . general damages are presumed in a libel of a businessman, this is not so in action for trade libel. Dean Prosser has discussed the problems in such actions as follows: 'Injurious falsehood, or disparagement, then, may consist of the publication of matter derogatory to the plaintiff's title to his property, or its

quality, or to his business in general, . . . The cause of action founded upon it resembles that for defamation, but differs from it materially in the greater burden of proof resting on the plaintiff, and the necessity for special damage in all cases. . . . [The] plaintiff must prove in all cases that the publication has played a material and substantial part in inducing others not to deal with him, and that as a result he has suffered special damages. . . . Usually, . . . the damages claimed have consisted of loss of prospective contracts with the plaintiff's customers. Here the remedy has been so hedged about with limitations that its usefulness to the plaintiff has been seriously impaired. It is nearly always held that it is not enough to show a general decline in his business resulting from the falsehood, even where no other cause for it is apparent, and that it is only the loss of specific sales that can be recovered. This means, in the usual case, that the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived.' " (*Erlich, supra*, 224 Cal.App. 2d at pp. 73–74.)

- "Because the gravamen of the complaint is the allegation that respondents made false statements of fact that injured appellant's business, the 'limitations that define the First Amendment's zone of protection' are applicable. '[It] is immaterial for First Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property . . . .' " (*Hofmann Co., supra*, 202 Cal.App.3d at p. 397, internal citation omitted.)
- "If respondents' statements about appellant are opinions, the cause of action for trade libel must of course fail. 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.' Statements of fact can be true or false, but an opinion—'a view, judgment, or appraisal formed in the mind . . . [a] belief stronger than impression and less strong than positive knowledge'—is the result of a mental process and not capable of proof in terms of truth or falsity." (*Hofmann Co., supra*, 202 Cal.App.3d at p. 397, footnote and internal citation omitted.)
- "[I]t is not absolutely necessary that the disparaging publication be intentionally designed to injure. If the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher, it is not material that the publisher did not intend the disparaging statement to be so understood." (*Nichols, supra*, 169 Cal.App.3d at p. 773.)
- "Disparagement by 'reasonable implication' requires more than a statement that may conceivably or plausibly be construed as derogatory to a specific product or business. A 'reasonable implication' in this context means a clear or necessary inference." (*Hartford Casualty Ins. Co.*, *supra*, 59 Cal.4th at p. 295, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 747–750

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.70 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.103 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 9, *Commercial Defamation*, 9.04

1732–1799. Reserved for Future Use

VF-1700. Defamation per se (Public Officer/Figure and Limited Public Figure)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per se defamatory statement.***]**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did the [person/people] to whom the statement was made reasonably understand that the statement was about** [*name of plaintiff*]**?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [this person/these people] reasonably understand the statement to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the statement false?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of plaintiff***] prove by clear and convincing evidence that [***name of defendant***] knew the statement was false or had serious doubts about the truth of the statement?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer questions 6, 7, and 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

6. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*] actual harm?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are [*name of plaintiff*]'s actual damages for:

[a. Harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation? . . . . . $_____]

[b. Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements? . . . . . $_____]

[c. Harm to [*name of plaintiff*]'s reputation? . . . . . $_____]

[d. Shame, mortification, or hurt feelings? . . . . . $_____]

[If [*name of plaintiff*] has not proved any actual damages for either c or d, then answer question 8. If [*name of plaintiff*] has proved actual damages for both c and d, skip question 8 and answer question 9.]

ASSUMED DAMAGES

8. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her/*nonbinary pronoun*] reputation, and for shame, mortification, or hurt feelings? You must award at least a nominal sum.

$ _____

PUNITIVE DAMAGES

9. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What is your award of punitive damages, if any, against [*name of defendant*]?

$ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2005, April 2008, October 2008, December 2010, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

Omit question 10 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1701. Defamation per quod (Public Officer/Figure and Limited Public Figure)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per quod defamatory statement.***]**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did the [person/people] to whom the statement was made reasonably understand that the statement was about [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the statement false?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of plaintiff***] prove by clear and convincing evidence that [***name of defendant***] knew the statement was false or had serious doubts about the truth of the statement?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Is the statement, because of facts known to the people who heard or read it, the kind that would tend to injure [***name of plaintiff***] in [his/her/***nonbinary pronoun***] occupation?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of plaintiff*] suffer Harm to [his/her/*nonbinary pronoun*] property, business, profession, or occupation [including money spent as a result of the statement]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

7. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*] actual harm?

_____ Yes _____ No

If your answer to question 7 is yes, then answer questions 8. If you answered no, skip question 8 and answer question 9.

8. What are [*name of plaintiff*]'s actual damages?

[$ _____]

PUNITIVE DAMAGES

9. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What is your award of punitive damages, if any, against [*name of defendant*]?

$ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2005, December 2010, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1701, *Defamation per quod—Essential*

Factual Elements (Public Officer/Figure and Limited Public Figure).

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Users may need to itemize all the damages listed in question 8 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Question 5 may be modified by referring to one of the other two grounds listed in element 3 of CACI No. 1701, *Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*, depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 10 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1702. Defamation per se (Private Figure—Matter of Public Concern)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per se defamatory statement.***]**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did the [person/people] to whom the statement was made reasonably understand that the statement was about [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [this person/these people] reasonably understand the statement to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the statement false?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

6. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*] actual harm?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are [*name of plaintiff*]'s actual damages for:

[a. Harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation? . . . . . $_____]

[b. Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements? . . . . . $_____]

[c. Harm to [*name of plaintiff*]'s reputation? . . . . . $_____]

[d. Shame, mortification, or hurt feelings?. . . . . $_____]

[If [*name of plaintiff*] has not proved any actual damages for either c or d, answer question 8. If [*name of plaintiff*] has proved actual damages for both c and d, skip questions 8 and 9 and answer question 10.]

ASSUMED DAMAGES

8. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] knew the statement was false or had serious doubts about the truth of the statement?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her/*nonbinary pronoun*] reputation and for shame, mortification, or hurt feelings? You must award at least a nominal sum.

$ _____

Regardless of your answer to question 9, skip question 10 and answer question 11.

PUNITIVE DAMAGES

10. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] knew the statement was false or had serious doubts about the truth of the statement?

_____ Yes _____ No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

11. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 11 is yes, then answer question 12. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

12. What amount, if any, do you award as punitive damages against [*name of defendant*]?

$ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2005, April 2008, October 2008, December 2010, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1702, *Defamation per se—Essential Factual Elements (Private Figure—Matter of Public Concern).*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame, mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 12 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1703. Defamation per quod (Private Figure—Matter of Public Concern)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per quod defamatory statement.***]**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did the [person/people] to whom the statement was made reasonably understand that the statement was about [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the statement false?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Is the statement, because of facts known to the people who heard or read the statement, the kind of statement that would tend to injure [***name of plaintiff***] in [his/her/***nonbinary pronoun***] occupation?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of plaintiff*] suffer Harm to [his/her/*nonbinary pronoun*] property, business, profession, or occupation [including money spent as a result of the statement]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was the statement a substantial factor in causing [*name of plaintiff*]'s harm?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

8. What are [*name of plaintiff*]'s actual damages?

[$ _____]

If [*name of plaintiff*] has not proved any actual damages, stop here, answer no further questions, and have the presiding juror sign and date this form. If you awarded actual damages, answer question 9.

PUNITIVE DAMAGES

9. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] knew the statement was false or had serious doubts about the truth of the statement?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. Has [*name of plaintiff*] proved by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

11. What amount, if any, do you award as punitive damages against [*name of defendant*]?

$ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2005, December 2010, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1703, *Defamation per quod—Essential Factual Elements (Private Figure—Matter of Public Concern).*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Users may need to itemize all the damages listed in question 8 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Question 5 may be modified by referring to one of the other two grounds listed in element 3 of CACI No. 1703, *Defamation per quod—Essential Factual Elements (Private Figure—Matter of Public Concern)*, depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 11 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1704. Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Private Concern)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per se defamatory statement.***]**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did the [person/people] to whom the statement was made reasonably understand that the statement was about [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [this person/these people] reasonably understand the statement to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the statement substantially true?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

6. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*] actual harm?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are [*name of plaintiff*]'s actual damages for:

[a. Harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation? . . . . . $_____]

[b. Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements? . . . . . $_____]

[c. Harm to [*name of plaintiff*]'s reputation? . . . . . $_____]

[d. Shame, mortification, or hurt feelings? . . . . . $_____]

TOTAL $ _____

[If [*name of plaintiff*] has not proved any actual damages for either c or d, then answer question 8. If [*name of plaintiff*] has proved actual damages for both c and d, skip question 8 and answer question 9.]

ASSUMED DAMAGES

8. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her/*nonbinary pronoun*] reputation and for shame, mortification, or hurt feelings? You must award at least a nominal sum.

$ _____

Regardless of your answer to question 8, answer question 9.

PUNITIVE DAMAGES

9. Has [*name of plaintiff*] proved by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What amount, if any, do you award as punitive damages against [*name of defendant*]?

$ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2005, April 2008, October 2008, December 2010, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1704, *Defamation per se—Essential Factual Elements (Private Figure—Matter of Private Concern)*, and CACI No. 1720, Affirmative *Defense—Truth*. Delete question 4 if the affirmative defense of the truth is not at issue.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

Multiple statements may need to be set out separately in question 1, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements will need to be found as to each statement.

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame, mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

Additional questions on the issue of punitive damages may be needed if the defendant is a corporate or other entity.

Omit question 10 if the issue of punitive damages has been bifurcated.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual

findings that are required in order to calculate the amount of prejudgment interest.

VF-1705. Defamation per quod (Private Figure—Matter of Private Concern)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per quod defamatory statement.***]**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did the [person/people] to whom the statement was made reasonably understand that the statement was about [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did the statement tend to injure [***name of plaintiff***] in [his/her/***nonbinary pronoun***] occupation?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of plaintiff***] suffer Harm to [his/her/***nonbinary pronoun***] property, business, profession, or occupation [including money spent as a result of the statement]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was the statement a substantial factor in causing [*name of plaintiff*]'s harm?

_____ Yes _____ No

If your answer to question 6 is yes, then answer questions 7 and 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

7. What are [*name of plaintiff*]'s actual damages?

[a. Past economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] had to pay as a result of the defamatory statements

$ _____]

[b. Future economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] will have to pay as a result of the defamatory statements

$ _____]

[c. Past noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation

$ _____]

[d. Future noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation

$ _____]

TOTAL $ _____

If [*name of plaintiff*] has not proved any actual damages, stop here, answer no further questions, and have the presiding juror sign and date this form. If you awarded actual damages, answer question 8.

PUNITIVE DAMAGES

8. Has [*name of plaintiff*] proved by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What amount, if any, do you award as punitive damages against [*name of defendant*]?

$ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2005, December 2010, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1703, *Defamation per quod—Essential Factual Elements (Private Figure—Matter of Public Concern).*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

Multiple statements may need to be set out separately in question 1, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements will need to be found as to each statement.

Question 4 may be modified by referring to one of the other two grounds listed in element 3 of CACI No. 1705, *Defamation per quod—Essential Factual Elements (Private Figure—Matter of Private Concern)*, depending on which ground is applicable in the case.

If the affirmative defense of truth is at issue (see CACI No. 1720, *Affirmative Defense—Truth*), include question 4 from VF-1704, *Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Private Concern)*. Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Users may need to itemize all the damages listed in question 7 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Omit question 9 if the issue of punitive damages has been bifurcated.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-

3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1706–VF-1719. Reserved for Future Use

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [make a statement/[***specify other act, e.g., record a deed***] that cast doubts about [***name of plaintiff***]'s ownership of the property?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[Was the statement made to a person other than [***name of plaintiff***]/[***Specify other publication, e.g., Did the deed become a public record***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] in fact own the property?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] [know that/act with reckless disregard of the truth or falsity as to whether] [***name of plaintiff***] owned the property?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] know or should [he/she/***nonbinary pronoun***] have recognized that someone else might act in reliance on the [statement/***e.g., deed***], causing [***name of plaintiff***] financial loss?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of plaintiff*] in fact suffer immediate and direct financial harm because someone else acted in reliance on the [statement/*e.g., deed*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s harm?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss: $_____]

[b. Future economic loss: $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2015; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1730, *Slander of Title—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Slander of title may be either by words or an act that clouds title to the property. (See, e.g., *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 661 [132 Cal.Rptr.3d 781] [filing of lis pendens].) If the slander is by words, select the first option in question 2. If the slander is by means other than words, specify the means in question 1 and how it became known to others in question 2.

If specificity is not required, users do not have to itemize all the damages listed in

question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make a statement that [***would be clearly or necessarily understood to have***] disparaged the quality of [***name of plaintiff***]'s [***product/service***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was the statement made to a person other than [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the statement untrue?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] [know that the statement was untrue/act with reckless disregard of the truth or falsity of the statement]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] know or should [he/she/***nonbinary pronoun***] have recognized that someone else might act in reliance on the statement, causing [***name of plaintiff***] financial loss?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Did [***name of plaintiff***] suffer direct financial harm because someone else acted in reliance on the statement?**

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s harm?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss $_____]

[b. Future economic loss $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2015; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1731, *Trade Libel—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801,

814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1722–VF-1799. Reserved for Future Use

Table A. Defamation Per Se

Table A
Defamation Per Se

		Public Figure			Private Figure			
	Cause of Action	Assumed by Law	Actual	Punitive Damages	Cause of Action	Assumed by Law	Actual	Punitive Damages
Public Issue	*New York Times* Malice	Yes	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294	*New York Times* Malice	Yes	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294
	Negligence	—	—	—	Negligence	No	Yes, if shown by a preponderance of the evidence	No
Private Issue	*New York Times* Malice	Yes	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294	*New York Times* Malice	—	—	—
	Negligence	—	—	—	Negligence	Yes	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294

Information provided by Judge Michael B. Orfield (Ret.), Superior Court of California, County of San Diego

Table B. Defamation Per Quod

Table B
Defamation Per Quod

		Public Figure			Private Figure			
	Cause of Action	Assumed by Law	Actual	Punitive Damages	Cause of Action	Assumed by Law	Actual	Punitive Damages
Public Issue	*New York Times* Malice	No	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294	*New York Times* Malice	No	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294
	Negligence	—	—	—	Negligence	No	Yes, if shown by a preponderance of the evidence	No
Private Issue	*New York Times* Malice	No	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294	*New York Times* Malice	—	—	—
	Negligence	—	—	—	Negligence	No	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294

Information provided by Judge Michael B. Orfield (Ret.), Superior Court of California, County of San Diego

RIGHT OF PRIVACY

1800. Intrusion Into Private Affairs

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her/***nonbinary pronoun***] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] had a reasonable expectation of privacy in [***specify place or other circumstance***];**
2. **That [***name of defendant***] intentionally intruded in [***specify place or other circumstance***];**
3. **That [***name of defendant***]'s intrusion would be highly offensive to a reasonable person;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

In deciding whether [*name of plaintiff***] had a reasonable expectation of privacy in [***specify place or other circumstance***], you should consider, among other factors, the following:**

(a) The identity of [*name of defendant***];**

(b) The extent to which other persons had access to [*specify place or other circumstance***] and could see or hear [***name of plaintiff***]; and**

(c) The means by which the intrusion occurred.

In deciding whether an intrusion is highly offensive to a reasonable person, you should consider, among other factors, the following:

(a) The extent of the intrusion;

(b) [*Name of defendant***]'s motives and goals; and**

(c) The setting in which the intrusion occurred.

New September 2003; Revised June 2010

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

Sources and Authority

- "Seventy years after Warren and Brandeis proposed a right to privacy, Dean William L. Prosser analyzed the case law development of the invasion of privacy tort, distilling four distinct kinds of activities violating the privacy protection and

giving rise to tort liability: (1) intrusion into private matters; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person's name or likeness. . . . Prosser's classification was adopted by the Restatement Second of Torts in sections 652A–652E. California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633].)

- "[The tort of intrusion] encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 230–231 [74 Cal.Rptr.2d 843, 955 P.2d 469], internal citation omitted.)
- "The foregoing arguments have been framed throughout this action in terms of both the common law and the state Constitution. These two sources of privacy protection 'are not unrelated' under California law. (*Shulman, supra*, 18 Cal.4th 200, 227; accord, *Hill, supra*, 7 Cal.4th 1, 27; but see *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 313, fn. 13 [127 Cal.Rptr.2d 482, 58 P.3d 339] [suggesting it is an open question whether the state constitutional privacy provision, which is otherwise self-executing and serves as the basis for injunctive relief, can also provide direct and sole support for a damages claim].)" (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 286 [97 Cal.Rptr.3d 274, 211 P.3d 1063].)
- "[W]e will assess the parties' claims and the undisputed evidence under the rubric of both the common law and constitutional tests for establishing a privacy violation. Borrowing certain shorthand language from *Hill, supra*, 7 Cal.4th 1, which distilled the largely parallel elements of these two causes of action, we consider (1) the nature of any intrusion upon reasonable expectations of privacy, and (2) the offensiveness or seriousness of the intrusion, including any justification and other relevant interests." (*Hernandez, supra*, 47 Cal.4th at p. 288.)
- "Whether an expectation of privacy is reasonable in any given circumstance is a context-specific inquiry, and ' "[t]he protection afforded to the plaintiff's interest in his [or her] privacy must be relative to the customs of the time and place, to the occupation of the plaintiff[,] and to the habits of his [or her] neighbors and fellow citizens." ' *Burrows* . . . recognizes as much in identifying 'compulsion by legal process' as a factor potentially affecting the expectation of privacy. Ultimately, 'whether a legally recognized privacy interest exists is a question of law, and whether the circumstances give rise to a reasonable expectation of privacy and a serious invasion thereof are mixed questions of law and fact.' " (*Garrabrants v. Erhart* (2023) 98 Cal.App.5th 486, 500 [316 Cal.Rptr.3d 792], original italics, internal citations omitted.)
- "The cause of action . . . has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person.

The first element . . . is not met when the plaintiff has merely been observed, or even photographed or recorded, in a public place. Rather, 'the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff.' " (*Sanders v. American Broadcasting Co.* (1999) 20 Cal.4th 907, 914–915 [85 Cal.Rptr.2d 909, 978 P.2d 67], internal citations omitted.)

- "As to the first element of the common law tort, the defendant must have 'penetrated some zone of physical or sensory privacy . . . or obtained unwanted access to data' by electronic or other covert means, in violation of the law or social norms. In either instance, the expectation of privacy must be 'objectively reasonable.' In *Sanders* [*supra*, at p. 907] . . . , this court linked the reasonableness of privacy expectations to such factors as (1) the identity of the intruder, (2) the extent to which other persons had access to the subject place, and could see or hear the plaintiff, and (3) the means by which the intrusion occurred." (*Hernandez, supra*, 47 Cal.4th at pp. 286–287.)
- "Privacy for purposes of the intrusion tort must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion." (*Sanders, supra,* 20 Cal.4th at pp. 917–918.)
- "The second common law element essentially involves a 'policy' determination as to whether the alleged intrusion is 'highly offensive' under the particular circumstances. Relevant factors include the degree and setting of the intrusion, and the intruder's motives and objectives. Even in cases involving the use of photographic and electronic recording devices, which can raise difficult questions about covert surveillance, 'California tort law provides no bright line on ["offensiveness"]; each case must be taken on its facts.' " (*Hernandez, supra*, 47 Cal.4th at p. 287, internal citations omitted.)
- "While what is 'highly offensive to a reasonable person' suggests a standard upon which a jury would properly be instructed, there is a preliminary determination of 'offensiveness' which must be made by the court in discerning the existence of a cause of action for intrusion. . . . A court determining the existence of 'offensiveness' would consider the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." (*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1483–1484 [232 Cal.Rptr. 668].)
- "Plaintiffs must show more than an intrusion upon reasonable privacy expectations. Actionable invasions of privacy also must be 'highly offensive' to a reasonable person, and 'sufficiently serious' and unwarranted as to constitute an 'egregious breach of the social norms.' " (*Hernandez, supra*, 47 Cal.4th at p. 295, internal citation omitted.)
- " '[T]he extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.' The impact on the plaintiff's privacy rights must be more than 'slight or trivial.' " (*Mezger v. Bick* (2021) 66

Cal.App.5th 76, 87 [280 Cal.Rptr.3d 720], internal citations omitted.)

- "[L]iability under the intrusion tort requires that the invasion be highly offensive to a reasonable person, considering, among other factors, the motive of the alleged intruder." (*Sanders, supra,* 20 Cal.4th at p. 911, internal citations omitted.)
- "[T]he damages flowing from an invasion of privacy logically would include an award for mental suffering and anguish." (*Miller, supra,* 187 Cal.App.3d at p. 1484, citing *Fairfield v. American Photocopy Equipment Co.* (1955) 138 Cal.App.2d 82 [291 P.2d 194].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 756, 757, 762–765

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1887

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.02 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.16 (Matthew Bender)

18 California Points and Authorities, Ch. 183, *Privacy: State Constitutional Rights*, § 183.30 (Matthew Bender)

California Civil Practice: Torts § 20:8 (Thomson Reuters)

1801. Public Disclosure of Private Facts

[*Name of plaintiff*] claims that [*name of defendant*] violated [his/her/*nonbinary pronoun*] right to privacy. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] publicized private information concerning [*name of plaintiff*];**
2. **That a reasonable person in [*name of plaintiff*]'s position would consider the publicity highly offensive;**
3. **That [*name of defendant*] knew, or acted with reckless disregard of the fact, that a reasonable person in [*name of plaintiff*]'s position would consider the publicity highly offensive;**
4. **That the private information was not of legitimate public concern [or did not have a substantial connection to a matter of legitimate public concern];**
5. **That [*name of plaintiff*] was harmed; and**
6. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

In deciding whether the information was a matter of legitimate public concern, you should consider, among other factors, the following:

(a) The social value of the information;

(b) The extent of the intrusion into [*name of plaintiff*]'s privacy; [and]

(c) Whether [*name of plaintiff*] consented to the publicity explicitly or by voluntarily seeking public attention or a public office; [and]

(d) [*Insert other applicable factor*].

[In deciding whether [*name of defendant*] publicized the information, you should determine whether it was made public either by communicating it to the public at large or to so many people that the information was substantially certain to become public knowledge.]

New September 2003

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

Comment (a) to Restatement Second of Torts, section 652D states that "publicity" "means that the matter is made public, by communicating it to the public at large,

or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." This point has been placed in brackets because it may not be an issue in every case.

Sources and Authority

- "[T]he allegations involve a public disclosure of private facts. The elements of this tort are ' "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern." ' The absence of any one of these elements is a complete bar to liability." (*Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, 1129–1130 [91 Cal.Rptr.3d 858], internal citations omitted.)
- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)
- "Generally speaking, matter which is already in the public domain is not private, and its publication is protected." (*Diaz v. Oakland Tribune* (1983) 139 Cal.App.3d 118, 131 [188 Cal.Rptr. 762], internal citations omitted.) "[M]atter which was once of public record may be protected as private facts where disclosure of that information would not be newsworthy." (*Id.* at p. 132.)
- "[W]e find it reasonable to require a plaintiff to prove, in each case, that the publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive." (*Briscoe v. Reader's Digest Assn., Inc.* (1971) 4 Cal.3d 529, 542–543 [93 Cal.Rptr. 866, 483 P.2d 34].)
- "If a jury finds that a publication discloses private facts which are 'highly offensive and injurious to the reasonable man' [citation] then it would *inter alia* also satisfy the reckless disregard requirement." (*Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 891, fn. 11 [118 Cal.Rptr. 370].)
- "*Diaz* . . . expressly makes the lack of newsworthiness part of the plaintiff's case in a private facts action. . . . We therefore agree with defendants that under California common law the dissemination of truthful, newsworthy material is not actionable as a publication of private facts." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 215 [74 Cal.Rptr.2d 843, 955 P.2d 469], internal citations omitted.)
- "In analyzing the element of newsworthiness, appellate decisions 'balance[] the public's right to know against the plaintiff's privacy interest by drawing a protective line at the point the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report.' " (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1257 [217 Cal.Rptr.3d 234].)
- " '[N]ewsworthiness is not limited to "news" in the narrow sense of reports of current events. "It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate

interest in what is published" ' " (*Jackson, supra,* 10 Cal.App.5th at p. 1257.)

- "[T]here is a public interest which attaches to people who by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities. Certainly, the accomplishments and way of life of those who have achieved a marked reputation or notoriety by appearing before the public such as actors and actresses [and] professional athletes, . . . may legitimately be mentioned and discussed in print or on radio or television. Such public figures have to some extent lost the right of privacy, and it is proper to go further in dealing with their lives and public activities than with those of entirely private persons." (*Jackson, supra,* 10 Cal.App.5th at pp. 1257–1258.)
- "In the matter before us, however, there is no indication that any issue of public interest or freedom of the press was involved. ' "In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern." ' Put another way, morbid and sensational eavesdropping or gossip 'serves no legitimate public interest and is not deserving of protection. [Citations.]' " (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 874 [104 Cal.Rptr.3d 352], internal citation omitted.)
- "Almost any truthful commentary on public officials or public affairs, no matter how serious the invasion of privacy, will be privileged." (*Briscoe, supra,* 4 Cal.3d at p. 535, fn. 5.)
- "We have previously set forth criteria for determining whether an incident is newsworthy. We consider '[1] the social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety.' " (*Briscoe, supra,* 4 Cal.3d at p. 541, internal citations omitted.)
- "[T]he right of privacy is purely personal. It cannot be asserted by anyone other than the person whose privacy has been invaded." (*Moreno, supra*, 172 Cal.App.4th at p. 1131.)
- "[L]imiting liability for public disclosure of private facts to those recorded in a writing is contrary to the tort's purpose, which has been since its inception to allow a person to control the kind of information about himself made available to the public—in essence, to define his public persona. While this restriction may have made sense in the 1890's—when no one dreamed of talk radio or confessional television—it certainly makes no sense now. Private facts can be just as widely disclosed—if not more so—through oral media as through written ones. To allow a plaintiff redress for one kind of disclosure but not the other,

when both can be equally damaging to privacy, is a rule better suited to an era when the town crier was the principal purveyor of news. It is long past time to discard this outmoded rule." (*Ignat v. Yum! Brands, Inc.* (2013) 214 Cal.App.4th 808, 819 [154 Cal.Rptr.3d 275], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 772–775

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.03 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.32 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.20 (Matthew Bender)

California Civil Practice: Torts §§ 20:1–20:2 (Thomson Reuters)

1802. False Light

[*Name of plaintiff*] claims that [*name of defendant*] violated [his/her/*nonbinary pronoun*] right to privacy. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] publicly disclosed information or material that showed [*name of plaintiff*] in a false light;**
2. **That the false light created by the disclosure would be highly offensive to a reasonable person in [*name of plaintiff*]'s position;**
3. **[That there is clear and convincing evidence that [*name of defendant*] knew the disclosure would create a false impression about [*name of plaintiff*] or acted with reckless disregard for the truth;]**

   [or]

   [That [*name of defendant*] was negligent in determining the truth of the information or whether a false impression would be created by its disclosure;]
4. **[That [*name of plaintiff*] was harmed; and]**

   [or]

   [That [*name of plaintiff*] sustained harm to [his/her/*nonbinary pronoun*] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and]
5. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised November 2017, May 2018, November 2018

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

False light claims are subject to the same constitutional protections that apply to defamation claims. (*Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, 543 [93 Cal.Rptr. 866, 483 P.2d 34], overruled on other grounds in *Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679, 696, fn. 9 [21 Cal.Rptr.3d 663, 101 P.3d 552] [false light claim should meet the same requirements of a libel claim, including proof of malice when required].) Thus, a knowing violation of or reckless disregard for the plaintiff's rights is required if the plaintiff is a public figure. (See *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 721–722 [257 Cal.Rptr. 708,

771 P.2d 406].) Give the first option for element 3 if the disclosure involves a public figure. Give the second option for a private citizen, at least with regard to a matter of private concern. (See *id.* at p. 742 [private person need prove only negligence rather than malice to recover for defamation].)

There is perhaps some question as to which option for element 3 to give for a private person if the matter is one of public concern. For defamation, a private figure plaintiff must prove malice to recover presumed and punitive damages for a matter of public concern, but not to recover for damages to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178, 965 P.2d 696].) No case has been found that provides for presumed damages for a false light violation. Therefore, the court will need to decide whether proof of malice is required from a private plaintiff even though the matter may be one of public concern.

If the jury will also be instructed on defamation, an instruction on false light would be superfluous and therefore need not be given. (See *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385, fn. 13 [88 Cal.Rptr.2d 802]; see also *Briscoe, supra,* 4 Cal.3d at p. 543.) For defamation, utterance of a defamatory statement to a single third person constitutes sufficient publication. (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 307 [81 Cal.Rptr. 855, 461 P.2d 39]; but see *Warfield v. Peninsula Golf & Country Club* (1989) 214 Cal.App.3d 646, 660 [262 Cal.Rptr. 890] [false light case holding that "account" published in defendant's membership newsletter does not meet threshold allegation of a general public disclosure].)

Sources and Authority

- " 'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264 [217 Cal.Rptr.3d 234].)
- "A 'false light' claim, like libel, exposes a person to hatred, contempt, ridicule, or obloquy and assumes the audience will recognize it as such." (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 865 [230 Cal.Rptr.3d 625].)
- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)
- "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person. Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well." (*Fellows v. National Enquirer* (1986) 42 Cal.3d 234, 238–239 [228 Cal.Rptr. 215, 721 P.2d 97], internal citation omitted.)
- "When a false light claim is coupled with a defamation claim, the false light

claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action." (*Eisenberg, supra,* 74 Cal.App.4th at p. 1385, fn. 13, internal citations omitted.)

- "[A] 'false light' cause of action 'is in substance equivalent to . . . [a] libel claim, and should meet the same requirements of the libel claim . . . including proof of malice and fulfillment of the requirements of [the retraction statute] section 48a [of the Civil Code].' " (*Briscoe, supra,* 4 Cal.3d at p. 543, internal citation omitted.)
- "Because in this defamation action [plaintiff] is a private figure plaintiff, he was required to prove only negligence, and not actual malice, to recover damages for actual injury to his reputation. But [plaintiff] was required to prove actual malice to recover punitive or presumed damages . . . ." (*Khawar*, *supra*, 19 Cal.4th at p. 274.)
- "To defeat [defendant] 's anti-SLAPP motion on her false light claim, [plaintiff], as a public figure, must demonstrate a reasonable probability she can prove [defendant] broadcast statements that are (1) assertions of fact, (2) actually false or create a false impression about her, (3) highly offensive to a reasonable person or defamatory, and (4) made with actual malice." (*De Havilland, supra*, 21 Cal.App.5th at p. 865.)
- "[Plaintiff] does not dispute that she is a public figure. . . . Accordingly, the Constitution requires [plaintiff] to prove by clear and convincing evidence that [defendant] 'knew the [docudrama] would create a false impression about [her] or acted with reckless disregard for the truth.' (CACI No. 1802.)" (*De Havilland, supra*, 21 Cal.App.5th at p. 869.)
- "Publishing a fictitious work about a real person cannot mean the author, by virtue of writing fiction, has acted with actual malice." (*De Havilland, supra,* 21 Cal.App.5th at p. 869.)
- "[I]n cases where the claimed highly offensive or defamatory aspect of the portrayal is implied, courts have required plaintiffs to show that the defendant ' "intended to convey the defamatory impression." ' [Plaintiff] must demonstrate 'that [defendant] either deliberately cast [her] statements in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or that [it] knew or acted in reckless disregard of whether [its] words would be interpreted by the average reader as defamatory statements of fact.' Moreover, because actual malice is a 'deliberately subjective' test, liability cannot be imposed for an implication that merely ' "should have been foreseen." ' " (*De Havilland, supra*, 21 Cal.App.5th at pp. 869–870, internal citations omitted.)
- "The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given the stated cause of action; it bars not only actions for defamation, but also claims for invasion of privacy." (*Reader's Digest Assn., Inc. v. Superior Court* (1984) 37 Cal.3d 244, 265 [208 Cal.Rptr. 137, 690 P.2d 610], internal citations omitted.)

- "[T]he constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." (*Time, Inc. v. Hill* (1967) 385 U.S. 374, 387–388 [87 S.Ct. 534, 17 L.Ed.2d 456].)
- "We hold that whenever a claim for false light invasion of privacy is based on language that is defamatory within the meaning of section 45a, pleading and proof of special damages are required." (*Fellows, supra,* 42 Cal.3d at p. 251.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 781–783

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.04 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.33 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.21 (Matthew Bender)

California Civil Practice: Torts §§ 20:12–20:15 (Thomson Reuters)

1803. Appropriation of Name or Likeness—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her/***nonbinary pronoun***] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used [***name of plaintiff***]'s name, likeness, or identity;**
2. **That [***name of plaintiff***] did not consent to this use;**
3. **That [***name of defendant***] gained a commercial benefit [or some other advantage] by using [***name of plaintiff***]'s name, likeness, or identity;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2014, November 2017, May 2020

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

If the alleged "benefit" is not commercial, the judge will need to determine whether the advantage gained by the defendant qualifies as "some other advantage."

If suing under both the common law and Civil Code section 3344, the judge may need to explain that a person's voice, for example, may qualify as "identity" if the voice is sufficient to cause listeners to identify the plaintiff. The two causes of action overlap, and the same conduct should be covered by both.

Even if the elements are established, the First Amendment may require that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information. (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409 [114 Cal.Rptr.2d 307].) In a closely related right-of-publicity claim, the California Supreme Court has held that an artist who is faced with a challenge to the artist's work may raise as affirmative defense that the work is protected by the First Amendment because it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame. (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797]; see CACI No. 1805, *Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (Comedy III).*) Therefore, if there is an issue of fact regarding a First Amendment

balancing test, it most probably should be considered to be an affirmative defense. (Cf. *Gionfriddo, supra*, 94 Cal.App.4th at p. 414 ["Given the significant public interest in this sport, plaintiffs can only prevail if they demonstrate a substantial competing interest"].)

Sources and Authority

- "A common law misappropriation claim is pleaded by 'alleging: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. [Citations.]" [Citation.]' " (*Maxwell v. Dolezal* (2014) 231 Cal.App.4th 93, 97 [179 Cal.Rptr.3d 807].)
- " '[T]he right of publicity has come to be recognized as distinct from the right of privacy'. 'What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one's name, voice, signature, photograph, or likeness.' 'What the right of publicity holder possesses is . . . a right to prevent others from misappropriating the economic value generated . . . through the merchandising of the 'name, voice, signature, photograph, or likeness' of the [holder].' " (*Timed Out, LLC v. Youabian, Inc.* (2014) 229 Cal.App.4th 1001, 1006 [177 Cal.Rptr.3d 773], internal citations omitted.)
- "The common law cause of action may be stated by pleading the defendant's unauthorized use of the plaintiff's identity; the appropriation of the plaintiff's name, voice, likeness, signature, or photograph to the defendant's advantage, commercially or otherwise; and resulting injury." (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 684–685 [166 Cal.Rptr.3d 359].)
- "[B]oth the statutory and common law versions of a right of publicity claim require that the defendant actually use the plaintiff's likeness . . . ." (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 210 [222 Cal.Rptr.3d 250].)
- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)
- "Consent to the use of a name or likeness is determined by traditional principles of contract interpretation." (*Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 8 [206 Cal.Rptr.3d 884].)
- "[T]he appearance of an 'endorsement' is not the *sine qua non* of a claim for commercial appropriation." (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 419 [198 Cal.Rptr. 342].)
- "[N]o cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citation omitted.)
- "The difficulty in defining the boundaries of the right, as applied in the

publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals' interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy." (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278–279 [239 P.2d 630].)

- "Even if each of these elements is established, however, the common law right does not provide relief for every publication of a person's name or likeness. The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo, supra,* 94 Cal.App.4th at pp. 409–410, internal citations and footnote omitted.)
- "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790], internal citation omitted.)
- "[T]he fourth category of invasion of privacy, namely, appropriation, 'has been *complemented* legislatively by Civil Code section 3344, adopted in 1971.' " (*Eastwood, supra*, 149 Cal.App.3d at pp. 416–417.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 784–786

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, §§ 429.35, 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.21 (Matthew Bender)

California Civil Practice: Torts § 20:16 (Thomson Reuters)

1804A. Use of Name or Likeness (Civ. Code, § 3344)

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her/***nonbinary pronoun***] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] knowingly used [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] [on merchandise/ [or] to advertise or sell [***describe what is being advertised or sold***]];**
2. **That the use did not occur in connection with a news, public affairs, or sports broadcast or account, or with a political campaign;**
3. **That [***name of defendant***] did not have [***name of plaintiff***]'s consent;**
4. **That [***name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] was directly connected to [***name of defendant***]'s commercial purpose;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 1804 April 2008; Revised April 2009

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing. One's name and likeness are protected under both the common law and under Civil Code section 3344. As the statutory remedy is cumulative (Civ. Code, § 3344(g)), both this instruction and CACI No. 1803, *Appropriation of Name or Likeness*, which sets forth the common-law cause of action, will normally be given.

Different standards apply if the use is in connection with a news, public affairs, or sports broadcast or account, or with a political campaign. (See Civ. Code, § 3344(d); *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 421–426 [198 Cal.Rptr. 342].) The plaintiff bears the burden of proving the nonapplicability of these exceptions. (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416–417 [114 Cal.Rptr.2d 307].) Element 2 may be omitted if there is no question of fact with regard to this issue. See CACI No. 1804B, *Use of Name or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign*, for an instruction to use if one of the exceptions of Civil Code section 3344(d) applies.

If plaintiff alleges that the use was not covered by Civil Code section 3344(d) (e.g.,

not a "news" account) but that even if it were covered it is not protected under the standards of *Eastwood*, then both this instruction and CACI No. 1804B should be given in the alternative. In that case, it should be made clear to the jury that if the plaintiff fails to prove the inapplicability of Civil Code section 3344(d) as set forth in element 2, the claim is still viable if the plaintiff proves all the elements of CACI No. 1804B.

Note that a plaintiff is entitled to the sum of $750 under Civil Code section 3344(a) even if actual damages are not proven. (See *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1008 [72 Cal.Rptr.3d 194] [claim for 14,060 misappropriations of plaintiff's name under section 3344(a) constitutes single cause of action for which statutory damages are $750].)

Sources and Authority

- Liability for Use of Name or Likeness. Civil Code section 3344.
- "Civil Code section 3344 provides a statutory cause of action for commercial misappropriation that complements, rather than codifies, the common law misappropriation cause of action." (*Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 13 [206 Cal.Rptr.3d 884].)
- "[C]alifornia's appropriation statute is not limited to celebrity plaintiffs." (*KNB Enters v. Matthews* (2000)78 Cal.App.4th 362, 367 [92 Cal.Rptr.2d 713].)
- "There are two vehicles a plaintiff can use to protect this right: a common law cause of action for commercial misappropriation and a section 3344 claim. To prove the common law cause of action, the plaintiff must establish: ' "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." [Citation.]' To prove the statutory remedy, a plaintiff must present evidence of 'all the elements of the common law cause of action' and must also prove 'a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.' " (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 544 [135 Cal.Rptr.3d 200], internal citations omitted.)
- "The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law." (*Eastwood, supra*, 149 Cal.App.3d at p. 417, fn. 6, internal citation omitted.)
- "[B]oth the statutory and common law versions of a right of publicity claim require that the defendant actually use the plaintiff's likeness . . . ." (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 210 [222 Cal.Rptr.3d 250].)
- "Plaintiffs assert that Civil Code section 3344's 'commercial use' requirement does not need to 'involve some form of advertising or endorsement.' This is simply incorrect, as Civil Code section 3344, subdivision (a) explicitly provides

for possible liability on '[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner . . . for purposes of advertising . . . without such person's prior consent.' The statute requires some 'use' by the advertiser aimed at obtaining a commercial advantage for the advertiser." (*Cross*, *supra*, 14 Cal.App.5th at p. 210.)

- "[T]he single-publication rule as codified in [Civil Code] section 3425.3 applies, in general, to a cause of action for unauthorized commercial use of likeness." (*Christoff v. Nestle USA, Inc.* (2009) 47 Cal.4th 468, 476 [97 Cal.Rptr.3d 798, 213 P.3d 132].)
- "Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant's answer based upon a general denial and need not be raised by affirmative defense. . . . Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d)." (*Gionfriddo, supra*, 94 Cal.App.4th at pp. 416–417, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 789–791

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Invasion Of Privacy*, ¶¶ 5:1116–5:1118 (The Rutter Group)

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, §§ 429.35–429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, §§ 184.22–184.24 (Matthew Bender)

California Civil Practice: Torts § 20:17 (Thomson Reuters)

1804B. Use of Name or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign (Civ. Code, § 3344(d))

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her/***nonbinary pronoun***] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] knowingly used [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] [on merchandise/ [or] to advertise or sell [***describe what is being advertised or sold***]];**
2. **That the use occurred in connection with a [[news/public affairs/ sports] broadcast or account/political campaign];**
3. **That the use contained false information;**
4. **[***Use for public figure***: That [***name of defendant***] knew the [broadcast or account/campaign material] was false or that [he/ she/***nonbinary pronoun***/it] acted with reckless disregard of its falsity;]**

   [*or***]**

   [*Use for private individual***: That [***name of defendant***] was negligent in determining the truth of the [broadcast or account/campaign material];]**
5. **That [***name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/ signature/photograph/likeness] was directly connected to [***name of defendant***]'s commercial purpose;**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 1804 April 2008; Revised April 2009

Directions for Use

Give this instruction if the plaintiff's name or likeness has been used in connection with a news, public affairs, or sports broadcast or account, or with a political campaign. In this situation, consent is not required. (Civ. Code, § 3344(d).) However, in *Eastwood v. Superior Court,* the court held that the constitutional standards under defamation law apply under section 3344(d) and that the statute as it applies to news does not provide protection for a knowing or reckless falsehood. (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 421–426 [198 Cal.Rptr. 342].) Under defamation law, this standard applies only to public figures, and

private individuals may sue for negligent publication of defamatory falsehoods. (*Id.* at p. 424.) Presumably, the same distinction between public figures and private individuals would apply under Civil Code section 3344(d). Element 4 provides for the standards established and suggested by *Eastwood*.

Give CACI No. 1804A, *Use of Name or Likeness,* if there is no issue whether one of the exceptions of Civil Code section 3344(d) applies. If plaintiff alleges that the use was not covered by subdivision (d) (e.g., not a "news" account) but that even if it were covered it is not protected under the standards of *Eastwood*, then both this instruction and CACI No. 1804A should be given in the alternative. In that case, it should be made clear to the jury that if the plaintiff fails to prove the inapplicability of Civil Code section 3344(d) as set forth element 2 of CACI No. 1804A, the claim is still viable if the plaintiff proves all the elements of this instruction.

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing. One's name and likeness are protected under both the common law and under Civil Code section 3344. As the statutory remedy is cumulative (Civ. Code, § 3344(g)), both this instruction and CACI No. 1803, *Appropriation of Name or Likeness,* which sets forth the common-law cause of action, will normally be given.

Note that a plaintiff is entitled to the sum of $750 under Civil Code section 3344(a) even if actual damages are not proven. (See *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1008 [72 Cal.Rptr.3d 194] [claim for 14,060 misappropriations of plaintiff's name under section 3344(a) constitutes single cause of action for which statutory damages are $750].)

Even though consent is not required, it may be an affirmative defense. CACI No. 1721, *Affirmative Defense—Consent* (to defamation), may be used in this situation.

Sources and Authority

- Liability for Use of Name or Likeness. Civil Code section 3344.
- Civil Code section 3344 is "a commercial appropriation statute which complements the common law tort of appropriation." (*KNB Enters. v. Matthews* (2000) 78 Cal.App.4th 362, 366–367 [92 Cal.Rptr.2d 713].)
- "[C]alifornia's appropriation statute is not limited to celebrity plaintiffs." (*KNB Enters., supra,* 78 Cal.App.4th at p. 367.)
- "There are two vehicles a plaintiff can use to protect this right: a common law cause of action for commercial misappropriation and a section 3344 claim. To prove the common law cause of action, the plaintiff must establish: ' "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." [Citation.]' To prove the statutory remedy, a plaintiff must present evidence of 'all the elements of the common law cause of action' and must also prove 'a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.' " (*Orthopedic*

Systems, Inc. v. Schlein (2011) 202 Cal.App.4th 529, 544 [135 Cal.Rptr.3d 200], internal citations omitted.)

- "The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law." (*Eastwood, supra,* 149 Cal.App.3d at p. 417, fn. 6, internal citation omitted.)
- "The spacious interest in an unfettered press is not without limitation. This privilege is subject to the qualification that it shall not be so exercised as to abuse the rights of individuals. Hence, in defamation cases, the concern is with defamatory lies masquerading as truth. Similarly, in privacy cases, the concern is with nondefamatory lies masquerading as truth. Accordingly, we do not believe that the Legislature intended to provide an exemption from liability for a knowing or reckless falsehood under the canopy of 'news.' We therefore hold that Civil Code section 3344, subdivision (d), as it pertains to news, does not provide an exemption for a knowing or reckless falsehood." (*Eastwood, supra,* 149 Cal.App.3d at p. 426, internal citations omitted.)
- The burden of proof as to knowing or reckless falsehood under Civil Code section 3344(d) is on the plaintiff. (See *Eastwood, supra,* 149 Cal.App.3d at p. 426.)
- "[T]he single-publication rule as codified in [Civil Code] section 3425.3 applies, in general, to a cause of action for unauthorized commercial use of likeness." (*Christoff v. Nestle USA, Inc.* (2009) 47 Cal.4th 468, 476 [97 Cal.Rptr.3d 798, 213 P.3d 132].)
- "Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant's answer based upon a general denial and need not be raised by affirmative defense. . . . Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d)." (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416–417 [114 Cal.Rptr.2d 307], internal citation omitted.)
- "We presume that the Legislature intended that the category of public affairs would include things that would not necessarily be considered news. Otherwise, the appearance of one of those terms in the subsection would be superfluous, a reading we are not entitled to give to the statute. We also presume that the term 'public affairs' was intended to mean something less important than news. Public affairs must be related to real-life occurrences." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 546 [18 Cal.Rptr.2d 790], internal citations omitted.)
- "[N]o cause of action will lie for the 'publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th

790, 793 [40 Cal.Rptr.2d 639], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 789–791

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-:L, *Invasion Of Privacy*, ¶¶ 5:1116–5:1118 (The Rutter Group)

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.35 (Matthew Bender)

California Civil Practice: Torts § 20:17 (Thomson Reuters)

1805. Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (*Comedy III*)

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] has not violated [***name of plaintiff***]'s right of privacy because the [***insert type of work, e.g., "picture"***] is protected by the First Amendment's guarantee of freedom of speech and expression. To succeed, [***name of defendant***] must prove either of the following:**

1. **That the [***insert type of work, e.g., "picture"***] adds something new to [***name of plaintiff***]'s likeness, giving it a new expression, meaning, or message; or**
2. **That the value of the [***insert type of work, e.g., "picture"***] does not result primarily from [***name of plaintiff***]'s fame.**

New September 2003; Revised October 2008

Directions for Use

This instruction assumes that the plaintiff is the celebrity whose likeness is the subject of the trial. This instruction will need to be modified if the plaintiff is not the actual celebrity.

Sources and Authority

- "In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797].)
- "We have explained that '[o]nly if [a defendant] is entitled to the [transformative] defense *as a matter of law* can it prevail on its motion to strike,' because the California Supreme Court 'envisioned the application of the defense as a question of fact.' As a result, [defendant] 'is only entitled to the defense as a matter of law if no trier of fact could reasonably conclude that the [game] [i]s not transformative.' " (*Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)* (9th Cir. 2013) 724 F.3d 1268, 1274, original italics.)
- "[C]ourts can often resolve the question as a matter of law simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person or persons portrayed. Because of these circumstances, an action presenting this issue is often properly resolved on summary judgment or, if the complaint includes the work in question, even demurrer." (*Winter v. DC Comics*

(2003) 30 Cal.4th 881, 891–892 [134 Cal.Rptr.2d 634, 69 P.3d 473], internal citation omitted.)

- "[T]he First Amendment . . . safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays." (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 860 [230 Cal.Rptr.3d 625].)
- "Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 400.)
- "Furthermore, in determining whether a work is sufficiently transformative, courts may find useful a subsidiary inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity—from the creativity, skill, and reputation of the artist—it may be presumed that sufficient transformative elements are present to warrant First Amendment protection. If the question is answered in the affirmative, however, it does not necessarily follow that the work is without First Amendment protection—it may still be a transformative work." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 407.)
- "As the Supreme Court has stated, the central purpose of the inquiry into this fair use factor 'is to see . . . whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." ' " (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 404, internal citations omitted.)
- "We emphasize that the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to subtle social criticism." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 406.)
- "[Defendant] contends the plaintiffs' claims are barred by the transformative use defense formulated by the California Supreme Court in *Comedy III* . . . . 'The defense is "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." ' " (*Davis v. Elec. Arts, Inc.* (9th Cir. 2015) 775 F.3d 1172, 1177, internal citation omitted.)

- "Simply stated, the transformative test looks at 'whether the celebrity likeness is one of the "raw materials" from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness.' This transformative test is the court's primary inquiry when resolving a conflict between the right of publicity and the First Amendment." (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 686 [166 Cal.Rptr.3d 359], internal citations omitted.)
- "*Comedy III's* 'transformative' test makes sense when applied to products and merchandise—'tangible personal property,' in the Supreme Court's words. Lower courts have struggled mightily, however, to figure out how to apply it to expressive works such as films, plays, and television programs." (*De Havilland, supra,* 21 Cal.App.5th at p. 863, internal citation omitted.)
- "The First Amendment defense does not apply only to visual expressions, however. 'The protections may extend to all forms of expression, including written and spoken words (fact or fiction), music, films, paintings, and entertainment, whether or not sold for a profit.' " (*Ross*, *supra*, 222 Cal.App.4th at p. 687.)
- "The distinction between parody and other forms of literary expression is irrelevant to the *Comedy III* transformative test. It does not matter what precise literary category the work falls into. What matters is whether the work is transformative, not whether it is parody or satire or caricature or serious social commentary or any other specific form of expression." (*Winter, supra,* 30 Cal.4th at p. 891.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 788

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 4(VII)-C, *Harm to Reputation and Privacy Interests*, ¶ 4:1385 et seq. (The Rutter Group)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.38 (Matthew Bender)

1806. Affirmative Defense to Invasion of Privacy—First Amendment Balancing Test—Public Interest

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[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] has not violated [***name of plaintiff***]'s right of privacy because the public interest served by [***name of defendant***]'s [***specify privacy violation, e.g., use of [name of plaintiff]'s name, likeness, or identity***] outweighs [***name of plaintiff***]'s privacy interests. In deciding whether the public interest outweighs [***name of plaintiff***]'s privacy interest, you should consider all of the following:**

a. Where the information was used;

b. The extent of the use;

c. The public interest served by the use;

d. The seriousness of the interference with [*name of plaintiff***]'s privacy; and**

e. [*specify other factors***].**

New June 2015

Directions for Use

This instruction sets forth a balancing test for a claim for invasion of privacy. A defendant's First Amendment right to freedom of expression and freedom of the press can, in some cases, outweigh the plaintiff's right of privacy (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409–410 [114 Cal.Rptr.2d 307]; see also *Gill v. Hearst Publishing Co. Inc.* (1953) 40 Cal.2d 224, 228–231 [253 P.2d 441].) This balancing test is an affirmative defense. (See *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797]; CACI No. 1805, *Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (Comedy III)*.)

A First-Amendment defense based on newsworthiness has been allowed for the defendant's use of the plaintiff's name or likeness. (See *Gionfriddo*, *supra*, 94 Cal.App.4th at pp. 409–411; see CACI No. 1804A.) It has also been allowed for privacy claims based on intrusion into private affairs (see CACI No. 1800) and public disclosure of private facts (See CACI No. 1802; *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214–242 [74 Cal.Rptr.2d 843, 955 P.2d 469].) It has also been allowed for a claim that the plaintiff had been presented in a false light (See CACI No. 1802; *Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278–279 [239 P.2d 630] [magazine's use of plaintiffs' picture in connection with article on divorce suggested that they were not happily married].)

Sources and Authority

- "[N]o cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News, Inc.* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citation omitted.)
- "The sense of an ever-increasing pressure on personal privacy notwithstanding, it has long been apparent that the desire for privacy must at many points give way before our right to know, and the news media's right to investigate and relate, facts about the events and individuals of our time." (*Shulman, supra*, 18 Cal.4th at p. 208.)
- "The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals' interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy." (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278–279 [239 P.2d 630].)
- "[T]he common law right does not provide relief for every publication of a person's name or likeness. The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo*, *supra*, 94 Cal.App.4th at pp. 409–410, internal citations and footnote omitted.)
- "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790], internal citation omitted.)
- "Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." (*Comedy III Productions, Inc.*, *supra*, 25 Cal.4th at p. 400.)
- "The First Amendment defense does not apply only to visual expressions, however. 'The protections may extend to all forms of expression, including written and spoken words (fact or fiction), music, films, paintings, and entertainment, whether or not sold for a profit.' " (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 687 [166 Cal.Rptr.3d 359].)
- "Producers of films and television programs may enter into agreements with

individuals portrayed in those works for a variety of reasons, including access to the person's recollections or 'story' the producers would not otherwise have, or a desire to avoid litigation for a reasonable fee. But the First Amendment simply does not require such acquisition agreements." (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 861 [230 Cal.Rptr.3d 625].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 681 et seq.

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.35 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.27 (Matthew Bender)

1807. Affirmative Defense—Invasion of Privacy Justified

[*Name of defendant***] claims that even if [***name of plaintiff***] has proven all of the above, [his/her/***nonbinary pronoun***/its] conduct was justified. [***Name of defendant***] must prove that the circumstances justified the invasion of privacy because the invasion of privacy substantially furthered [***insert relevant legitimate or compelling competing interest***].**

If [*name of defendant***] proves that [his/her/***nonbinary pronoun***/its] conduct was justified, then you must find for [***name of defendant***] unless [***name of plaintiff***] proves that there was a practical, effective, and less invasive method of achieving [***name of defendant***]'s purpose.**

New September 2003; Revised October 2008, June 2010

Sources and Authority

- "A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests. Of course, a defendant may also plead and prove other available defenses, e.g., consent, unclean hands, etc., that may be appropriate in view of the nature of the claim and the relief requested." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 40 [26 Cal.Rptr.2d 834, 865 P.2d 633].)
- "The existence of a sufficient countervailing interest or an alternative course of conduct present threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. Again, in cases where material facts are undisputed, adjudication as a matter of law may be appropriate." (*Hill, supra,* 7 Cal.4th at p. 40.)
- "*Hill* and its progeny further provide that no constitutional violation occurs, i.e., a 'defense' exists, if the intrusion on privacy is justified by one or more competing interests. For purposes of this balancing function—and except in the rare case in which a 'fundamental' right of personal autonomy is involved—the defendant need not present a ' "compelling" ' countervailing interest; only 'general balancing tests are employed.' To the extent the plaintiff raises the issue in response to a claim or defense of competing interests, the defendant may show that less intrusive alternative means were not reasonably available. A relevant inquiry in this regard is whether the intrusion was limited, such that no confidential information was gathered or disclosed." (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 288 [97 Cal.Rptr.3d 274, 211 P.3d 1063], internal citations omitted.)

- Note that whether the countervailing interest needs to be "compelling" or "legitimate" depends on the status of the defendant. "In general, where the privacy violation is alleged against a private entity, the defendant is not required to establish a 'compelling interest' but, rather, one that is 'legitimate' or 'important.' " (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440 [57 Cal.Rptr.2d 46].)

Secondary Sources

7 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 642–670

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.06 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.16 (Matthew Bender)

18 California Points and Authorities, Ch. 183, *Privacy: State Constitutional Rights*, § 183.20 (Matthew Bender)

California Civil Practice: Torts §§ 20:18–20:20 (Thomson Reuters)

1808. Stalking (Civ. Code, § 1708.7)

Revoked June 2015. See Stats 2014, Ch. 853 (AB 1356), substantially amending Civ. Code, § 1708.7.

1809. Recording of Confidential Information (Pen. Code, §§ 632, 637.2)

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her/***nonbinary pronoun***] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally [eavesdropped on/recorded] [***name of plaintiff***]'s conversation by using an electronic device;**
2. **That [***name of plaintiff***] had a reasonable expectation that the conversation was not being overheard or recorded; [and]**
3. **That [***name of defendant***] did not have the consent of all parties to the conversation to [eavesdrop on/record] it;**
4. **[That [***name of plaintiff***] was harmed; and]**
5. **[That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.]**

New September 2003

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

Elements 4 and 5 are in brackets because if there is no actual harm, plaintiff can recover the statutory penalty. If plaintiff is seeking actual damages, such damages must be proven along with causation.

Sources and Authority

- Recording Confidential Communication. Penal Code section 632(a).
- Civil Action for Recording Confidential Communication. Penal Code section 637.2.
- "[A] conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 776–777 [117 Cal.Rptr.2d 574, 41 P.3d 575].)
- " 'A communication must be protected if either party reasonably expects the communication to be confined to the parties.' " (*Coulter v. Bank of America National Trust and Savings Assn.* (1994) 28 Cal.App.4th 923, 929 [33 Cal.Rptr.2d 766], internal citation omitted.)
- "While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the

secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device." (*Ribas v. Clark* (1985) 38 Cal.3d 355, 360–361 [212 Cal.Rptr. 143, 696 P.2d 637].)

- "We hold that an actionable violation of section 632 does not require disclosure of a confidential communication to a third party." (*Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, 1660 [21 Cal.Rptr.2d 85].)
- "The right to recover [the] statutory minimum accrue[s] at the moment the privacy act [is] violated." (*Friddle, supra,* 16 Cal.App.4th at p. 1661.)
- "If the plaintiff has suffered injuries akin to those for emotional distress, 'i.e., anxiety, embarrassment, humiliation, shame, depression, feelings of powerlessness, anguish, etc.,' these are 'actual' damages which shall be trebled." (*Friddle, supra,* 16 Cal.App.4th at p. 1660.)
- "Because the right to [the statutory] award accrues at the moment of the violation, it is not barred by the judicial privilege. . . . Section 637.2 therefore permits him to pursue his statutory remedy of a civil lawsuit for $3,000, even though the judicial privilege bars his recovery for the only actual damage he claims to have suffered." (*Ribas, supra,* 38 Cal.3d at p. 365.)

Secondary Sources

7 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 728, 729, 736

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.07[8] (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.283 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.25A (Matthew Bender)

1810. Distribution of Private Sexually Explicit Materials—Essential Factual Elements (Civ. Code, § 1708.85)

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her/***nonbinary pronoun***] right to privacy by distributing private sexually explicit materials. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally distributed by [***specify means, e.g., posting online***] [a] [photograph(s)/film(s)/videotape(s)/ recording(s)/[***specify other reproduction***]] of [***name of plaintiff***];**
2. **That [***name of plaintiff***] did not consent to the distribution of the [***specify, e.g., photographs***];**
3. **That [***name of defendant***] knew, or reasonably should have known, that [***name of plaintiff***] had a reasonable expectation that the [***e.g., photographs***] would remain private;**
4. **That the [***e.g., photographs***] [exposed an intimate body part of [***name of plaintiff***]/ [or] showed [***name of plaintiff***] engaging in an act of [intercourse/oral copulation/sodomy/ [or] [***specify other act of sexual penetration***]]];**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[An "intimate body part" is any part of the genitals[, and, in the case of a female, also includes any portion of the breast below the top of the areola,] that is uncovered or visible through less than fully opaque clothing.]

New December 2015; Revised May 2022

Directions for Use

This instruction is for use for an invasion-of-privacy cause of action for the dissemination of sexually explicit materials. (See Civ. Code, § 1708.85(a).) It may not be necessary to include the last definitional paragraph as the court may rule as a matter of law that an image of an intimate body part has been distributed. (See Civ. Code, § 1708.85(b).)

Plaintiff may recover general or special damages as defined in subdivision (d) of Civil Code section 48a. (Civ. Code, § 1708.85(a).) "General damages" are damages for loss of reputation, shame, mortification and hurt feelings. (Civ. Code, § 48a(d)(1).) "Special damages" are essentially economic loss. (Civ. Code, § 48a(d)(2).)

Sources and Authority

- Right of Action Against Distributor of Private Sexually Explicit Material. Civil Code section 1708.85
- General and Special Damages. Civil Code section 48a(d)(1), (2)

Secondary Sources

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.07 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.36A (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.25B (Matthew Bender)

1811. Reserved for Future Use

1812. Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements (Pen. Code, § 502)

[*Name of plaintiff***] claims that [***name of defendant***] has violated the Comprehensive Computer Data and Access Fraud Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] is the [owner/lessee] of the [***specify computer, computer system, computer network, computer program, and/or data***];**
2. **That [***name of defendant***] knowingly [***specify one or more prohibited acts from Pen. Code, § 502(c), e.g., accessed [name of plaintiff]'s data on a computer, computer system, or computer network***];**

[3. That [*name of defendant***]'s [***specify conduct from Pen. Code, § 502(c), e.g., use of the computer services***] was without [***name of plaintiff***]'s permission;]**

[4.] That [*name of plaintiff***] was harmed; and**

[5.] That [*name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New May 2020

Directions for Use

Give this instruction for a claim under the Comprehensive Computer Data Access and Fraud Act (CDAFA). CDAFA makes civil remedies available to any person who suffers damage or loss by reason of the commission of certain computer-related offenses. (Pen. Code, § 502(c), (e)(1).)

For element 1, the court may need to define the technology (e.g., "computer network," "computer program or software," "computer system," or "data") or other statutory term depending on the facts and circumstances of the particular case. (See Pen. Code, § 502(b) [defining various terms].) For a definition of "access," see CACI No. 1813, *Definition of "Access."*

Some of the prohibited acts for element 2 may also require that the defendant do something specific with the access or that the defendant have a specific purpose. For example, if the defendant allegedly deleted or used plaintiff's computer data, it must have been done without permission and either to (a) devise or execute any scheme or artifice to defraud, deceive, or extort, or (b) wrongfully control or obtain money, property, or data. (See Pen. Code, § 502(c)(1).) Modify the instruction to include these elements where required.

Include element 3 regarding lack of permission depending on the violation(s) alleged. Lack of permission is a required element for violations of subdivisions

(c)(1)–(7) and (c)(9)–(13), but not for violations of subdivisions (c)(8) and (c)(14). Modify element 3 accordingly. Delete element 3 for violations of the latter subdivisions.

If plaintiff's claim involves a "government computer system" or a "public safety infrastructure computer system" and there is a factual dispute about the type of computer system involved, this instruction should be modified to add that issue as an element. (See Pen. Code, § 502(c)(10), (11), (12), (13), and (14).)

Sources and Authority

- Comprehensive Computer Data Access and Fraud Act. Penal Code section 502.
- "Penal Code section 502, subdivision (e)(1) permits a civil action to recover expenses related to investigating the unauthorized computer access." (*Verio Healthcare, Inc. v. Superior Court* (2016) 3 Cal.App.5th 1315, 1321 fn. 3 [208 Cal.Rptr.3d 436].)
- "Whether [plaintiff] owned the data in [defendant's] possession was a question of fact for the jury to decide. By assuming or asking whether [plaintiff] had an *unspecified* interest in the data in question, the instruction as given removed from the jury's consideration an element that [plaintiff] had to prove to prevail on his claim." (*Garrabrants v. Erhart* (2023) 98 Cal.App.5th 486, 509 [316 Cal.Rptr.3d 792], original italics.)
- "Four of the section 502, subdivision (c) offenses include access as an element. The provision under which [defendant] was charged does not. When different words are used in adjoining subdivisions of a statute that were enacted at the same time, that fact raises a compelling inference that a different meaning was intended. The Legislature's requirement of unpermitted access in some section 502 offenses and its failure to require that element in other parts of the same statute raise a strong inference that the subdivisions that do not require unpermitted access were intended to apply to persons who gain lawful access to a computer but then abuse that access." (*People v. Childs* (2013) 220 Cal.App.4th 1079, 1102 [164 Cal.Rptr.3d 287], internal citations omitted.)
- "[The CDAFA] does not require *unauthorized* access. It merely requires *knowing* access. What makes that access unlawful is that the person 'without permission takes, copies, or makes use of' data on the computer. A plain reading of the statute demonstrates that its focus is on unauthorized taking or use of information." (*United States v. Christensen* (9th Cir. 2015) 828 F.3d 763, 789, original italics, internal citations omitted.)
- "Because [defendant] had implied authorization to access [plaintiff]'s computers, it did not, at first, violate the [CDAFA]. But when [plaintiff] sent the cease and desist letter, [defendant], as it conceded, knew that it no longer had permission to access [plaintiff]'s computers at all. [Defendant], therefore, knowingly accessed and without permission took, copied, and made use of [plaintiff]'s data." (*Facebook, Inc. v. Power Ventures, Inc.* (9th Cir. 2016) 844 F.3d 1058, 1069.)

- "[T]aking data using a *method* prohibited by the applicable terms of use, when the taking itself generally is permitted, does not violate the CDAFA." (*Oracle USA, Inc. v. Rimini Street, Inc.* (9th Cir. 2018) 879 F.3d 948, 962, reversed in part on other grounds by *Rimini Street, Inc. v. Oracle USA, Inc.* (2019) 586 U.S. 334, 346 [139 S.Ct. 873, 203 L.Ed.2d 180], original italics.)

Secondary Sources

5 Witkin, California Criminal Law (4th ed. 2012) Crimes Against Property, § 229 et seq.

31 California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright*, § 349.41[5] (Matthew Bender)

1813. Definition of "Access" (Pen. Code, § 502(b)(1))

The term "access" means to gain entry to, instruct, cause input to, cause output from, cause data processing with, or communicate with the logical, arithmetical, or memory function resources of a computer, computer system, or computer network.

A person can access a computer, computer system, or computer network in different ways. For example, access can be accomplished by sitting down at a computer and using the mouse and keyboard, or by using a wireless network or some other method or tool to gain remote entry.

New May 2020

Directions for Use

This instruction should be read with CACI No. 1812, *Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements*, for claims that require that the defendant "access" a computer, computer system, or computer network. (See Pen. Code, § 502 (c)(1), (2), (4), (7), and (11).)

Sources and Authority

- "Access" Defined. Penal Code section 502(b)(1).
- "Underscoring that 'accessing' a computer's 'logical, arithmetical, or memory function' is different from the ordinary, everyday use of a computer to which people are accustomed when they speak of 'using' a computer, another subdivision criminalizes 'us[ing] or caus[ing] to be used computer services' without permission. Principles of statutory interpretation obligate us to give different meanings to the words 'use' and 'access' in order to avoid rendering either word redundant." (*Chrisman v. City of Los Angeles* (2007) 155 Cal.App.4th 29, 34 [65 Cal.Rptr.3d 701], internal citation and footnote omitted.)
- "Public access computer terminals are increasingly common in the offices of many governmental bodies and agencies, from courthouses to tax assessors. We believe subdivision (c)(7) was designed to criminalize unauthorized access to the software and data in such systems, even where none of the other illegal activities listed in subdivision (c) have occurred." (*People v. Lawton* (1996) 48 Cal.App.4th Supp. 11, 15 [56 Cal.Rptr.2d 521].)

Secondary Sources

5 Witkin, California Criminal Law (4th ed. 2012) Crimes Against Property, § 229 et seq.

1814. Damages for Investigating Violations of Comprehensive Computer Data and Access Fraud Act (Pen. Code, § 502(e)(1))

To recover damages for money spent to investigate or verify whether [*name of plaintiff*]'s computer system, computer network, computer program, or data was or was not altered, damaged, or deleted by [*specify wrongful conduct under section 502(c) that led to accessing the plaintiff's computer system, computer network, or computer program*], [*name of plaintiff*] must prove the amount of money reasonably and necessarily spent to conduct such an investigation.

New May 2020; Revised November 2020

Directions for Use

Give this instruction for violations of the Comprehensive Computer Data and Access Fraud Act in which there is evidence that the plaintiff spent money to investigate or verify the defendant's wrongful conduct. (See Pen. Code, § 502; CACI No. 1812, *Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements*.) In some cases, it may be appropriate to tailor the instruction to specify the technology or data at issue (e.g., the name of a computer program or the plaintiff's data files).

For other damages instructions, see the Damages series, CACI No. 3900 et seq.

Punitive or exemplary damages are available for willful violations. (Pen. Code, § 502(e)(4).) For instructions on punitive damages, see CACI Nos. 3940–3949.

Sources and Authority

- Compensatory Damages. Penal Code section 502(e)(1).

Secondary Sources

5 Witkin, California Criminal Law (4th ed. 2012) Crimes Against Property, § 229 et seq.

31 California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright*, § 349.91 (Matthew Bender)

1815–1819. Reserved for Future Use

1820. Damages

If you decide that [*name of plaintiff*] has proved [his/her/*nonbinary pronoun*/its] claim against [*name of defendant*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages."

The amount of damages must include an award for all harm that was caused by [*name of defendant*], even if the particular harm could not have been anticipated.

[*Name of plaintiff*] must prove the amount of [his/her/*nonbinary pronoun*/its] damages. However, [*name of plaintiff*] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [*name of plaintiff*]:

1. **[Mental suffering/anxiety/humiliation/emotional distress;]**
2. **[Harm to reputation and loss of standing in the community;]**
3. **[The commercial value of [*name of plaintiff*]'s name or likeness;]**
4. **[***Insert other applicable item of damage.***]**

No fixed standard exists for deciding the amount of damages for [*insert item of mental or emotional distress*]. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[To recover for future [*insert item of mental or emotional distress*], [*name of plaintiff*] must prove that [he/she/*nonbinary pronoun*] is reasonably certain to suffer that harm.]

New September 2003

Directions for Use

This instruction is not intended for cases involving invasion of privacy by false light. Damages for false light are similar to the damages available in defamation (see CACI Nos. 1700 to 1705).

Item 2 will probably not be relevant in all cases. It will have particular application to the aspect of this tort involving the publication of private facts. (See *Diaz v. Oakland Tribune, Inc.* (1983) 139 Cal.App.3d 118, 137 [188 Cal.Rptr. 762].)

Item 3 is intended only for cases involving violation of privacy by appropriation.

Sources and Authority

- Restatement Second of Torts, section 652H provides:

One who has established a cause of action for invasion of his privacy is entitled to recover damages for

(a) the harm to his interest in privacy resulting from the invasion;

(b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and

(c) special damage of which the invasion is a legal cause.

Note that this Restatement section has not been cited by any published California cases.

- "Damages recoverable in California for invasion of a privacy right were discussed in detail in *Fairfield v. American Photocopy Equipment Co.* The Court of Appeal declared that because the interest involved privacy, the damages flowing from its invasion logically would include an award for mental suffering and anguish. *Fairfield* was an appropriation case, but the principles it laid down concerning damage awards in privacy cases relied on a body of California law which had already recognized violation of the right of privacy as a tort." (*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1484 [232 Cal.Rptr. 668], internal citation omitted.)
- "The elements of emotional distress damages, i.e., anxiety, embarrassment, humiliation, shame, depression, feelings of powerlessness, anguish, etc., would thus be subjects of legitimate inquiry by a jury in the action before us, taking into account all of the consequences and events which flowed from the actionable wrong." (*Miller, supra,* 187 Cal.App.3d at p. 1485.)
- "The actual injury involved herein is not limited to out-of-pocket loss. It generally includes 'impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.' " (*Diaz, supra,* 139 Cal.App.3d at p. 137, internal citation omitted.)
- In *Time, Inc. v. Hill* (1967) 385 U.S. 374, 384, fn. 9 [87 S.Ct. 534, 17 L.Ed.2d 456], the court stated: "In the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage."
- "There is a distinction between causes of action for invasion of privacy and defamation with regard to the respective interests protected and compensated by each. 'The gist of a cause of action in a privacy case is not injury to the character or reputation but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community. The right of privacy concerns one's own peace of mind, while the right of freedom from defamation concerns primarily one's reputation. The injury is mental and subjective.' " (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1135 [212 Cal.Rptr. 838], internal citations omitted.)
- "California recognizes the right to profit from the commercial value of one's

identity as an aspect of the right of publicity." (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409 [114 Cal.Rptr.2d 307], internal citations omitted.)

- "What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one's name, voice, signature, photograph, or likeness." (*KNB Enterprises v. Matthews* (2000) 78 Cal.App.4th 362, 366 [92 Cal.Rptr.2d 713].)
- "The first type of appropriation is the right of publicity . . . which is 'in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned, endows the name and likeness of the person involved with commercially exploitable opportunities.' The other is the appropriation of the name and likeness that brings injury to the feelings, that concerns one's own peace of mind, and that is mental and subjective." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 541–542 [18 Cal.Rptr.2d 790], internal citations omitted.)

Secondary Sources

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.13 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.46 (Matthew Bender)

1821. Damages for Use of Name or Likeness (Civ. Code § 3344(a))

If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

[*Name of plaintiff***] must prove the amount of [his/her/***nonbinary pronoun***] damages. [***Name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **[Humiliation, embarrassment, and mental distress, including any physical symptoms;]**
2. **[Harm to [***name of plaintiff***]'s reputation;] [and]**
3. **[***Insert other item(s) of claimed harm***].**

In addition, [*name of plaintiff***] may recover any profits that [***name of defendant***] received from the use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] [that have not already been taken into account with regard to the above damages]. To establish the amount of these profits you must:**

1. **Determine the gross, or total, revenue that [***name of defendant***] received from the use;**
2. **Determine the expenses that [***name of defendant***] had in obtaining the gross revenue; and**
3. **Deduct [***name of defendant***]'s expenses from the gross revenue.**

[*Name of plaintiff***] must prove the amount of gross revenue, and [***name of defendant***] must prove the amount of expenses.**

New September 2003; Revised June 2012, December 2012

Directions for Use

Under Civil Code section 3344(a), an injured party may recover either actual damages or $750, whichever is greater, as well as profits from the unauthorized use that were not taken into account in calculating actual damages. (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547 [135 Cal.Rptr.3d 200].) If no actual damages are sought, the first part of the instruction may be deleted or modified to simply instruct the jury to award $750 if it finds liability.

The plaintiff might claim that the plaintiff would have earned the same profits that

the defendant wrongfully earned. In such a case, to avoid a double recovery, the advisory committee recommends computing damages to recover the defendant's wrongful profits separately from actual damages, that is, under the second part of the instruction and not under actual damages item 3 ("other item(s) of claimed harm"). See also CACI No. VF-1804, *Privacy—Use of Name or Likeness*. Give the bracketed phrase in the paragraph that introduces the second part of the instruction if the plaintiff alleges lost profits that are different from the defendant's wrongful profits and that are claimed under actual damages item 3.

Sources and Authority

- Liability for Use of Name or Likeness. Civil Code section 3344.
- "[Plaintiff] alleges, and submits evidence to show, that he was injured economically because the ad will make it difficult for him to endorse other automobiles, and emotionally because people may be led to believe he has abandoned his current name and assume he has renounced his religion. These allegations suffice to support his action. Injury to a plaintiff's right of publicity is not limited to present or future economic loss, but 'may induce humiliation, embarrassment, and mental distress.' " (*Abdul-Jabbar v. General Motors Corp.* (9th Cir. 1996) 85 F.3d 407, 416, internal citation omitted.)
- "The statutory language of section 3344 is unambiguous—the plaintiff bears the burden of presenting proof of the gross revenue attributable to the defendant's unauthorized use of the plaintiff's likeness, and the defendant must then prove its deductible expenses. CACI No. 1821 mirrors the language of section 3344: '[plaintiff] must prove the amount of gross revenue, and [. . . defendant] must prove the amount of expenses.' (CACI No. 1821.)" (*Olive v. General Nutrition Centers, Inc.* (2018) 30 Cal.App.5th 804, 814 [242 Cal.Rptr.3d 15], internal citation omitted.)
- "CACI No. 1821 adequately explained the applicable law to the jury." (*Olive, supra,* 30 Cal.App.5th at p. 815.)
- "We can conceive no rational basis for the Legislature to limit the $750 as an alternative to all other damages, including profits. If someone profits from the unauthorized use of another's name, it makes little sense to preclude the injured party from recouping those profits because he or she is entitled to statutory damages as opposed to actual damages. Similar reasoning appears to be reflected in the civil jury instructions for damages under section 3344, which provides: 'If [name of plaintiff] has not proved the above damages, or has proved an amount of damages less than $750, then you must award [him/her] $750. [¶] In addition, [name of plaintiff] may recover any profits that [name of defendant] received from the use of [name of plaintiff]'s [name . . .] [that have not already been taken into account in computing the above damages].' (CACI No. 1821, italics omitted.)." (*Orthopedic Systems, Inc., supra*, 202 Cal.App.4th at p. 546.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1715–1724

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Invasion Of Privacy*, ¶¶ 5:1116–5:1118 (The Rutter Group)

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.13 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.35 (Matthew Bender)

California Civil Practice, Torts § 20:17 (Thomson Reuters)

1822–1899. Reserved for Future Use

VF-1800. Privacy—Intrusion Into Private Affairs

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] have a reasonable expectation of privacy in [*specify place or other circumstance*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] intentionally intrude in [*specify place or other circumstance*]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Would [*name of defendant*]'s intrusion be highly offensive to a reasonable person?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1800, *Intrusion Into Private Affairs.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] publicize private information concerning [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Would a reasonable person in [*name of plaintiff*]'s position consider the publicity highly offensive?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] know or act with reckless disregard of the fact that a reasonable person in [*name of plaintiff*]'s position would consider the publicity highly offensive?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the private information of legitimate public concern [or did it have a substantial connection to a matter of legitimate public concern]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [*name of plaintiff*]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1801, *Public Disclosure of Private Facts.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual

forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1802. Privacy—False Light

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] publicize information or material that showed [*name of plaintiff*] in a false light?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Would a reasonable person in [*name of plaintiff*]'s position consider the false light created by the publication to be highly offensive?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Is there clear and convincing evidence that [*name of defendant*] either knew the publication would create a false impression about [*name of plaintiff*] or acted with reckless disregard for the truth?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1802, *False Light.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the conduct does not involve a matter of public concern, then substitute the following for question number 3: "Was [*name of defendant*] negligent in determining the truth of the information or whether a false impression would be created by its publication?" If the conduct involved material that is not defamatory on its face, the following question should be added to this form: "Did [*name of plaintiff*] sustain harm to [his/her/*nonbinary pronoun*] property, business, profession, or occupation [including money spent as a result of the statements(s)]?"

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual

forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1803. Privacy—Appropriation of Name or Likeness

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] use [*name of plaintiff*]'s name, likeness, or identity?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] consent to the use of [his/her/*nonbinary pronoun*] name, likeness, or identity?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] gain a commercial benefit [or some other advantage] by using [*name of plaintiff*]'s name, likeness, or identity?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, November 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1803, *Appropriation of Name or Likeness.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] knowingly use [*name of plaintiff*]'s [name/voice/signature/photograph/likeness] on merchandise or to advertise or sell products or services?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] have [*name of plaintiff*]'s consent?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of defendant*]'s use of [*name of plaintiff*]'s [name/voice/signature/photograph/likeness] directly connected to [*name of defendant*]'s commercial purpose?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[5. Did [*name of plaintiff*] suffer any actual damages or is [*name of plaintiff*] reasonably likely to suffer any actual damages in the future?

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer questions 6 and 7. If you answered no, answer question 7.]

6. **What are [*name of plaintiff*]'s actual damages?**

   [a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [humiliation/embarrassment/mental distress including any physical symptoms:] $_____]

[d. Future noneconomic loss, including [humiliation/embarrassment/mental distress including any physical symptoms:] $_____]

TOTAL ACTUAL DAMAGES $_____

[7. Did [*name of defendant*] receive any profits from the use of [*name of plaintiff*]'s [name/voice/signature/photograph/likeness] that you did not include under [*name of plaintiff*]'s actual damages for lost profits in Question 6 above?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What amount of those profits did [*name of defendant*] receive from the use of [*name of plaintiff*]'s [name/voice/signature/photograph/likeness]?

TOTAL PROFITS RECEIVED BY DEFENDANT $_____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2008, December 2010, June 2012, December 2012, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1804A, *Use of Name or Likeness,* and CACI No. 1821, *Damages for Use of Name or Likeness.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Under Civil Code section 3344(a), the plaintiff may recover actual damages or $750, whichever is greater. The plaintiff may also recover any profits that the defendant received from the unauthorized use that were not taken into account in calculating actual damages. (*Orthopedic Systems Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547 [135 Cal.Rptr.3d 200].) The advisory committee recommends calculating the defendant's profits to be disgorged separately from actual damages. Questions 5 through 8 take the jury through the recommended course. If no actual damages are sought, question 5 may be omitted and the jury instructed to enter $750 as the total actual damages in question 6. If the jury awards actual damages of less than $750, the court should raise the amount to $750. If there is no claim to disgorge the defendant's wrongful profits, questions 7 and 8 may be omitted.

Additional questions may be necessary if the facts implicate Civil Code section 3344(d) (see Directions for Use under CACI No. 1804B, *Use of Name or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign*).

If specificity is not required, users do not have to itemize all the actual damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1805–VF-1806. Reserved for Future Use

VF-1807. Privacy—Recording of Confidential Information (Pen. Code, §§ 632, 637.2)

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] intentionally [eavesdrop on/record] [*name of plaintiff*]'s conversation by using an electronic device?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] have a reasonable expectation that the conversation was not being overheard or recorded?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] have the consent of all parties to the conversation to [eavesdrop on/record] it?**

   _____ Yes _____ No

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1809, *Recording of Confidential Information.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Questions 4 and 5 do not have to be read if the plaintiff is seeking the statutory penalty only.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801,

814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1808–VF-1899. Reserved for Future Use

FRAUD OR DECEIT

1900. Intentional Misrepresentation

[*Name of plaintiff*] claims that [*name of defendant*] made a false representation that harmed [him/her/*nonbinary pronoun*/it]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] represented to [*name of plaintiff*] that a fact was true;**
2. **That [*name of defendant*]'s representation was false;**
3. **That [*name of defendant*] knew that the representation was false when [he/she/*nonbinary pronoun*] made it, or that [he/she/*nonbinary pronoun*] made the representation recklessly and without regard for its truth;**
4. **That [*name of defendant*] intended that [*name of plaintiff*] rely on the representation;**
5. **That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s representation;**
6. **That [*name of plaintiff*] was harmed; and**
7. **That [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation was a substantial factor in causing [his/her/*nonbinary pronoun*/its] harm.**

New September 2003; Revised December 2012, December 2013

Directions for Use

Give this instruction in a case in which it is alleged that the defendant made an intentional misrepresentation of fact. (See Civ. Code, § 1710(1).) If element 5 is contested, give CACI No. 1907, *Reliance*, and CACI No. 1908, *Reasonable Reliance*. If it is disputed that a representation was made, the jury should be instructed that "a representation may be made orally, in writing, or by nonverbal conduct." (See *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567 [54 Cal.Rptr.2d 468].)

The representation must ordinarily be an affirmation of fact, as opposed to an opinion. (See *Cohen v. S&S Construction Co.* (1983) 151 Cal.App.3d 941, 946 [201 Cal.Rptr. 173].) Opinions are addressed in CACI No. 1904, *Opinions as Statements of Fact*.

Sources and Authority

- Actionable Deceit. Civil Code section 1709.
- Intentional Misrepresentation. Civil Code section 1710(1).
- Fraud in Contract Formation. Civil Code section 1572.

- "The elements of fraud that will give rise to a tort action for deceit are: " '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal quotation marks omitted.)
- "A complaint for fraud must allege the following elements: (1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages." (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816 [52 Cal.Rptr.2d 650] [combining misrepresentation and scienter as a single element].)
- "Puffing," or sales talk, is generally considered opinion, unless it involves a representation of product safety. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 112 [120 Cal.Rptr. 681, 534 P.2d 377].)
- "Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or fiduciary duty one party might owe to the other." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 482 [80 Cal.Rptr.2d 329], internal citations omitted.)
- "[F]raudulent intent is an issue for the trier of fact to decide." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1061 [141 Cal.Rptr.3d 142].)
- "[T]he trial court failed to consider that a cause of action based in fraud may arise from conduct that is designed to mislead, and not only from verbal or written statements." (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 839 [199 Cal.Rptr.3d 901].)
- "[A] cause of action for misrepresentation requires an affirmative statement, not an implied assertion." (*RSB Vineyards, LLC v. Orsi* (2017) 15 Cal.App.5th 1089, 1102 [223 Cal.Rptr.3d 458].)
- " '[F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered.' " (*Engalla, supra,* 15 Cal.4th at p. 974, quoting *Yellow Creek Logging Corp. v. Dare* (1963) 216 Cal.App.2d 50, 55 [30 Cal.Rptr. 629].)
- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith, supra,* 205 Cal.App.4th at p. 1062.)
- "A 'complete causal relationship' between the fraud or deceit and the plaintiff's damages is required. . . . Causation requires proof that the defendant's conduct

was a " 'substantial factor' " in bringing about the harm to the plaintiff." (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132 [39 Cal.Rptr.2d 658], internal citations omitted.)

- " ' "Misrepresentation, even maliciously committed, does not support a cause of action unless the plaintiff suffered consequential damages." ' " [Citation.]' [Citation.] Indeed, ' " '[a]ssuming . . . a claimant's reliance on the actionable misrepresentation, no liability attaches if the damages sustained were otherwise inevitable or due to unrelated causes.' [Citation.]" [Citation.] [If the defrauded plaintiff would have suffered the alleged damage even in the absence of the fraudulent inducement, causation cannot be alleged and a fraud cause of action cannot be sustained.' " (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1008 [198 Cal.Rptr.3d 715].)
- "The law is well established that actionable misrepresentations must pertain to past or existing material facts. Statements or predictions regarding future events are deemed to be mere opinions which are not actionable." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469 [169 Cal.Rptr.3d 619], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 294, 883, 939, 943, 944, 949

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.02, 40.05 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.19 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.80 et seq. (Matthew Bender)

California Civil Practice: Torts § 22:12 (Thomson Reuters)

1901. Concealment

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed because [***name of defendant***] concealed certain information. To establish this claim, [***name of plaintiff***] must prove all of the following:**

[1. (a) That [*name of defendant***] and [***name of plaintiff***] were [***insert type of fiduciary relationship, e.g., "business partners"***]; and**

(b) That [*name of defendant***] intentionally failed to disclose certain facts to [***name of plaintiff***];]**

[or]

[1. That [*name of defendant***] disclosed some facts to [***name of plaintiff***] but intentionally failed to disclose [other/another] fact[s], making the disclosure deceptive;]**

[or]

[1. That [*name of defendant***] intentionally failed to disclose certain facts that were known only to [him/her/***nonbinary pronoun***/it] and that [***name of plaintiff***] could not have discovered;]**

[or]

[1. That [*name of defendant***] prevented [***name of plaintiff***] from discovering certain facts;]**

2. That [*name of plaintiff***] did not know of the concealed fact[s];**

3. That [*name of defendant***] intended to deceive [***name of plaintiff***] by concealing the fact[s];**

4. That had the omitted information been disclosed, [*name of plaintiff***] reasonably would have behaved differently;**

5. That [*name of plaintiff***] was harmed; and**

6. That [*name of defendant***]'s concealment was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised October 2004, December 2012, June 2014, June 2015

Directions for Use

Give this instruction if it is alleged that the defendant concealed certain information to the detriment of the plaintiff. (See Civ. Code, § 1710(3).) Element 2 may be deleted if the third option for element 1 is selected.

Regarding element 1, before there can be liability for concealment, there must

usually be a duty to disclose arising from a fiduciary or confidential relationship between the parties. However, in transactions that do not involve fiduciary or confidential relations, a duty to disclose material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts that materially qualify the facts disclosed, or that render his disclosure likely to mislead (option 2); (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff (option 3); (3) the defendant actively conceals discovery from the plaintiff (option 4). (See *Warner Constr. Corp. v. L.A.* (1970) 2 Cal.3d 285, 294 [85 Cal. Rptr. 444, 466 P.2d 996].) For the second, third, and fourth options, if the defendant asserts that there was no relationship based on a transaction giving rise to a duty to disclose, the jury should also be instructed to determine whether the requisite relationship existed. (See *Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1187 [175 Cal.Rptr.3d 820].)

If element 4 is contested, give CACI No. 1907, *Reliance*, and CACI No. 1908, *Reasonable Reliance*. To avoid any possible confusion created by using "rely on the concealment" (see *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568].), CACI Nos. 1907 and 1908 may be modified to replace the words "rely," "relied," and "reliance" with language based on "behave differently" from element 4. It must have been reasonable for the plaintiff to have behaved differently had the omitted information been disclosed. (See *Hoffman, supra*, 228 Cal.App.4th at p. 1194 [concealment case].)

Sources and Authority

- Concealment. Civil Code section 1710(3).
- "[T]he elements of an action for fraud and deceit based on a concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248 [129 Cal.Rptr.3d 874].)
- "A duty to speak may arise in four ways: it may be directly imposed by statute or other prescriptive law; it may be voluntarily assumed by contractual undertaking; it may arise as an incident of a relationship between the defendant and the plaintiff; and it may arise as a result of other conduct by the defendant that makes it wrongful for him to remain silent." (*SCC Acquisitions, Inc. v. Central Pacific Bank* (2012) 207 Cal.App.4th 859, 860 [143 Cal.Rptr.3d 711].)
- "In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely

to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff." (*Warner Construction Corp., supra*, 2 Cal.3d at p. 294, footnotes omitted.)

- "[O]ther than the first instance, in which there must be a fiduciary relationship between the parties, 'the other three circumstances in which nondisclosure may be actionable: presuppose[] the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. . . . "[W]here material facts are known to one party and not to the other, failure to disclose them is not actionable fraud unless there is *some relationship* between the parties which gives rise to a duty to disclose such known facts." [Citation.]' A relationship between the parties is present if there is 'some sort of *transaction* between the parties. [Citations.] Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement.' " (*Hoffman, supra*, 228 Cal.App.4th at p. 1187, original italics, internal citations omitted.)
- "Even if a fiduciary relationship is not involved, a non-disclosure claim arises when the defendant makes representations but fails to disclose additional facts which materially qualify the facts disclosed, or which render the disclosure likely to mislead." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 666 [51 Cal.Rptr.2d 907], internal citations omitted.)
- " '[T]he rule has long been settled in this state that although one may be under no duty to speak as to a matter, "if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure." ' " (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 613 [7 Cal.Rptr.2d 859].)
- "While a reasonable jury could, and in this case did, find these warnings inadequate for product liability purposes given [defendant]'s knowledge of the risk of NFCI's, these statements are not 'misleading "half-truths" ' that give rise to a duty to disclose in the absence of an otherwise sufficient relationship or transaction. To hold otherwise would unduly conflate two distinct areas of law, products liability and fraud, and transform every instance of inadequate product warning into a potential claim for fraud." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 313-314 [213 Cal.Rptr.3d 82].)
- "[F]raudulent intent is an issue for the trier of fact to decide." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1061 [141 Cal.Rptr.3d 142].)
- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage."

(*Beckwith, supra*, 205 Cal.App.4th at p. 1062.)

- "[P]laintiffs argue that actual reliance cannot logically be an element of a cause of action for deceit based on an omission because it is impossible to demonstrate reliance on something that one was not told. In support of the argument, plaintiffs cite *Affiliated Ute Citizens v. United States, supra*, 406 U.S. 128 (*Ute*) . . . , Interpreting Rule 10b-5, the high court held that 'positive proof of reliance is not a prerequisite to recovery' in a case 'involving primarily a failure to disclose . . . .' [¶] Contrary to plaintiffs' assertion, it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed, one would have been aware of it and behaved differently." (*Mirkin, supra*, 5 Cal.4th at p. 1093.)
- "The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he [or she] transacts business. Laws are made to protect the trusting as well as the suspicious. [T]he rule of *caveat emptor* should not be relied upon to reward fraud and deception." (*Boschma*, *supra*, 198 Cal.App.4th at p. 249, original italics.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 912–919

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 11-E, *Damages For Fraud*, ¶ 11:354 (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.03[2][b] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.26 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.70 et seq. (Matthew Bender)

California Civil Practice: Torts § 22:16 (Thomson Reuters)

1902. False Promise

[*Name of plaintiff*] claims [he/she/*nonbinary pronoun*] was harmed because [*name of defendant*] made a false promise. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] made a promise to [*name of plaintiff*];**
2. **That [*name of defendant*] did not intend to perform this promise when [he/she/*nonbinary pronoun*] made it;**
3. **That [*name of defendant*] intended that [*name of plaintiff*] rely on this promise;**
4. **That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s promise;**
5. **That [*name of defendant*] did not perform the promised act;**
6. **That [*name of plaintiff*] was harmed; and**
7. **That [*name of plaintiff*]'s reliance on [*name of defendant*]'s promise was a substantial factor in causing [his/her/*nonbinary pronoun*/its] harm.**

New September 2003; Revised December 2012, December 2013

Directions for Use

Give this instruction in a case in which it is alleged that the defendant made a promise without any intention of performing it. (See Civ. Code, § 1710(4).) If element 4 is contested, give CACI No. 1907, *Reliance*, and CACI No. 1908, *Reasonable Reliance*.

Sources and Authority

- Deceit. Civil Code section 1710.
- " ' "Promissory fraud" is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973–974 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal citations omitted.)
- "Under Civil Code section 1709, one is liable for fraudulent deceit if he 'deceives another with intent to induce him to alter his position to his injury or risk . . . .' Section 1710 of the Civil Code defines deceit for the purposes of Civil Code section 1709 as, inter alia, '[a] promise, made without any intention of performing it.' ' "The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or

nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." [Citations.]' Each element must be alleged with particularity." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1059–1060 [141 Cal.Rptr.3d 142], internal citations omitted.)

- "A promise of future conduct is actionable as fraud only if made without a present intent to perform. 'A declaration of intention, although in the nature of a promise, made in good faith, without intention to deceive, and in the honest expectation that it will be fulfilled, even though it is not carried out, does not constitute a fraud.' Moreover, ' "something more than nonperformance is required to prove the defendant's intent not to perform his promise." . . . [I]f plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury.' " (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 481 [55 Cal.Rptr.2d 225], internal citations omitted.)
- "[I]n a promissory fraud action, to sufficiently allege[] defendant made a misrepresentation, the complaint must allege (1) the defendant made a representation of intent to perform some future action, i.e., the defendant made a promise, and (2) the defendant did not really have that intent at the time that the promise was made, i.e., the promise was false." (*Beckwith, supra*, 205 Cal.App.4th at p. 1060.)
- "[F]raudulent intent is an issue for the trier of fact to decide." (*Beckwith, supra*, 205 Cal.App.4th at p. 1061.)
- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith, supra*, 205 Cal.App.4th at p. 1062.)
- "An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a [written] contract. [Citations.] In such cases, the plaintiff's claim does not depend upon whether the defendant's promise is ultimately enforceable as a contract." (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 588 [230 Cal.Rptr.3d 528].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 899–904

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.03[1][a] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.12 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.30 et seq. (Matthew Bender)

California Civil Practice: Torts § 22:20 (Thomson Reuters)

1903. Negligent Misrepresentation

[*Name of plaintiff*] claims [he/she/*nonbinary pronoun*/it] was harmed because [*name of defendant*] negligently misrepresented a fact. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] represented to [*name of plaintiff*] that a fact was true;**
2. **That [*name of defendant*]'s representation was not true;**
3. **That [although [*name of defendant*] may have honestly believed that the representation was true,] [[*name of defendant*]/he/she/*nonbinary pronoun*] had no reasonable grounds for believing the representation was true when [he/she/*nonbinary pronoun*] made it;**
4. **That [*name of defendant*] intended that [*name of plaintiff*] rely on this representation;**
5. **That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s representation;**
6. **That [*name of plaintiff*] was harmed; and**
7. **That [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation was a substantial factor in causing [his/her/*nonbinary pronoun*/its] harm.**

New September 2003; Revised December 2009, December 2013

Directions for Use

Give this instruction in a case in which it is alleged that the defendant made certain representations with no reason to believe that they were true. (See Civ. Code, § 1710(2).) If element 5 is contested, give CACI No. 1907, *Reliance*, and CACI No. 1908, *Reasonable Reliance*.

If both negligent misrepresentation and intentional misrepresentation are alleged in the alternative, give both this instruction and CACI No.1900, *Intentional Misrepresentation*. If only negligent misrepresentation is alleged, the bracketed reference to the defendant's honest belief in the truth of the representation in element 3 may be omitted. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

Sources and Authority

- Negligent Misrepresentation. Civil Code section 1710.
- "Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit. 'Where the defendant makes false statements, honestly believing that

they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit.' " (*Bily, supra*, 3 Cal.4th at p. 407, internal citations omitted.)

- "This is not merely a case where the defendants made false representations of matters within their personal knowledge which they had *no reasonable grounds for believing to be true*. Such acts clearly would constitute actual fraud under California law. In such situations the defendant *believes* the representations to be true but is without reasonable grounds for such belief. His liability is based on negligent misrepresentation which has been made a form of actionable deceit. On the contrary, in the instant case, the court found that the defendants *did not believe* in the truth of the statements. Where a person makes statements which he does not believe to be true, in a reckless manner without knowing whether they are true or false, the element of scienter is satisfied and he is liable for intentional misrepresentation." (*Yellow Creek Logging Corp. v. Dare* (1963) 216 Cal.App.2d 50, 57 [30 Cal.Rptr. 629], original italics, internal citations omitted.)
- "Negligent misrepresentation requires an assertion of fact, falsity of that assertion, and the tortfeasor's lack of reasonable grounds for believing the assertion to be true. It also requires the tortfeasor's intent to induce reliance, justifiable reliance by the person to whom the false assertion of fact was made, and damages to that person. An implied assertion of fact is 'not enough' to support liability." *(SI 59 LLC v. Variel Warner Ventures, LLC* (2018) 29 Cal.App.5th 146, 154 [239 Cal.Rptr.3d 788], internal citation omitted.)
- " 'To be actionable deceit, the representation need not be made with knowledge of actual falsity, but need only be an "assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true" and made "with intent to induce [the recipient] to alter his position to his injury or his risk. . . .' " The elements of negligent misrepresentation also include justifiable reliance on the representation, and resulting damage." (*B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 834 [64 Cal.Rptr.2d 335], internal citations omitted.)
- "[Plaintiffs] do not allege negligence. They allege negligent misrepresentation. They are different torts, as the Supreme Court expressly observed in [*Bily*, *supra*, 3 Cal.4th at p. 407]: '[N]either the courts (ourselves included), the commentators, nor the authors of the Restatement Second of Torts have made clear or careful distinctions between the tort of negligence and the separate tort of negligent misrepresentation. The distinction is important not only because of the different statutory bases of the two torts, but also because it has practical implications for the trial of cases in complex areas . . . . [¶] Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit.' In short, the elements of each tort are different. Perhaps more importantly, the policies behind each tort sometimes call for different results even when applied to the same conduct." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 227–228 [170 Cal.Rptr.3d 293].)
- "As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty, imposed by contract, statute or otherwise,

owed by a defendant to the injured person. The determination of whether a duty exists is primarily a question of law." (*Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864 [245 Cal.Rptr. 211], internal citations omitted.)

- "The tort of negligent misrepresentation is similar to fraud, except that it does not require scienter or an intent to defraud. . . . [T]he same elements of intentional fraud also comprise a cause of action for negligent misrepresentation, with the exception that there is no requirement of intent to induce reliance . . . ." (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 845 [199 Cal.Rptr.3d 901], internal citation omitted.)
- "In our view, and to clarify, the proper formulation of the elements is that negligent misrepresentation *does* require proof of ' "intent to induce another's reliance on the fact misrepresented[.]" ' However, negligent misrepresentation does *not* require proof of an intent to defraud." (*Borman v. Brown* (2021) 59 Cal.App.5th 1048, 1061 [273 Cal.Rptr.3d 868], original italics, internal citation omitted.)
- " ' "Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit." ' If defendant's belief 'is both honest and reasonable, the misrepresentation is innocent and there is no tort liability.' " (*Diediker v. Peelle Financial Corp.* (1997) 60 Cal.App.4th 288, 297 [70 Cal.Rptr.2d 442], internal citations omitted.)
- "[A] cause of action for misrepresentation requires an affirmative statement, not an implied assertion." (*RSB Vineyards, LLC v. Orsi* (2017) 15 Cal.App.5th 1089, 1102 [223 Cal.Rptr.3d 458].)
- "Whether a defendant had reasonable ground for believing his or her false statement to be true is ordinarily a question of fact." (*Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal.App.4th 1687, 1696 [58 Cal.Rptr.2d 592], internal citations omitted.)
- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062 [141 Cal.Rptr.3d 142].)
- "The law is well established that actionable misrepresentations must pertain to past or existing material facts. Statements or predictions regarding future events are deemed to be mere opinions which are not actionable." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469 [169 Cal.Rptr.3d 619], internal citation omitted.)
- "Where, as here, a negligent misrepresentation claim is brought against the provider of a professional opinion based on special knowledge, information or expertise regarding a company's value, the California Supreme Court requires

the following: 'The representation must have been made with the intent to induce plaintiff, or a particular class of persons to which plaintiff belongs, to act in reliance upon the representation in a specific transaction, or a specific type of transaction, that defendant intended to influence. Defendant is deemed to have intended to influence [its client's] transaction with plaintiff whenever defendant knows with substantial certainty that plaintiff, or the particular class of persons to which plaintiff belongs, will rely on the representation in the course of the transaction. [However,] [i]f others become aware of the representation and act upon it, there is no liability even though defendant should reasonably have foreseen such a possibility.' " (*Public Employees' Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 667–668 [172 Cal.Rptr.3d 238].)

- "[P]laintiffs rely on section 311 of the Restatement Second of Torts (section 311), which addresses negligent misrepresentation involving physical harm. Under section 311(1), '[o]ne who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results [¶] . . . [¶] to such third persons as the actor should expect to be put in peril by the action taken.' [¶] Section 311's theory of liability is intended to be 'somewhat broader' than that for mere pecuniary loss. It 'finds particular application where it is a part of the actor's business or profession to give information upon which the safety of the recipient or a third person depends.' This court applied and followed section 311 . . ." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162–163 [226 Cal.Rptr.3d 336, 407 P.3d 18], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 940–942, 946–949

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-H, *Negligent Misrepresentation*, ¶ 5:781 et seq. (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-D, *Negligent Misrepresentation*, ¶ 11:41 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.10 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.14 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.270 et seq. (Matthew Bender)

California Civil Practice: Torts §§ 22:13–22:15 (Thomson Reuters)

1904. Opinions as Statements of Fact

Ordinarily, an opinion is not considered a representation of fact. An opinion is a person's belief that a fact exists, a statement regarding a future event, or a judgment about quality, value, authenticity, or similar matters. However, [*name of defendant***]'s opinion is considered a representation of fact if [***name of plaintiff***] proves that:**

[[*Name of defendant***] claimed to have special knowledge about the subject matter that [***name of plaintiff***] did not have;] [or]**

[[*Name of defendant***] made a representation, not as a casual expression of belief, but in a way that declared the matter to be true;] [or]**

[[*Name of defendant***] had a relationship of trust and confidence with [***name of plaintiff***];] [or]**

[[*Name of defendant***] had some other special reason to expect that [***name of plaintiff***] would rely on the defendant's opinion.]**

New September 2003; Revised April 2004, May 2020

Directions for Use

This is not a stand-alone instruction. It should be read in conjunction with one of the elements instructions (CACI Nos. 1900–1903).

The second bracketed option appears to be limited to cases involving professional opinions. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

Alternative bracketed options that do not apply to the facts of the case may be deleted.

Sources and Authority

- "Representations of opinion, particularly involving matters of value, are ordinarily not actionable representations of fact. A representation is an opinion ' "if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value . . . or other matters of judgment." ' " (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 606–607 [172 Cal.Rptr.3d 218], internal citations omitted.)
- "Plaintiffs cite the exceptions to the general rule that, to be actionable, a misrepresentation must be of an existing fact, not an opinion or prediction of future events. They arise '(1) where a party holds himself out to be specially qualified and the other party is so situated that he may reasonably rely upon the former's superior knowledge; (2) where the opinion is by a fiduciary or other trusted person; (3) where a party states his opinion as an existing fact or as

implying facts which justify a belief in the truth of the opinion. [Citation.]' " (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 769 [153 Cal.Rptr.3d 1], internal citation omitted.)

- "[W]hen one of the parties possesses, or assumes to possess, superior knowledge or special information regarding the subject matter of the representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or assuming to possess such knowledge or information, though it might be regarded as but the expression of an opinion if made by any other person, is not excused if it be false." (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 892 [153 Cal.Rptr.3d 546].)
- "Since the appraisal is a value opinion performed for the benefit of the lender, there is no representation of fact upon which a buyer may reasonably rely." (*Graham*, *supra*, 226 Cal.App.4th at p. 607.)
- "Whether a statement is nonactionable opinion or actionable misrepresentation of fact is a question of fact for the jury." (*Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1080–1081 [76 Cal.Rptr.2d 911], internal citations omitted.)
- "If defendants' assertion of safety is merely a statement of opinion—mere 'puffing'—they cannot be held liable for its falsity." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 111 [120 Cal.Rptr. 681, 534 P.2d 377].)
- "The alleged false representations in the subject brochures were not statements of 'opinion' or mere 'puffing.' They were, in essence, representations that the DC-10 was a safe aircraft. In *Hauter*, [*supra*,] the Supreme Court held that promises of safety are not statements of opinion—they are 'representations of fact.' " (*Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 424 [264 Cal.Rptr. 779].)
- "Under certain circumstances, expressions of professional opinion are treated as representations of fact. When a statement, although in the form of an opinion, is 'not a casual expression of belief' but 'a deliberate affirmation of the matters stated,' it may be regarded as a positive assertion of fact. Moreover, when a party possesses or holds itself out as possessing superior knowledge or special information or expertise regarding the subject matter and a plaintiff is so situated that it may reasonably rely on such supposed knowledge, information, or expertise, the defendant's representation may be treated as one of material fact." (*Bily, supra,* 3 Cal.4th at p. 408, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 892–896

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.03[1][b] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.17 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.50 (Matthew

Bender)
California Civil Practice: Torts, §§ 22:21–22:28 (Thomson Reuters)

1905. Definition of Important Fact/Promise

Revoked December 2013

See CACI No. 1908, *Reasonable Reliance*.

1906. Misrepresentations Made to Persons Other Than the Plaintiff

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[*Name of defendant***] is responsible for a representation that was not made directly to [***name of plaintiff***] if [he/she/***nonbinary pronoun***/it] made the representation [to a group of persons including [***name of plaintiff***]] [or] [to another person, intending or reasonably expecting that it would be repeated to [***name of plaintiff***]].**

New September 2003

Directions for Use

An instruction on concealment made to a person other than the plaintiff is not necessary; this point is covered by the third option of element 1 in CACI No. 1901, *Concealment*.

Sources and Authority

- Intent to Defraud Class. Civil Code section 1711.
- "It is true that in order for a defendant to be liable for fraud, he or she must intend that a particular representation (or concealment) be relied upon by a specific person or persons. However, it is also established that a defendant cannot escape liability if he or she makes a representation to one person while intending or having reason to expect that it will be repeated to and acted upon by the plaintiff (or someone in the class of persons of which plaintiff is a member). This is the principle of indirect deception described in section 533 of the Restatement Second of Torts (section 533): 'The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.' Comment d to section 533 makes it clear the rule of section 533 applies where the maker of the misrepresentation has information that gives him special reason to expect that the information will be communicated to others and will influence their conduct. Comment g goes on to explain that it is not necessary that the maker of the misrepresentation have the particular person in mind. It is enough that it is intended to be repeated to a particular class of persons." (*Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1548 [76 Cal.Rptr.2d 101], internal citations omitted; see also *Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 605–606 [37 Cal.Rptr.2d 483].)
- "[L]iability for a fraud worked on an agent is imposed where it is the agent who not only places reliance on the misrepresentations, but also makes the decision and takes action based upon the misrepresentations." (*Hasso v. Hapke* (2014)

227 Cal.App.4th 107, 129 [173 Cal.Rptr.3d 356].)

- "The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transactions involved." (*Hasso, supra*, 227 Cal.App.4th at p. 130.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 922–926

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.05[3] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.14 (Matthew Bender)

California Civil Practice: Torts, § 22:34 (Thomson Reuters)

1907. Reliance

[*Name of plaintiff***] relied on [***name of defendant***]'s [misrepresentation/concealment/false promise] if:**

1. **The [misrepresentation/concealment/false promise] substantially influenced [him/her/***nonbinary pronoun***/it] to [***insert brief description of the action, e.g., "buy the house"***]; and**
2. **[He/She/***Nonbinary pronoun***/It] would probably not have [***e.g., bought the house***] without the [misrepresentation/concealment/false promise].**

It is not necessary for a [misrepresentation/concealment/false promise] to be the only reason for [*name of plaintiff***]'s conduct.**

New September 2003; Revised December 2013

Directions for Use

Give this instruction with one of the fraud causes of action (see CACI Nos. 1900–1903), all of which require actual reliance on the statement or omission at issue. Reliance must be both actual and reasonable. Give also CACI No. 1908, *Reasonable Reliance*.

Sources and Authority

- "It is settled that a plaintiff, to state a cause of action for deceit based on a misrepresentation, must plead that he or she actually relied on the misrepresentation." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1088 [23 Cal.Rptr.2d 101, 858 P.2d 568], internal citations omitted.)
- "Actual reliance occurs when a misrepresentation is ' "an immediate cause of [a plaintiff's] conduct, which alters his legal relations," ' and when, absent such representation, ' "he would not, in all reasonable probability, have entered into the contract or other transaction." ' 'It is not . . . necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. . . . It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976–977 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal citations omitted.)
- "In establishing the reliance element of a cause of action for fraud, it is settled that the alleged fraud need not be the sole cause of a party's reliance. Instead, reliance may be established on the basis of circumstantial evidence showing the alleged fraudulent misrepresentation or concealment substantially influenced the party's choice, even though other influences may have operated as well."

(*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 170 [80 Cal.Rptr.2d 66], internal citations omitted.)

- "[A] presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' and as such, materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Engalla, supra,* 15 Cal.4th at p. 977.)
- " 'It must be shown that the plaintiff actually relied upon the misrepresentation; i.e., that the representation was "an immediate cause of his conduct which alters his legal relations," and that without such representation, "he would not, in all reasonable probability, have entered into the contract or other transaction." ' " (*Okun v. Morton* (1988) 203 Cal.App.3d 805, 828 [250 Cal.Rptr. 220], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 928–937

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.05–40.06 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.15 et seq. (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.200 et seq. (Matthew Bender)

California Civil Practice: Torts § 22:31 (Thomson Reuters)

1908. Reasonable Reliance

In determining whether [*name of plaintiff*]'s reliance on the [misrepresentation/concealment/false promise] was reasonable, [he/she/*nonbinary pronoun*/it] must first prove that the matter was material. A matter is material if a reasonable person would find it important in deciding what to do.

If you decide that the matter is material, you must then decide whether it was reasonable for [*name of plaintiff*] to rely on the [misrepresentation/concealment/false promise]. In making this decision, take into consideration [*name of plaintiff*]'s intelligence, knowledge, education, and experience.

However, it is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] that is preposterous. It also is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] if facts that are within [his/her/*nonbinary pronoun*] observation show that it is obviously false.

New September 2003; Revised October 2004, December 2013, May 2020

Directions for Use

There would appear to be three considerations in determining reasonable reliance. First, the representation or promise must be material, as judged by a reasonable-person standard. (*Charpentier v. Los Angeles Rams* (1999) 75 Cal.App.4th 301, 312–313 [89 Cal.Rptr.2d 115].) Second, if the matter is material, reasonableness must take into account the plaintiff's own knowledge, education, and experience; the objective reasonable person is irrelevant at this step. Third, some matters are simply too preposterous to be believed by anyone, notwithstanding limited knowledge, education, and experience. (*Blankenheim v. E. F. Hutton, Co., Inc.* (1990) 217 Cal.App.3d 1463, 1474 [266 Cal.Rptr. 593].)

See also CACI No. 1907, *Reliance*.

Sources and Authority

- "After establishing actual reliance, the plaintiff must show that the reliance was reasonable by showing that (1) the matter was material in the sense that a reasonable person would find it important in determining how he or she would act, and (2) it was reasonable for the plaintiff to have relied on the misrepresentation." (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1194 [175 Cal.Rptr.3d 820], internal citations omitted.)
- "According to the Restatement of Torts, '[r]eliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material. . . . The matter is material if . . . a reasonable [person] would attach

importance to its existence or nonexistence in determining his choice of action in the transaction in question . . . .' But materiality is a jury question, and a 'court may [only] withdraw the case from the jury if the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Charpentier, supra*, 75 Cal.App.4th at pp. 312–313, internal citations omitted.)

- "[T]he issue is whether the person who claims reliance was justified in believing the representation in the light of his own knowledge and experience." (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503 [198 Cal.Rptr. 551, 674 P.2d 253], internal citations omitted.)
- "[N]or is a plaintiff held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man. Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' " (*Blankenheim, supra*, 217 Cal.App.3d at p. 1474, internal citations omitted.)
- "[G]enerally speaking, ' "[a] plaintiff will be denied recovery only if his conduct is manifestly unreasonable in the light of his own intelligence or information. It must appear that he put faith in representations that were 'preposterous' or 'shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.' [Citation.] Even in case of a mere negligent misrepresentation, a plaintiff is not barred unless his conduct, in the light of his own information and intelligence, is preposterous and irrational. . . . The effectiveness of disclaimers is assessed in light of these principles. [Citation.]" ' " (*Public Employees' Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 673 [172 Cal.Rptr.3d 238].)
- "[I]f the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery." (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1239 [160 Cal.Rptr.3d 718].)
- "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1067 [141 Cal.Rptr.3d 142].)
- " 'What would constitute fraud in a given instance might not be fraudulent when exercised toward another person. The test of the representation is its actual effect on the particular mind . . . .' " (*Blankenheim, supra*, 217 Cal.App.3d at p. 1475, internal citation omitted.)
- "[Plaintiff]'s deposition testimony on which appellants rely also reveals that she is a practicing attorney and uses releases in her practice. In essence, she is asking this court to rule that a practicing attorney can rely on the advice of an equestrian instructor as to the validity of a written release of liability that she

executed without reading. In determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered. Under these circumstances, we conclude as a matter of law that any such reliance was not reasonable." (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843–844 [2 Cal.Rptr.2d 437], internal citations omitted.)

- "[I]t is inherently unreasonable for any person to rely on a prediction of future IRS enactment, enforcement, or non-enforcement of the law by someone unaffiliated with the federal government. As such, the reasonable reliance element of any fraud claim based on these predictions fails as a matter of law." (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 769 [153 Cal.Rptr.3d 1].)
- "[A] presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' and as such, materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal citations omitted.)
- "[I]t is well established that the kind of disclaimers and exculpatory documents—such as the 'estoppel' attached to the lease and signed by [plaintiff] that disavowed any representations made by landlord or its agents to him—do not operate to insulate defrauding parties from liability or preclude [plaintiff] from demonstrating justifiable reliance on misrepresentations." (*Orozco v. WPV San Jose, LLC* (2019) 36 Cal.App.5th 375, 393 [248 Cal.Rptr.3d 623].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 933–937

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.06 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.19 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.229 (Matthew Bender)

2 California Civil Practice: Torts, § 22:32 (Thomson Reuters)

1909. Reserved for Future Use

1910. Real Estate Seller's Nondisclosure of Material Facts

[*Name of plaintiff***] claims that [***name of defendant***] failed to disclose certain information, and that because of this failure to disclose, [***name of plaintiff***] was harmed. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] purchased [***describe real property***] from [***name of defendant***];**
2. **That [***name of defendant***] knew that [***specify information that was not disclosed***];**
3. **That [***name of defendant***] did not disclose this information to [***name of plaintiff***];**
4. **That [***name of plaintiff***] did not know, and could not reasonably have discovered, this information;**
5. **That [***name of defendant***] knew that [***name of plaintiff***] did not know, and could not reasonably have discovered, this information;**
6. **That this information significantly affected the value or desirability of the property;**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s failure to disclose the information was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2009; Revised May 2020

Directions for Use

This instruction sets forth the common law duty of disclosure that a real estate seller has to a buyer. Nondisclosure is tantamount to a misrepresentation. (See *Calemine v. Samuelson* (2009) 171 Cal.App.4th 153, 161 [89 Cal.Rptr.3d 495].)

For certain transfers, there is also a statutory duty of disclosure. (See Civ. Code, § 1102 et seq.) The scope of the required disclosure is set forth on a statutory form. (See Civ. Code, § 1102.6.) The common law duty is not preempted by the statutory duty (see Civ. Code, § 1102.1(a)), but breach of the statutory duty can constitute proof of breach of the common law duty if all of the elements are established. (See, e.g., *Calemine, supra,* 171 Cal.App.4th at pp. 164–165 [seller did not disclose earlier lawsuits, as required by statutory form].)

Sources and Authority

- Real Estate Buyer's Action Against Seller. Civil Code section 1102.13.

- " 'A real estate seller has both a common law and statutory duty of disclosure. . . . "In the context of a real estate transaction, '[i]t is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property . . . and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]' [Citations.] Undisclosed facts are material if they would have a significant and measurable effect on market value. [Citation.]" . . . Where a seller fails to disclose a material fact, he may be subject to liability 'for mere nondisclosure since his conduct in the transaction *amounts to a representation of the nonexistence of the facts which he has failed to disclose* [citation]." [Citation.]' " (*RSB Vineyards, LLC v. Orsi* (2017) 15 Cal.App.5th 1089, 1097 [223 Cal.Rptr.3d 458], original italics.)
- "Generally, whether the undisclosed matter was of sufficient materiality to have affected the value or desirability of the property is a question of fact." (*Calemine, supra,* 171 Cal.App.4th at p. 161, internal citations omitted.)
- "Actual knowledge can, and often is, shown by inference from circumstantial evidence. In that case, however, ' "actual knowledge can be inferred from the circumstances only if, in the light of the evidence, such inference is not based on speculation or conjecture. Only where the circumstances are such that the defendant 'must have known' and not 'should have known' will an inference of actual knowledge be permitted." ' " (*RSB Vineyards, LLC*, *supra*, 15 Cal.App.5th at p. 1098, internal citation omitted.)
- "Generally, where one party to a transaction has sole knowledge or access to material facts and knows that such facts are not known or reasonably discoverable by the other party, then a duty to disclose exists." (See *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544 [76 Cal.Rptr.2d 101].)
- "Failure of the seller to fulfill [the] duty of disclosure constitutes actual fraud." (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 736 [29 Cal.Rptr. 201].)
- "When and where the action by the purchaser is based on conditions that are visible and that a personal inspection at once discloses and, when it is admitted that such personal inspection was in fact made, then manifestly it cannot be successfully contended that the purchaser relied upon any alleged misrepresentations with regard to such visible conditions. But personal inspection is no defense when and where the conditions are not visible and are known only to the seller, and 'where material facts are accessible to the vendor only and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee.' " (*Buist v. C. Dudley De Velbiss Corp.* (1960) 182 Cal.App.2d 325, 331 [6 Cal.Rptr. 259].)
- "In enacting [Civil Code section 1102 et seq.], the Legislature made clear it did not intend to alter a seller's common law duty of disclosure. The purpose of the enactment was instead to make the required disclosures specific and clear.

(*Calemine, supra,* 171 Cal.App.4th at pp. 161–162.)

- "The legislation was sponsored by the California Association of Realtors to provide a framework for formal disclosure of facts relevant to a decision to purchase realty. The statute therefore confirms and perhaps clarifies a disclosure obligation that existed previously at common law." (*Shapiro, supra,* 64 Cal.App.4th at p. 1539, fn. 6.)

Secondary Sources

1 California Real Estate Law and Practice, Ch. 71, *Real Property Purchase and Sale Agreements*, § 71.30 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

50 California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser of Real Property*, § 569.11 (Matthew Bender)

2A California Points and Authorities, Ch. 31, *Brokers and Salesperson*, § 31.142 (Matthew Bender)

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 4-E, *Purchase and Sale Agreement—Terms and Conditions*, ¶ 4:351 et seq. (The Rutter Group)

1911–1919. Reserved for Future Use

1920. Buyer's Damages for Purchase or Acquisition of Property

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If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***/its] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

[*Name of plaintiff***] must prove the amount of [his/her/***nonbinary pronoun***/its] damages. However, [***name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **The difference between [the amount that [***name of plaintiff***] paid] [or] [the fair market value of what [***name of plaintiff***] exchanged for the property] and the fair market value of the property at the time of sale;**
2. **Amounts that [***name of plaintiff***] reasonably spent in reliance on [***name of defendant***]'s [false representation/failure to disclose/promise] if those amounts would not otherwise have been spent in the purchase or acquisition of the property; [and]**
3. **[***Insert additional harm arising from the transaction***] to the extent that [***name of defendant***]'s [false representation/failure to disclose/promise] was a substantial factor in causing that [***insert additional harm arising from the transaction***]; [and]**
4. **[Lost profits [or other gains].]**

New September 2003

Directions for Use

For an instruction on damages for loss of use, see CACI No. 3903G, *Loss of Use of Real Property (Economic Damage).*

The first element of this instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage occurred." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 145–146 [135 Cal.Rptr. 802].)

Sources and Authority

- Fraud in Sale of Property: Buyer's Damages. Civil Code section 3343.
- "As they apply to damages for fraud, subdivisions (a)(2) and (a)(3) of section

3343 are limited to recovery of damages by sellers of real property, while subdivision (a)(4) deals with purchasers of real property." (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 309 [129 Cal.Rptr. 704], footnote omitted.)

- "Before 1935 the California courts had no statutory mandate on the measure of damages for fraud. While the 'benefit of the bargain' measure of damages was generally employed, on occasion California courts sometimes applied the 'out of pocket' rule when the 'loss of bargain' rule was difficult to apply or would work a hardship on plaintiff or defendant." (*Channell, supra,* 58 Cal.App.3d at p. 309.)
- "We find nothing in section 3343 as amended which requires that a plaintiff show 'out-of-pocket' loss (i.e., an amount by which the consideration paid exceeded the value of the property received) in order to be entitled to any recovery for fraud in a property transaction." (*Stout v. Turney* (1978) 22 Cal.3d 718, 729 [150 Cal.Rptr. 637, 586 P.2d 1228].)
- "All doubt concerning this matter was set at rest, however, in the carefully considered opinion in *Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 753 [192 P.2d 935] where it was definitely and finally determined that the term 'actual value,' as used in the statute, was that same market value so frequently defined in actions for condemnation." (*Nece v. Bennett* (1963) 212 Cal.App.2d 494, 497 [28 Cal.Rptr. 117], internal citation omitted.)
- "[P]ursuant to Civil Code section 3343, amounts paid for escrow fees, moving to and from the property, building permits, telephone connections, fences, yard cleaning, garage materials, door locks, shrubbery, taxes, rent and labor are examples of recoverable damages when reasonably expended in reliance on the fraud." (*Cory v. Villa Properties* (1986) 180 Cal.App.3d 592, 603 [225 Cal.Rptr. 628], internal citations omitted.)
- "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1897–1899

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.23 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

1921. Buyer's Damages for Purchase or Acquisition of Property—Lost Profits

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[*Name of plaintiff*] may recover damages for profits [or other gains] [he/she/*nonbinary pronoun*/it] would have made if the property had been as represented. [*Name of plaintiff*] can recover these profits [or other gains] only if [he/she/*nonbinary pronoun*/it] has proved all of the following:

1. **That [*name of plaintiff*] acquired the property for the purpose of using or reselling it for a [profit/gain];**
2. **That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s [false representation/failure to disclose/promise] in entering into the transaction and in anticipating [profits/gains] from the use or sale of the property; and**
3. **That [*name of defendant*]'s [false representation/failure to disclose/promise] and [*name of plaintiff*]'s reliance on it were both substantial factors in causing the lost profits.**

You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

Directions for Use

This instruction should be read immediately after CACI No. 1920, *Buyer's Damages for Purchase or Acquisition of Property,* if the plaintiff is claiming lost profits.

Sources and Authority

- Fraud in Sale of Property: Buyer's Damages for Lost Profits. Civil Code section 3343(a)(4).
- "With glaring inconsistency, California's statutory structure before 1971 permitted recovery of lost profits and earnings under Civil Code section 3333 in fraud cases which did not concern the 'purchase, sale or exchange of property,' and even in simple negligence cases and breach of contract cases the injured parties could recover lost profits and earnings, while the 'out of pocket' rule barred the fraud victim in property transaction cases from recovering more than the difference between the amount he paid for the property and its actual value." (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 312 [129 Cal.Rptr. 704], internal citations and footnote omitted.)
- "The Legislature removed all doubt concerning the recovery of loss of profits resulting from the fraudulently induced property acquisition. Clearly and

specifically, lost profits proximately caused are recoverable. The cases cited, the arguments made concerning Civil Code section 3343 limitations are simply not relevant to post-1971 proceedings, where profits are the claimed loss. Civil Code section 3343 as amended, in so many words, authorizes recovery of lost profits." (*Hartman v. Shell Oil Co.* (1977) 68 Cal.App.3d 240, 247 [137 Cal.Rptr. 244].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1897–1899

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.23 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

1922. Seller's Damages for Sale or Exchange of Property

If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***/its] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

[*Name of plaintiff***] must prove the amount of [his/her/***nonbinary pronoun***/its] damages. However, [***name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **The difference between the fair market value of the property at the time of sale and [the amount that [***name of plaintiff***] received] [or] [the fair market value of what [***name of plaintiff***] received in exchange for the property];**
2. **Amounts that [***name of plaintiff***] reasonably spent in reliance on [***name of defendant***]'s [false representation/failure to disclose/promise] if those amounts would not otherwise have been spent in the sale or exchange of the property;**
3. **Loss of use and enjoyment of the property from [***insert beginning date***] to [***insert end date***], to the extent that [***name of defendant***]'s [false representation/failure to disclose/promise] was a substantial factor in causing that loss of use and enjoyment of the property;**
4. **Profits or other gains from [***insert beginning date***] to [***insert end date***], that [***name of plaintiff***] might reasonably have earned by use of the property if [he/she/***nonbinary pronoun***] had kept it; and**
5. **Any additional damage arising from the particular transaction.**

New September 2003

Directions for Use

This instruction should be tailored to fit the facts and evidence in the particular case: "If the seller parts with title and elects to forego his right of rescission and sue for damages only, then of course subdivisions (a)(2) and (a)(3) of section 3343 do not apply and should not be given by the trial court (unless, as here, the contract itself creates such rights). In each case in which a seller of property is defrauded by a buyer, the trial court will have to examine the circumstances of the particular case and decide whether the questioned portions of section 3343 do or do not apply." (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 317 [129 Cal.Rptr. 704].)

The first element of this instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage occurred." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 145–146 [135 Cal.Rptr. 802].)

For an instruction on lost profits, see CACI No. 3903N, *Lost Profits (Economic Damage).*

Sources and Authority

- Fraud in Sale of Property: Seller's Damages. Civil Code section 3343.
- "As they apply to damages for fraud, subdivisions (a)(2) and (a)(3) of section 3343 are limited to recovery of damages by sellers of real property, while subdivision (a)(4) deals with purchasers of real property." (*Channell, supra,* 58 Cal.App.3d at p. 309, footnote omitted.)
- "Before 1935 the California courts had no statutory mandate on the measure of damages for fraud. While the 'benefit of the bargain' measure of damages was generally employed, on occasion California courts sometimes applied the 'out of pocket' rule when the 'loss of bargain' rule was difficult to apply or would work a hardship on plaintiff or defendant." (*Channell, supra,* 58 Cal.App.3d at p. 309, footnote omitted.)
- "The 1971 amendment to section 3343 took the form of an addition to the 'out of pocket' rule. The statute had previously permitted recovery of 'additional damages,' but the 1971 amendment enumerated specific types of consequential damages which are included within the term 'additional damages.' " (*Channell, supra,* 58 Cal.App.3d at p. 312, footnote omitted.)
- "[T]he legislature clearly ruled out by the 1971 amendment any recovery of damages for fraud measured by the traditional 'loss of bargain' formula." (*Channell, supra,* 58 Cal.App.3d at p. 313, footnote omitted.)
- "[O]ut of pocket" loss under section 3343 is "the difference between what [plaintiffs] received for their property and the fair market value of the same at the time of the transfer." (*Channell, supra,* 58 Cal.App.3d at p. 314.)
- "[N]othing in section 3343 as amended . . . requires that a plaintiff show 'out-of-pocket' loss (i.e., an amount by which the consideration paid exceeded the value of the property received) in order to be entitled to any recovery for fraud in a property transaction." (*Stout v. Turney* (1978) 22 Cal.3d 718, 730 [150 Cal.Rptr. 637, 586 P.2d 1228].)
- "In the absence of a fiduciary relationship, section 3343 governs the measure of damages in fraudulent property transactions." (*Croeni v. Goldstein* (1994) 21 Cal.App.4th 754, 759 [26 Cal.Rptr.2d 412].)
- "In the case of a seller . . . the defrauded victim is entitled to recover not only the difference between the actual value of that with which he parted and the actual value of that which he received (out-of-pocket) but also any additional

damage arising from the particular transaction including any of the following: 1. amounts expended in reliance upon the fraud; 2. amounts compensating for loss of use and enjoyment of the property due to the fraud; and 3. an amount which would compensate him for the profits or other gains by the use of the property had he retained it." (*Channell, supra,* 58 Cal.App.3d at p. 312, internal citation omitted.)

- "What that time span [for damages for lost use and lost profits] should be would be determined by the peculiar circumstances of the particular case before the court and should present no insurmountable difficulty for a court in fixing a reasonable period contemplated by the statute." (*Channell, supra,* 58 Cal.App.3d at p. 317, footnote omitted.)
- "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301], internal citations omitted.)
- "Mental distress is not an element of damages allowable under Civil Code section 3343." (*Channell, supra,* 58 Cal.App.3d at p. 315, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1897–1899

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.23 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

1923. Damages—"Out of Pocket" Rule

If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***/its] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

The amount of damages must include an award for all harm that [*name of defendant***] was a substantial factor in causing, even if the particular harm could not have been anticipated.**

[*Name of plaintiff***] must prove the amount of [his/her/***nonbinary pronoun***/its] damages. However, [***name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

To decide the amount of damages you must determine the [fair market] value of what [*name of plaintiff***] gave and subtract from that amount the [fair market] value of what [he/she/***nonbinary pronoun***/it] received.**

["Fair market value" is the highest price that a willing buyer would have paid on the date of the transaction to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**
2. **That the buyer and seller know all the uses and purposes for which the [***insert item***] is reasonably capable of being used.]**

[*Name of plaintiff***] may also recover amounts that [he/she/***nonbinary pronoun***/it] reasonably spent in reliance on [***name of defendant***]'s [false representation/failure to disclose/false promise] if those amounts would not otherwise have been spent.**

New September 2003; Revised December 2009

Directions for Use

For discussion of damages if there is both a breach of fiduciary duty and intentional misrepresentation, see the Directions for Use to CACI No. 1924, *Damages—"Benefit of the Bargain" Rule.*

Sources and Authority

- Damages for Fraud. Civil Code section 1709.
- Measure of Damages in Tort. Civil Code section 3333.
- Damages for Fraud in Sale of Property. Civil Code section 3343.
- This instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the

date the promise was breached because that is the date when the damage occurred." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 145–146 [135 Cal.Rptr. 802].)

- "There are two measures of damages for fraud: out of pocket and benefit of the bargain. The 'out-of-pocket' measure of damages 'is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The "benefit-of-the-bargain" measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.' 'In California, a defrauded party is ordinarily limited to recovering his "out-of-pocket" loss . . . .' " (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 [44 Cal.Rptr.2d 352, 900 P.2d 601], internal citations omitted.)
- "Of the two measures the 'out-of-pocket' rule has been termed more consistent with the logic and purpose of the tort form of action (i.e., compensation for loss sustained rather than satisfaction of contractual expectations) while the 'benefit-of-the-bargain' rule has been observed to be a more effective deterrent (in that it contemplates an award even when the property received has a value equal to what was given for it)." (*Stout v. Turney* (1978) 22 Cal.3d 718, 725 [150 Cal.Rptr. 637, 586 P.2d 1228].)
- "In fraud cases involving the 'purchase, sale or exchange of property,' the Legislature has expressly provided that the 'out-of-pocket' rather than the 'benefit-of-the-bargain' measure of damages should apply. Civil Code section 3343 provides the exclusive measure of damages for fraud in such cases." (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 236 [1 Cal.Rptr.3d 616].)
- "Civil Code section 3343 does not apply, however, 'when a victim is defrauded by its fiduciaries.' Instead, in the case of fraud by a fiduciary, 'the "broader" measure of damages provided by sections 1709 and 3333 applies.' . . . [¶] In the case of a negligent misrepresentation by a fiduciary, 'a plaintiff is only entitled to its actual or "out-of-pocket" losses suffered because of [the] fiduciary's negligent misrepresentation under section 3333.' [¶] The Supreme Court has not decided whether 'the measure of damages under section 3333 might be greater for a fiduciary's *intentional* misrepresentation . . . .' " (*Fragale, supra,* 110 Cal.App.4th at pp. 236–237, original italics, internal citations omitted.)
- "We have previously held that a plaintiff is only entitled to its actual or 'out-of-pocket' losses suffered because of fiduciary's negligent misrepresentation under section 3333. While the measure of damages under section 3333 might be greater for a fiduciary's intentional misrepresentation, we need not address that issue here." (*Alliance Mortgage Co., supra,* 10 Cal.4th at pp. 1249–1250.)
- "To recover damages for fraud, a plaintiff must have sustained damages

proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1893–1900

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.23 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* § 269.27 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit* § 105.252 (Matthew Bender)

1924. Damages—"Benefit of the Bargain" Rule

If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***/its] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

The amount of damages must include an award for all harm that [*name of defendant***] was a substantial factor in causing, even if the particular harm could not have been anticipated.**

[*Name of plaintiff***] must prove the amount of [his/her/***nonbinary pronoun***/its] damages. However, [***name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

To determine the amount of damages, you must:

1. **Determine the fair market value that [***name of plaintiff***] would have received if the representations made by [***name of defendant***] had been true; and**
2. **Subtract the fair market value of what [he/she/***nonbinary pronoun***/it] did receive.**

The resulting amount is [*name of plaintiff***]'s damages. "Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:**

1. **That there is no pressure on either one to buy or sell; and**
2. **That the buyer and seller know all the uses and purposes for which the [***insert item***] is reasonably capable of being used.**

Fair market value must be determined as of the date that [*name of plaintiff***] discovered [***name of defendant***]'s [false representation/ failure to disclose].**

[*Name of plaintiff***] may also recover amounts that [he/she/***nonbinary pronoun***/it] reasonably spent in reliance on [***name of defendant***]'s [false representation/failure to disclose/false promise] if those amounts would not otherwise have been spent.**

New September 2003; Revised December 2009

Directions for Use

There is a split of authority regarding whether benefit-of-the-bargain damages can ever be recovered for intentional misrepresentation in the sale or exchange of property. It is settled that in a nonfiduciary relationship, damages are limited to the

out-of-pocket measure, even if the misrepresentation is intentional. (See *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 [44 Cal.Rptr.2d 352, 900 P.2d 601]; Civ. Code, § 3343.) However, there is disagreement on the proper measure if there is a fiduciary relationship.

Some courts have held that benefit-of-the-bargain damages are available if there is both a fiduciary relationship and intentional misrepresentation. (See *Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 235–239 [1 Cal.Rptr.3d 616]; *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 564 [29 Cal.Rptr.2d 463]; see also *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1383 [89 Cal.Rptr.3d 659].) At least one court has held to the contrary, that only out-of-pocket losses may be recovered. (See *Hensley v. McSweeney* (2001) 90 Cal.App.4th 1081, 1086 [109 Cal.Rptr.2d 489].)

This instruction should be modified in cases involving promissory fraud: "In cases of promissory fraud, the damages are measured by market value as of the date the promise was breached because that is the date when the damage occurred." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 145–146 [135 Cal.Rptr. 802].)

Sources and Authority

- Damages for Fraud. Civil Code section 1709.
- Measure of Damages in Tort. Civil Code section 3333.
- "There are two measures of damages for fraud: out of pocket and benefit of the bargain. The 'out-of-pocket' measure of damages 'is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The "benefit-of-the-bargain" measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.' 'In California, a defrauded party is ordinarily limited to recovering his "out-of-pocket" loss . . . .' " (*Alliance Mortgage Co. supra,* 10 Cal.4th at p. 1240, internal citations omitted.)
- "Of the two measures the 'out-of-pocket' rule has been termed more consistent with the logic and purpose of the tort form of action (i.e., compensation for loss sustained rather than satisfaction of contractual expectations) while the 'benefit-of-the-bargain' rule has been observed to be a more effective deterrent (in that it contemplates an award even when the property received has a value equal to what was given for it.)" (*Stout v. Turney* (1978) 22 Cal.3d 718, 725 [150 Cal.Rptr. 637, 586 P.2d 1228].)
- "We have previously held that a plaintiff is only entitled to its actual or 'out-of-pocket' losses suffered because of fiduciary's negligent misrepresentation under

section 3333. While the measure of damages under section 3333 might be greater for a fiduciary's intentional misrepresentation, we need not address that issue here." (*Alliance Mortgage Co., supra,* 10 Cal.4th at pp. 1249–1250.)

- "The measure of damages for a real estate broker's intentional misrepresentation to a buyer for whom he acts as agent is not limited to the out-of-pocket losses suffered by the buyer. Because the broker is a fiduciary, damages for intentional fraud may be measured by the broader benefit-of-the-bargain rule." (*Fragale, supra*, 110 Cal.App.4th at p. 232.)
- "[T]he measure of damages for fraud by a fiduciary is out-of-pocket damages, not the benefit of the bargain computation normally applicable to contract causes of action." (*Hensley, supra*, 90 Cal.App.4th at p. 1085.)
- "Recognizing a split of authority on the matter, we follow those cases adopting the broader measure of damages under sections 1709 and 3333, a course that is not only consonant with the position we have taken in the past but just. This division has consistently applied the broader measure of damages for fiduciary fraud, refusing to limit damages to the 'out of pocket' measure." (*Salahutdin, supra*, 24 Cal.App.4th at pp. 566–567.)
- "Unlike the 'out of pocket' measure of damages, which are usually calculated at the time of the transaction, 'benefit of the bargain' damages may appropriately be calculated as of the date of discovery of the fraud." (*Salahutdin, supra,* 24 Cal.App.4th at p. 568.)
- "To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252 [1 Cal.Rptr.2d 301], internal citations omitted.)
- "[O]ne may recover compensation for time and effort expended in reliance on a defendant's misrepresentation." (*Block v. Tobin* (1975) 45 Cal.App.3d 214, 220 [119 Cal.Rptr. 288], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1893–1900

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.23

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.27 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.131 et seq. (Matthew Bender)

1925. Affirmative Defense—Statute of Limitations—Fraud or Mistake

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[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s claimed harm occurred before [***insert date three years before date of filing***].**

[If [*name of defendant***] proves that [***name of plaintiff***]'s claimed harm occurred before [***insert date three years before date of filing***], [***name of plaintiff***]'s lawsuit was still filed on time if [***name of plaintiff***] proves that before that date, [he/she/***nonbinary pronoun***/it] did not discover facts constituting the fraud or mistake, and with reasonable diligence could not have discovered those facts.]**

New April 2008

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable three-year period for fraud or mistake. (See Code Civ. Proc., § 338(d).) Include the second paragraph if the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation defense. The plaintiff bears the burden of pleading and proving delayed discovery. (See *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1319 [64 Cal.Rptr.3d 9] [regardless of which limitation statute applied to case, burden was on plaintiff].)

Sources and Authority

- Statute of Limitations for Fraud or Mistake. Code of Civil Procedure section 338(d).
- "The [Code of Civil Procedure section 338(d) three-year] limitations period . . . 'does not begin to run until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.' " (*Sun'n Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671, 701 [148 Cal.Rptr. 329, 582 P.2d 920].)
- "The discovery rule 'may be expressed by the Legislature or implied by the courts.' By statute, the discovery rule applies to fraud actions. (Code Civ. Proc., § 338, subd. (d).) In addition, 'judicial decisions have declared the discovery rule applicable in situations where the plaintiff is unable to see or appreciate a breach has occurred.' " (*E-Fab, Inc., supra,* 153 Cal.App.4th at p. 1318, internal citations omitted.)
- "Code of Civil Procedure section 338, subdivision (d), effectively codifies the delayed discovery rule in connection with actions for fraud, providing that a cause of action for fraud 'is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.'

In a case such as this, that date is the date the complaining party learns, or at least is put on notice, that a representation was false." (*Brandon G. v. Gray* (2003) 111 Cal.App.4th 29, 35 [3 Cal.Rptr.3d 330].)

- "This discovery element has been interpreted to mean 'the discovery by the aggrieved party of the fraud or facts that would lead a reasonably prudent person to *suspect* fraud.' " (*Doe v. Roman Catholic Bishop of Sacramento* (2010) 189 Cal.App.4th 1423, 1430 [117 Cal.Rptr.3d 597], original italics.)
- "Case law has interpreted this accrual provision to mean that 'a cause of action [under Code Civ. Proc., § 338(d)] accrues, and the limitations period commences to run, when the aggrieved party could have discovered the . . . mistake through the exercise of reasonable diligence.' " (*Creditors Collection Serv. v. Castaldi* (1995) 38 Cal.App.4th 1039, 1044 [45 Cal.Rptr. 2d 511].)
- "One [exception to the limitations period] is the doctrine of fraudulent concealment, which tolls the statute of limitations if a defendant's deceptive conduct 'has caused a claim to grow stale.' " (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962 [163 Cal.Rptr.3d 44].)
- " 'Technical rules as to when a cause of action accrues apply therefore only in those cases which are free from fraud committed by the defendant. Said section 338, subdivision 4, . . . recognizes the nonapplicability of those technical rules where the fraud of the defendant may be so concealed that in the absence of circumstances imposing greater diligence on the plaintiff, the cause of action is deemed not to accrue until the fraud is discovered. Otherwise, in such cases, the defendant by concealing his fraud, would effectively block recovery by the plaintiff because of the intervention of the statute of limitations.' " (*Snow v. A. H. Robins Co.* (1985) 165 Cal.App.3d 120, 127–128 [211 Cal.Rptr. 271], internal citation omitted.)
- "[C]ourts have relied on the nature of the relationship between defendant and plaintiff to explain application of the delayed accrual rule. The rule is generally applicable to confidential or fiduciary relationships. The fiduciary relationship carries a duty of full disclosure, and application of the discovery rule 'prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure.' " (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1526 [37 Cal.Rptr. 2d 810], internal citations omitted.)
- " 'The provision tolling operation of [section 338(d)] until discovery of the fraud has long been treated as an exception and, accordingly, this court has held that if an action is brought more than three years after commission of the fraud, plaintiff has the burden of pleading and proving that he did not make the discovery until within three years prior to the filing of his complaint.' " (*Samuels v. Mix* (1999) 22 Cal.4th 1, 14 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citation omitted.)
- "Only causes of action based on actual fraud are governed by section 338, subdivision (d). This includes . . . causes of action based on fraudulent concealment, which 'is a species of fraud or deceit. [Citations.]' " (*Stueve Bros.*

Farms, LLC v. Berger Kahn (2013) 222 Cal.App.4th 303, 322 [166 Cal.Rptr.3d 116].)

- "[T]he section 338, subdivision (d), three-year statute of limitations applies to an unjust enrichment cause of action based on *mistake*." (*Federal Deposit Ins. Corp. v. Dintino* (2008), 167 Cal.App.4th 333, 348 [84 Cal.Rptr.3d 38], original italics.)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, §§ 708–718

Rylaarsdam & Edmon, California Practice Guide: Civil Procedure Before Trial, Ch. 6-C, *Answer*, ¶¶ 6:462–6:462.2 (The Rutter Group)

California Civil Procedure Before Trial, Ch. 25, *Answer* (Cont.Ed.Bar 4th ed.) § 25.46

43 California Forms of Pleading and Practice, Ch. 489, *Relief From Judgments and Orders*, § 489.261 (Matthew Bender)

7 California Points and Authorities, Ch. 70A, *Defaults and Relief From Orders and Judgments: Equitable Remedies*, §§ 70A.32, 70A.52 et seq. (Matthew Bender)

1926–1999. Reserved for Future Use

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] make a false representation of [a] fact[s] to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] know that the representation was false, or did [he/she/*nonbinary pronoun*] make the representation recklessly and without regard for its truth?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] intend that [*name of plaintiff*] rely on the representation?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of plaintiff*] reasonably rely on the representation?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]

Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

$ _____]

TOTAL $ _____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2009, December 2010, June 2014, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1900, *Intentional Misrepresentation.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the defendant alleges that the representations referred to in question 1 were opinions only, additional questions may be required on this issue. See CACI No. 1904, *Opinions as Statements of Fact*.

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, if both intentional misrepresentation and negligent misrepresentation (see CACI No. 1903) are to be presented to the jury in the alternative, the preferred practice would seem to be that this verdict form and VF-1903, *Negligent Misrepresentation*, be kept separate and presented in the alternative. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

With respect to the same misrepresentation, question 2 above cannot be answered "yes" and question 3 of VF-1903 cannot also be answered "no." The jury may continue to answer the next question from one form or the other, but not both.

If both intentional and negligent misrepresentation are before the jury, it is important to distinguish between a statement made recklessly and without regard for the truth (see question 2 above) and one made without reasonable grounds for believing it is true (see CACI No. VF-1903, question 3). Question 2 of VF-1903 should be included to clarify that the difference is that for negligent misrepresentation, the defendant honestly believes that the statement is true. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1901. Concealment

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] intentionally fail to disclose [a] fact[s] that [*name of plaintiff*] did not know and could not reasonably have discovered?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] intend to deceive [*name of plaintiff*] by concealing the fact?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Had the omitted information been disclosed, would [*name of plaintiff*] reasonably have behaved differently?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s concealment a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2014, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1901, *Concealment.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Modify question 1 by referring to one of the other three grounds for concealment listed in element 1 of CACI No. 1901, *Concealment*, depending on which ground is applicable to the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual

findings that are required in order to calculate the amount of prejudgment interest.

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] make a promise to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] intend to perform this promise when [he/she/*nonbinary pronoun*] made it?**

   _____ Yes _____ No

   If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] intend that [*name of plaintiff*] rely on this promise?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of plaintiff*] reasonably rely on this promise?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [*name of defendant*] perform the promised act?**

   _____ Yes _____ No

   If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [*name of plaintiff*]'s reliance on [*name of defendant*]'s promise a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have

the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other past economic loss	**$ _____]**

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other future economic loss	**$ _____]**

Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2014, December 2015, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1902, *False Promise.*

The special verdict forms in this section are intended only as models. They may

need to be modified depending on the facts of the case.

If multiple promises are at issue, question 1 should be repeated to specify each one; for example: "1. Did [*name of defendant*] promise [*name of plaintiff*] that [*specify promise*]?" (See *Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 794 [211 Cal.Rptr.3d 743].) The rest of the questions will need to be repeated for each promise.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action (or from different promises), replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1903. Negligent Misrepresentation

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make a false representation of [a] fact[s] to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[2. **Did [***name of defendant***] honestly believe that the representation was true when [he/she/***nonbinary pronoun***] made it?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. **Did [***name of defendant***] have reasonable grounds for believing the representation was true when [he/she/***nonbinary pronoun***] made it?**

   _____ Yes _____ No

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] intend that [***name of plaintiff***] rely on the representation?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of plaintiff***] reasonably rely on the representation?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [***name of plaintiff***]'s reliance on [***name of defendant***]'s representation a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other past economic loss	**$ _____]**

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other future economic loss	**$ _____]**

Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2009, December 2010, June 2014, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1903, *Negligent Misrepresentation.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the defendant alleges that the representations referred to in question 1 were opinions only, additional questions may be required on this issue. See CACI No. 1904, *Opinions as Statements of Fact*.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, if both negligent misrepresentation and intentional misrepresentation (see CACI No. 1903) are to be presented to the jury in the alternative, the preferred practice would seem to be that this verdict form and VF-1900, *Intentional Misrepresentation*, be kept separate and presented in the alternative. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

With respect to the same misrepresentation, question 3 above cannot be answered "no" and question 2 of VF-1900 cannot also be answered "yes." The jury may continue to answer the next question from one form or the other, but not both.

If both intentional and negligent misrepresentation are before the jury, it is important to distinguish between a statement made without reasonable grounds for believing it is true (see question 3 above) and one made recklessly and without regard for the truth (see CACI No. VF-1900, question 2). Include question 2 to clarify that the difference is that for negligent misrepresentation, the defendant honestly believes that the statement is true. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1904–VF-1999. Reserved for Future Use

TRESPASS

2000. Trespass—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] trespassed on [his/her/** *nonbinary pronoun***/its] property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**
2. **That [***name of defendant***] [intentionally/, although not intending to do so, [recklessly [or] negligently]] entered [***name of plaintiff***]'s property] [or]**

   [intentionally/, although not intending to do so, [recklessly [or] negligently]] caused [another person/[*insert name of thing***]] to enter [***name of plaintiff***]'s property];**
3. **That [***name of plaintiff***] did not give permission for the entry [or that [***name of defendant***] exceeded [***name of plaintiff***]'s permission];**
4. **That [***name of plaintiff***] was [actually] harmed; and**
5. **That [***name of defendant***]'s [entry/conduct] was a substantial factor in causing [***name of plaintiff***]'s harm.**

[Entry can be on, above, or below the surface of the land.]

[Entry may occur indirectly, such as by causing vibrations that damage the land or structures or other improvements on the land.]

New September 2003; Revised June 2013, May 2020

Directions for Use

With regard to element 2, liability for trespass may be imposed for conduct that is intentional, reckless, negligent, or the result of an extra-hazardous activity. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 [235 Cal.Rptr. 165].) However, intent to trespass means only that the person intended to be in the particular place where the trespass is alleged to have occurred. (*Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480–1481 [232 Cal.Rptr. 668].) Liability may be also based on the defendant's unintentional, but negligent or reckless, act, for example, an automobile accident. An intent to damage is not necessary. (*Meyer v. Pacific Employers Insurance Co.* (1965) 233 Cal.App.2d 321, 326 [43 Cal.Rptr. 542].)

It is no defense that the defendant mistakenly, but in good faith, believed that the defendant had a right to be in that location. (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1780 [18 Cal.Rptr.2d 574].) In such a case, the word "intentionally" in element 2 might be confusing to the jury. To alleviate this possible confusion, give the third option to CACI No. 2004, *"Intentional Entry" Explained.*

If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 4, add "and" at the end of element 2, and adjust punctuation accordingly:

> If you find all of the above, then the law assumes that [*name of plaintiff*] has been harmed and [*name of plaintiff*] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is entitled to additional damages if [*name of plaintiff*] proves the following:

The last sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the fourth element only if nominal damages are also being sought.

Nominal damages alone are not available in cases involving intangible intrusions such as noise and vibrations; proof of actual damage to the property is required: "[T]he rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion . . . ." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936 [55 Cal.Rptr.2d 724, 920 P.2d 669], internal citation omitted.)

For an instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

- "Generally, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership." (*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 258 [225 Cal.Rptr.3d 305].)
- " 'Trespass is an unlawful interference with possession of property.' The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant's conduct was a substantial factor in causing the harm. (See CACI No. 2000.)" (*Ralphs Grocery Co., supra,* 17 Cal.App.5th at pp. 261–262, internal citation omitted.)
- "[I]n order to state a cause of action for trespass a plaintiff must allege an unauthorized and tangible entry on the land of another, which interfered with the plaintiff's exclusive possessory rights." (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1174 [227 Cal.Rptr.3d 390].)
- "The emission of sound waves which cause actual physical damage to property constitutes a trespass. Liability for trespass may be imposed for conduct which is intentional, reckless, negligent or the result of an extra-hazardous activity." (*Staples*, *supra*, 189 Cal.App.3d at p. 1406, internal citations omitted.)
- "California's definition of trespass is considerably narrower than its definition of nuisance. ' "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it . . . . A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference

with the possession." ' California has adhered firmly to the view that '[t]he cause of action for trespass is designed to protect possessory—not necessarily ownership—interests in land from unlawful interference.' " (*Capogeannis v. Superior Court* (1993) 12 Cal.App.4th 668, 674 [15 Cal.Rptr.2d 796], internal citations omitted.)

- "In the context of a trespass action, 'possession' is synonymous with 'occupation' and connotes a subjection of property to one's will and control." (*Veiseh v. Stapp* (2019) 35 Cal.App.5th 1099, 1105 [247 Cal.Rptr.3d 868].)
- " '[A] trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.' Under this definition, 'tortious conduct' denotes that conduct, whether of act or omission, which subjects the actor to liability under the principles of the law of torts." (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 345 [23 Cal.Rptr.2d 377], internal citations omitted.)
- The common-law distinction between direct and constructive trespass is not followed in California. A trespass may be committed by consequential and indirect injuries as well as by direct and forcible harm. (*Gallin v. Poulou* (1956) 140 Cal.App.2d 638, 641 [295 P.2d 958].)
- " 'It is a well-settled proposition that the proper party plaintiff in an action for trespass to real property is the person in actual possession. No averment of title in plaintiff is necessary. [Citations.]' . . . 'A defendant who is a mere stranger to the title will not be allowed to question the title of a plaintiff in possession of the land. It is only where the trespasser claims title himself, or claims under the real owner, that he is allowed to attack the title of the plaintiff whose peaceable possession he has disturbed.' " (*Veiseh, supra*, 35 Cal.App.5th at p. 1104, internal citation omitted.)
- "An action for trespass may technically be maintained only by one whose right to possession has been violated; however, an out-of-possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest." (*Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 774 [184 Cal.Rptr. 308], internal citation omitted.)
- "Under the forcible entry statutes the fact that a defendant may have title or the right to possession of the land is no defense. The plaintiff's interest in peaceable even if wrongful possession is secured against forcible intrusion by conferring on him the right to restitution of the premises, the primary remedy, and incidentally awarding damages proximately caused by the forcible entry." (*Allen v. McMillion* (1978) 82 Cal.App.3d 211, 218–219 [147 Cal.Rptr. 77], internal citations omitted.)
- "Where there is a consensual entry, there is no tort, because lack of consent is an element of the wrong." (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 16–17 [135 Cal.Rptr. 915].)
- " 'A conditional or restricted consent to enter land creates a privilege to do so

only insofar as the condition or restriction is complied with.' " (*Civic Western Corp., supra,* 66 Cal.App.3d at p. 17, quoting Rest.2d Torts, § 168.)

- "Where one has permission to use land for a particular purpose and proceeds to abuse the privilege, or commits any act hostile to the interests of the lessor, he becomes a trespasser. [¶] 'A good faith belief that entry has been authorized or permitted provides no excuse for infringement of property rights if consent was not in fact given by the property owner whose rights are at issue. Accordingly, by showing they gave no authorization, [plaintiffs] established the lack of consent necessary to support their action for injury to their ownership interests.' " (*Cassinos*, *supra*, 14 Cal.App.4th at p. 1780, internal citations omitted.)
- " '[T]he intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred . . . . The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.' " (*Miller*, *supra*, 187 Cal.App.3d at pp. 1480–1481, internal citation omitted.)
- "The general rule is simply that damages may be recovered for annoyance and distress, including mental anguish, proximately caused by a trespass." (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 [267 Cal.Rptr. 399], internal citations omitted.)
- "Causes of action for conversion and trespass support an award for exemplary damages." (*Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 148 [173 Cal.Rptr. 751], internal citation omitted.)
- "It is true that an action for trespass will support an award of nominal damages where actual damages are not shown. However, nominal damages need not be awarded where no actual loss has occurred. 'Failure to return a verdict for nominal damages is not in general ground for reversing a judgment or granting a new trial.' " (*Staples, supra,* 189 Cal.App.3d at p. 1406, internal citations omitted.)
- "Trespass may be ' "by personal intrusion of the wrongdoer or by his failure to leave; by throwing or placing something on the land; or by causing the entry of some other person." ' A trespass may be on the surface of the land, above it, or below it. The migration of pollutants from one property to another may constitute a trespass, a nuisance, or both." (*Martin Marietta Corp. v. Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1132 [47 Cal.Rptr.2d 670], internal citations omitted.)
- "Respondent's plant was located in a zone which permitted its operation. It comes within the protection of section 731a of the Code of Civil Procedure which, subject to certain exceptions, generally provides that where a manufacturing or commercial operation is permitted by local zoning, no private individual can enjoin such an operation. It has been determined, however, that this section does not operate to bar recovery for damages for trespassory

invasions of another's property occasioned by the conduct of such manufacturing or commercial use." (*Roberts v. Permanente Corp*. (1961) 188 Cal.App.2d 526, 529 [10 Cal.Rptr. 519], internal citations omitted.)

- "[A]s a matter of law, [plaintiff] cannot state a cause of action against the [defendants] for trespassing on the Secondary Access Easement because they own that land and her easement does not give her a possessory right, not to mention an exclusive possessory right in that property." (*McBride*, *supra*, 18 Cal.App.5th at p. 1174.)
- "[A] failure to comply with one or more provisions of the California Uniform Transfers to Minors Act does not render the grantor's continued possession and control of the real property unlawful for purposes of the tort of trespass to realty." (*Veiseh, supra*, 35 Cal.App.5th at p. 1107.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 803–805

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, §§ 550.11, 550.19 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.20 (Matthew Bender)

1 California Civil Practice: Torts §§ 18:1, 18:4–18:8, 18:10 (Thomson Reuters)

2001. Trespass—Extrahazardous Activities

[*Name of plaintiff***] claims that [***name of defendant***] trespassed on [his/her/** *nonbinary pronoun***/its] property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**
2. **That [***name of defendant***] was engaged in [***insert extrahazardous activity***];**
3. **That [***insert extrahazardous activity***] caused [***insert thing***] to enter [***name of plaintiff***]'s property;**
4. **That [***name of plaintiff***] did not give permission for the entry [or that [***name of defendant***] exceeded [***name of plaintiff***]'s permission];**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[Entry can be on, above, or below the surface of the land.]

[Entry may occur indirectly, such as by causing vibrations that damage the land or property on the land.]

New September 2003

Directions for Use

Nominal damages alone are not available in cases involving intangible intrusions such as noise and vibrations; proof of actual damage to the property is required: "[T]he rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion . . . ." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936 [55 Cal.Rptr.2d 724, 920 P.2d 669], internal citation omitted.)

"Whether an activity is ultrahazardous is a question of law to be determined by the court." (*Smith v. Lockheed Propulsion Co.* (1967) 247 Cal.App.2d 774, 785 [56 Cal.Rptr. 128].)

Sources and Authority

- "[W]e conclude that the rule of the Restatement is sound, and that in this state there is no liability for a trespass unless the trespass is intentional, the result of recklessness or negligence, or the result of engaging in an extra-hazardous activity." (*Gallin v. Poulou* (1956) 140 Cal.App.2d 638, 645 [295 P.2d 958].)
- "Section 520 of the Restatement of Torts defines ultrahazardous activity as

follows: 'An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.' California has apparently accepted the Restatement definition." (*Smith v. Lockheed Propulsion Co., supra,* 247 Cal.App.2d at p. 785.)

- "Trespass may be ' "by personal intrusion of the wrongdoer or by his failure to leave; by throwing or placing something on the land; or by causing the entry of some other person. . . ." ' A trespass may be on the surface of the land, above it, or below it. The migration of pollutants from one property to another may constitute a trespass, a nuisance, or both." (*Martin Marietta Corp. v. Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1132 [47 Cal.Rptr.2d 670], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 803–805

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, § 550.15 (Matthew Bender)

California Civil Practice: Torts §§ 18:1, 18:4–18:8, 18:10 (Thomson Reuters)

2002. Trespass to Timber—Essential Factual Elements (Civ. Code, § 3346)

[*Name of plaintiff***] claims that [***name of defendant***] trespassed on [his/her/** *nonbinary pronoun***/its] property and [cut down or damaged trees/took timber]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**
2. **That [***name of defendant***] intentionally entered [***name of plaintiff***]'s property and [cut down or damaged trees/took timber] located on the property;**

   [*or***]**

   That [*name of defendant***], although not intending to do so, [recklessly/ [or] negligently] entered [***name of plaintiff***]'s property and damaged trees located on the property;**
3. **That [***name of plaintiff***] did not give permission to [cut down or damage the trees/take timber] [or that [***name of defendant***] exceeded [***name of plaintiff***]'s permission];**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[In considering whether [*name of plaintiff***] was harmed, you may take into account the lost aesthetics and functionality of an injured tree.]**

New September 2003; Revised June 2013, May 2020

Directions for Use

Give this instruction for loss of timber or damages to trees. Note that actual damages are to be doubled regardless of the defendant's intent. (See Civ. Code, § 3346(a).) If treble damages for willful and malicious conduct are sought, also give CACI No. 2003, *Damage to Timber—Willful and Malicious Conduct*.

With regard to element 2, liability for trespass may be imposed for conduct that is intentional, reckless, negligent, or the result of an extra-hazardous activity. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 [235 Cal.Rptr. 165].) However, intent to trespass means only that the person intended to be in the particular place where the trespass is alleged to have occurred. (*Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480–1481 [232 Cal.Rptr. 668].) Liability may be also based on the defendant's unintentional, but negligent or reckless, act; for example an

automobile accident that damages a tree. An intent to damage is not necessary. (*Meyer v. Pacific Employers Insurance Co.* (1965) 233 Cal.App.2d 321 [43 Cal.Rptr. 542].)

It is no defense that the defendant mistakenly, but in good faith, believed that the defendant had a right to be in that location. (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1780 [18 Cal.Rptr.2d 574].) In such a case, the word "intentionally" in element 2 might be confusing to the jury. To alleviate this possible confusion, give the third option to CACI No. 2004, *"Intentional Entry" Explained*. See also the Sources and Authority to CACI No. 2000, *Trespass—Essential Factual Elements*.

Include the last paragraph if the plaintiff claims harm based on lost aesthetics and functionality.

Sources and Authority

- Damages for Injury to Timber. Civil Code section 3346(a).
- "[T]he effect of [Civil Code] section 3346 as amended, read together with [Code of Civil Procedure] section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages." (*Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 645, fn.3 [199 Cal.Rptr.3d 705].)
- "The measure of damages to be doubled or trebled under Code of Civil Procedure section 733 and Civil Code section 3346 is not limited to the value of the timber or the damage to the trees. The statutes have been interpreted to permit doubling or trebling the full measure of compensable damages for tortious injury to property." (*Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1312 [212 Cal.Rptr.3d 920] [annoyance and discomfort damages resulting from tortious injuries to timber or trees are subject to the damage multiplier under Code of Civil Procedure section 733 and Civil Code section 3346].)
- The damages provisions in sections 3346 and 733 must be "treated as penal and punitive." (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857], internal citation omitted.)
- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues

(persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)

- "Diminution in market value . . . is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss. . . . [¶] One alternative measure of damages is the cost of restoring the property to its condition prior to the injury. Courts will normally not award costs of restoration if they exceed the diminution in the value of the property; the plaintiff may be awarded the lesser of the two amounts." (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 862 [162 Cal.Rptr. 104], internal citations omitted.)
- "The rule precluding recovery of restoration costs in excess of diminution in value is, however, not of invariable application. Restoration costs may be awarded even though they exceed the decrease in market value if 'there is a reason personal to the owner for restoring the original condition,' or 'where there is reason to believe that the plaintiff will, if fact, make the repairs.' " (*Heninger, supra*, 101 Cal.App.3d at p. 863, internal citations omitted.)
- "Courts have stressed that only reasonable costs of replacing destroyed trees with identical or substantially similar trees may be recovered." (*Heninger, supra,* 101 Cal.App.3d at p. 865.)
- "As a tree growing on a property line, the Aleppo pine tree was a 'line tree.' Civil Code section 834 provides: 'Trees whose trunks stand partly on the land of two or more coterminous owners, belong to them in common.' As such, neither owner 'is at liberty to cut the tree without the consent of the other, nor to cut away the part which extends into his land, if he thereby injures the common property in the tree.' " (*Kallis v. Sones* (2012) 208 Cal.App.4th 1274, 1278 [146 Cal.Rptr.3d 419].)
- "[W]hen considering the diminished value of an injured tree, the finder of fact may account for lost aesthetics and functionality." (*Rony v. Costa* (2012) 210 Cal.App.4th 746, 755 [148 Cal.Rptr.3d 642].)
- "Although [plaintiff] never quantified the loss of aesthetics at $15,000, she need not have done so. As with other hard-to-quantify injuries, such as emotional and reputational ones, the trier of fact court was free to place any dollar amount on aesthetic harm, unless the amount was ' "so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the [trier of fact] was under the influence of passion or prejudice." ' " (*Rony*, *supra*, 210 Cal.App.4th at p. 756.)
- "[P]laintiffs here showed (i) the tree's unusual size and form made it very unusual for a 'line tree'—it functioned more like two trees growing on the separate properties; (ii) the tree's attributes, such as its broad canopy, provided significant benefits to the [plaintiffs'] property; and (iii) the [plaintiffs] placed great personal value on the tree. The trial court correctly recognized that it could account for these factors when determining damages, including whether or not damages should be reduced." (*Kallis*, *supra*, 208 Cal.App.4th at p. 1279.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1917–1919

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, § 550.10 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.161 et seq. (Matthew Bender)

2003. Damage to Timber—Willful and Malicious Conduct

[*Name of plaintiff*] also claims that [*name of defendant*]'s conduct in cutting down, damaging, or harvesting [*name of plaintiff*]'s trees was willful and malicious.

"Willful" simply means that [*name of defendant*]'s conduct was intentional.

"Malicious" means that [*name of defendant*] acted with intent to vex, annoy, harass, or injure, or that [*name of defendant*]'s conduct was done with a knowing disregard of the rights or safety of another. A person acts with knowing disregard when the person is aware of the probable dangerous consequences of the person's conduct and deliberately fails to avoid those consequences.

New September 2003; Revised December 2010, May 2020

Directions for Use

Read this instruction if the plaintiff is seeking double or treble damages because the defendant's conduct was willful and malicious. (See Civ. Code, § 3346; Code Civ. Proc., § 733; *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1742 [33 Cal.Rptr.2d 391].) The judge should ensure that this finding is noted on the special verdict form. The jury should find the actual damages suffered. If the jury finds willful and malicious conduct, the court must award double damages and may award treble damages. (See *Ostling*, *supra*, 27 Cal.App.4th at p. 1742.)

Sources and Authority

- Damages for Injury to Timber. Civil Code section 3346(a).
- Treble Damages for Injury to Timber. Code of Civil Procedure section 733.
- "[T]he effect of [Civil Code] section 3346 as amended, read together with [Code of Civil Procedure] section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages." (*Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 645, fn. 3 [199 Cal.Rptr.3d 705].)
- "The measure of damages to be doubled or trebled under Code of Civil Procedure section 733 and Civil Code section 3346 is not limited to the value of

the timber or the damage to the trees. The statutes have been interpreted to permit doubling or trebling the full measure of compensable damages for tortious injury to property." (*Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1312 [212 Cal.Rptr.3d 920] [annoyance and discomfort damages resulting from tortious injuries to timber or trees are subject to the damage multiplier under Code of Civil Procedure section 733 and Civil Code section 3346].)

- The damages provisions in sections 3346 and 733 must be "treated as penal and punitive." (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857], internal citation omitted.)
- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)
- " ' " '[T]reble damages may only be awarded when the wrongdoer intentionally acted wilfully or maliciously. The intent required is the intent to vex, harass, or annoy or injure the plaintiff. It is a question of fact for the trial court whether or not such intent exists.' [Civil Code section 3346 and Code of Civil Procedure section 733] are permissive and not mandatory and while they 'prescribe the degree of penalty to be invoked they commit to the sound discretion of the trial court the facts and circumstances under which it shall be invoked.' " ' " (*Salazar*, *supra*, 245 Cal.App.4th at p. 646, internal citation omitted.)
- "Although neither section [3346 or 733] expressly so provides, it is now settled that to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious." (*Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762 [27 Cal.Rptr. 675], internal citations omitted.)
- "A proper and helpful analogue here is the award of exemplary damages under section 3294 of the Civil Code when a defendant has been guilty, inter alia, of 'malice, express or implied.' . . . 'In order to warrant the allowance of such damages the act complained of must not only be wilful, in the sense of intentional, but it must be accompanied by some aggravating circumstance, amounting to malice. Malice implies an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others. There must be an intent to vex, annoy or injure. Mere spite or ill will is not sufficient.' . . . Malice may consist of a state of mind determined to perform an act with reckless or wanton disregard of or indifference to the rights of others. Since a defendant rarely admits to such a state of mind, it must frequently be established from the circumstances surrounding his allegedly malicious acts." (*Caldwell, supra*, 211 Cal.App.2d at pp. 763–764, internal citations omitted.)
- "Under [Health and Safety Code] section 13007, a tortfeasor generally is liable

to the owner of property for damage caused by a negligently set fire. '[T]he statute places no restrictions on the type of property damage that is compensable.' Such damages might include, for example, damage to structures, to movable personal property, to soil, or to undergrowth; damages may even include such elements as the lost profits of a business damaged by fire. If the fire also damages trees—that is, causes 'injuries to . . . trees . . . upon the land of another'—then the actual damages recoverable under section 13007 may be doubled (for negligently caused fires) or trebled (for fires intended to spread to the plaintiff's property) pursuant to section 3346." (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 461 [102 Cal.Rptr.3d 32], internal citations omitted; but see *Gould v. Madonna* (1970) 5 Cal.App.3d 404, 407–408 [85 Cal.Rptr. 457] [Civ. Code, § 3346 does not apply to fires negligently set; Health & Saf. Code, § 13007 provides sole remedy].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1918

4 Levy et al., California Torts, Ch. 52, *Recovery for Medical Expenses and Economic Loss*, § 52.34 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 350, *Logs and Timber*, § 350.12 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.161 et seq. (Matthew Bender)

2004. "Intentional Entry" Explained

[An entry is intentional if a person knowingly goes onto the property of another or knowingly causes something to go onto that property.]

[An entry is intentional if a person engages in conduct that is substantially certain to cause something to go onto that property.]

[Intent to trespass means only that a person intended to be in the particular location where the trespass is alleged to have occurred. An entry is intentional even if the person reasonably but mistakenly thought that the person had a right to come onto that property.]

An intent to do harm to the property or to the owner is not required.

New September 2003; Revised June 2013, May 2020

Directions for Use

This instruction is not intended for general use in every case. Give one of the three bracketed options if an issue regarding the intent of the entry is raised and further explanation is required. The third option should be given if the entry could appear to the jury to be unintentional, such as if the defendant was not aware that the defendant was trespassing. (See *Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480–1481 [232 Cal.Rptr. 668].)

Sources and Authority

- "The doing of an act which will to a substantial certainty result in the entry of foreign matter upon another's land suffices for an intentional trespass to land upon which liability may be based. It was error to instruct the jury that an 'intent to harm' was required." (*Roberts v. Permanente Corp*. (1961) 188 Cal.App.2d 526, 530–531 [10 Cal.Rptr. 519], internal citation omitted.)
- An instruction on the definition of intentional trespass is considered a proper statement of law. Failure to give this instruction on request where appropriate is error. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1407 [235 Cal.Rptr. 165].)
- "As Prosser and Keeton on Torts . . . explained, '[t]he intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred . . . . The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.' " (*Miller*, *supra*, 187 Cal.App.3d at pp. 1480–1481, internal citation omitted.)
- "Intent to cause damage was not, however, an element of [trespass] and . . . the trespasser was liable for such damage as he caused even though that damage was not intended or foreseen by him." (*Meyer v. Pacific Employers Ins. Co.* (1965) 233 Cal.App.2d 321, 326 [43 Cal.Rptr. 542].)

Secondary Sources

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.20[3] (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, § 550.15 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.40 (Matthew Bender)

California Civil Practice: Torts § 18:4 (Thomson Reuters)

2005. Affirmative Defense—Necessity

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*/it] is not responsible for [*name of plaintiff*]'s harm, if any, because the entry on to [*name of plaintiff*]'s property was lawful. To succeed, [*name of defendant*] must prove that it was necessary, or reasonably appeared to [him/her/*nonbinary pronoun*/it] to be necessary, to enter the land to prevent serious harm to a person or property.

New September 2003; Revised October 2008

Sources and Authority

- "[I]t has long [been] recognized that '[n]ecessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose.' " (*People v. Ray* (1999) 21 Cal.4th 464, 473 [88 Cal.Rptr.2d 1, 981 P.2d 928], internal citations omitted.)
- Restatement Second of Torts, section 197 provides:

  (1) One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to

  (a) the actor, or his land or chattels, or

  (b) the other or a third person, or the land or chattels of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action.

  (2) Where the entry is for the benefit of the actor or a third person, he is subject to liability for any harm done in the exercise of the privilege stated in Subsection (1) to any legally protected interest of the possessor in the land or connected with it, except where the threat of harm to avert which the entry is made is caused by the tortious conduct or contributory negligence of the possessor.

- This Restatement section was noted as having been previously cited in *People v. Ray, supra,* 21 Cal.4th at p. 474.

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 771, 772

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.22[2] (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, §§ 550.22, 550.51 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, §§ 225.220, 225.221 (Matthew Bender)

California Civil Practice: Torts § 18:11 (Thomson Reuters)

2006–2019. Reserved for Future Use

2020. Public Nuisance—Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] suffered harm because [*name of defendant*] created a nuisance. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*], by acting or failing to act, created a condition or permitted a condition to exist that [*insert one or more of the following:*]**

   [was harmful to health;] [or]

   [was indecent or offensive to the senses;] [or]

   [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;] [or]

   [was [a/an] [fire hazard/*specify other potentially dangerous condition*] to [*name of plaintiff*]'s property;]

2. **That the condition affected a substantial number of people at the same time;**
3. **That an ordinary person would be reasonably annoyed or disturbed by the condition;**
4. **That the seriousness of the harm outweighs the social utility of [*name of defendant*]'s conduct;**

[5. That [*name of plaintiff*] did not consent to [*name of defendant*]'s conduct;]

6. **That [*name of plaintiff*] suffered harm that was different from the type of harm suffered by the general public; and**
7. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised December 2007, June 2016, November 2017, May 2019, November 2019

Directions for Use

Give this instruction for a claim for public nuisance. For an instruction on private nuisance, give CACI No. 2021, *Private Nuisance—Essential Factual Elements.* While a private nuisance is designed to vindicate individual land ownership interests, a public nuisance is not dependent on an interference with any particular

rights of land: The public nuisance doctrine aims at the protection and redress of community interests. (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 358 [213 Cal.Rptr.3d 538].)

There is some uncertainty as to whether lack of consent is an element (element 5) or consent is a defense. Cases clearly list lack of consent with the elements. (See *Department of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1352 [129 Cal.Rptr.3d 719]; *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548 [87 Cal.Rptr.3d 602].) However, other cases have referred to consent as a defense, albeit in the context of a nuisance action involving parties with interests in the same property. (See *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 341–345 [23 Cal.Rptr. 2d 377]; *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1138–1140 [281 Cal.Rptr. 827].)

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.
- Public Nuisance. Civil Code section 3480.
- Action by Private Person for Public Nuisance. Civil Code section 3493.
- Act Done Under Express Authority of Statute. Civil Code section 3482.
- Property Used for Dogfighting and Cockfighting. Civil Code section 3482.8.
- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. . . . ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury." ' " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)
- "Public nuisance and private nuisance 'have almost nothing in common except the word "nuisance" itself.' Whereas private nuisance is designed to vindicate individual land ownership interests, the public nuisance doctrine has historically distinct origins and aims at 'the protection and redress of *community interests*.' With its roots tracing to the beginning of the 16th century as a criminal offense against the crown, public nuisances at common law are 'offenses against, or interferences with, the exercise of *rights common to the public,*' such as public health, safety, peace, comfort, or convenience." (*Citizens for Odor Nuisance Abatement, supra,* 8 Cal.App.5th at p. 358, original italics, internal citation omitted.)
- "The elements of a public nuisance, under the circumstances of this case, are as follows: (1) the 2007 poisoning obstructed the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) the 2007 poisoning affected a substantial number of people; (3) an ordinary person would be unreasonably annoyed or disturbed by the 2007 poisoning; (4) the seriousness

of the harm occasioned by the 2007 poisoning outweighed its social utility; (5) plaintiffs did not consent to the 2007 poisoning; (6) plaintiffs suffered harm as a result of the 2007 poisoning that was different from the type of harm suffered by the general public; and (7) the 2007 poisoning was a substantial factor in causing plaintiffs' harm." (*Department of Fish & Game, supra*, 197 Cal.App.4th at p. 1352 [citing this instruction].)

- "Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public." (*Venuto v. Owens Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 124 [99 Cal.Rptr. 350], internal citations omitted; but see *Birke, supra,* 169 Cal.App.4th at p. 1550 ["to the extent *Venuto* . . . can be read as precluding an action to abate a public nuisance by a private individual who has suffered personal injuries as a result of the challenged condition, we believe it is an incorrect statement of the law"].)
- "Unlike the private nuisance—tied to and designed to vindicate individual ownership interests in land—the 'common' or public nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103 [60 Cal.Rptr.2d 277, 929 P.2d 596].)
- "[W]hen the nuisance is a private as well as a public one, there is no requirement the plaintiff suffer damage different in kind from that suffered by the general public. That is, the plaintiff ' "does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree . . . ." ' " (*Birke, supra*, 169 Cal.App.4th at p. 1551, internal citations omitted.)
- "A public nuisance cause of action is established by proof that a defendant knowingly created or assisted in the creation of a substantial and unreasonable interference with a public right." (*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 79 [227 Cal.Rptr.3d 499].)
- "Of course, not every interference with collective social interests constitutes a public nuisance. To qualify . . . the interference must be both substantial and unreasonable." (*People ex rel. Gallo, supra*, 14 Cal.4th at p. 1105.)
- "It is substantial if it causes significant harm and unreasonable if its social utility is outweighed by the gravity of the harm inflicted." *People v. ConAgra Grocery Products Co., supra*, 17 Cal.App.5th at p. 112.)
- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke, supra*, 169 Cal.App.4th at p. 1552 [citing this instruction], internal citation omitted.)
- "A nuisance may be either a negligent or an intentional tort." (*Stoiber v.*

Honeychuck (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)

- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence. [Citations.]' However, ' "where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. . . ." [Citations.]' " (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422], internal citations omitted.)
- "An essential element of a cause of action for nuisance is damage or injury." (*Helix Land Co., Inc. v. City of San Diego* (1978) 82 Cal.App.3d 932, 950 [147 Cal.Rptr. 683].)
- "[M]ere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property . . . ." (*McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254 [172 P.2d 758].)
- "A fire hazard, at least when coupled with other conditions, can be found to be a public nuisance and abated." (*People v. Oliver* (1948) 86 Cal.App.2d 885, 889 [195 P.2d 926].)
- "By analogy to the rules governing tort liability, courts apply the same elements to determine liability for a public nuisance." (*People ex rel. Gallo, supra*, 14 Cal.4th at p. 1105, fn. 3, internal citation omitted.)
- "The elements 'of a cause of action for public nuisance include the existence of a duty and causation.' " (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542 [107 Cal.Rptr.3d 481], internal citations omitted.)
- "[L]iability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant *created or assisted in the creation of the nuisance*." (*People v. ConAgra Grocery Products Co.*, *supra*, 17 Cal.App.5th at p. 109, original italics.)
- "Causation is an essential element of a public nuisance claim. A plaintiff must establish a 'connecting element' or a 'causative link' between the defendant's conduct and the threatened harm." (*Citizens for Odor Nuisance Abatement, supra,* 8 Cal.App.5th at p. 359 [citing this instruction], internal citation omitted.)
- "Causation may consist of either '(a) an act; or [¶] (b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest or the invasion of the public interest.' A plaintiff must show the defendant's conduct was a 'substantial factor' in causing the alleged harm." (*Citizens for Odor Nuisance Abatement, supra,* 8 Cal.App.5th at p. 359 [citing this instruction], internal citation omitted.)
- " 'Where negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim.' The nuisance claim 'stands or falls with the determination of the negligence cause of action' in such

cases." (*Melton, supra*, 183 Cal.App.4th at p. 542, internal citations omitted.)

- "[W]here, as here, an owner of property seeks damages for creation of a nuisance by a prior lessee, the lessee has a defense that his use of the property was lawful and was authorized by the lease; i.e., his use of the property was undertaken with the consent of the owner." (*Mangini, supra,* 230 Cal.App.3d at p. 1138, original italics.)
- "Nor is a defense of consent vitiated simply because plaintiffs seek damages based on special injury from public nuisance. 'Where special injury to a private person or persons entitles such person or persons to sue on account of a public nuisance, both a public and private nuisance, in a sense, are in existence.' " (*Mangini, supra,* 230 Cal.App.3d at p. 1139.)
- "[W]here the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made and in this sense its mere existence is said to be a nuisance per se. [Citation.] But, to rephrase the rule, to be considered a nuisance per se the object, substance, activity or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law." (*People v. ConAgra Grocery Products Co.*, *supra*, 17 Cal.App.5th at p. 114.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 152

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 5-D, *Common Law Environmental Hazards Liability*, ¶¶ 5:140–5:179 (The Rutter Group)

California Real Property Remedies and Damages (Cont.Ed.Bar 2d ed.) Ch. 11, Remedies for Nuisance and Trespass, § 11.7

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.04, 17.06 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.12 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 et seq. (Matthew Bender)

California Civil Practice: Torts §§ 17:1–17:3 (Thomson Reuters)

2021. Private Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] suffered harm because [***name of defendant***] created a nuisance. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**
2. **That [***name of defendant***], by acting or failing to act, created a condition or permitted a condition to exist that [***insert one or more of the following:***]**

   [was harmful to health;] [or]

   [was indecent or offensive to the senses;] [or]

   [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;] [or]

   [was [a/an] [fire hazard/*specify other potentially dangerous condition***] to [***name of plaintiff***]'s property;]**
3. **That [[***name of defendant***]'s conduct in acting or failing to act was [intentional and unreasonable/unintentional, but negligent or reckless]/[the condition that [***name of defendant***] created or permitted to exist was the result of an abnormally dangerous activity]];**
4. **That this condition substantially interfered with [***name of plaintiff***]'s use or enjoyment of [his/her/***nonbinary pronoun***] land;**
5. **That an ordinary person would reasonably be annoyed or disturbed by [***name of defendant***]'s conduct;**

[6. That [*name of plaintiff***] did not consent to [***name of defendant***]'s conduct;]**

7. **That [***name of plaintiff***] was harmed;**
8. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm; and**
9. **That the seriousness of the harm outweighs the public benefit of**

[*name of defendant*]'s conduct.

New September 2003; Revised February 2007, December 2011, December 2015, June 2016, May 2017, May 2018, May 2019

Directions for Use

Private nuisance liability depends on some sort of conduct by the defendant that either directly and unreasonably interferes with the plaintiff's property or creates a condition that does so. (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 100 [253 Cal.Rptr. 470].) Element 2 requires that the defendant have acted to create a condition or allowed a condition to exist by failing to act.

The act that causes the interference may be intentional and unreasonable. Or it may be unintentional but caused by negligent or reckless conduct. Or it may result from an abnormally dangerous activity for which there is strict liability. However, if the act is intentional but reasonable, or if it is entirely accidental, there is generally no liability. (*Lussier*, *supra*, 206 Cal.App.3d at p. 100.)

The intent required is only to do the act that interferes, not an intent to cause harm. (*Lussier*, *supra*, 206 Cal.App.3d at pp. 100, 106; see Rest.2d Torts, § 822.) For example, it is sufficient that one intend to chop down a tree; it is not necessary to intend that it fall on a neighbor's property.

If the condition results from an abnormally dangerous activity, it must be one for which there is strict liability. (*Lussier*, *supra*, 206 Cal.App.3d at p. 100; see Rest.2d Torts, § 822).

There may be an exception to the scienter requirement of element 3 for at least some harm caused by trees. There are cases holding that a property owner is strictly liable for damage caused by tree branches and roots that encroach on neighboring property. (See *Lussier, supra,* 206 Cal.App.3d at p.106, fn. 5; see also *Mattos v. Mattos* (1958) 162 Cal.App.2d 41, 43 [328 P.2d 269] [absolute liability of an owner to remove portions of his fallen trees that extend over and upon another's land]; cf. *City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422] [plaintiff must prove negligent maintenance of trees that fell onto plaintiff's property in a windstorm].) Do not give element 3 if the court decides that there is strict liability for damage caused by encroaching or falling trees.

There is some uncertainty as to whether lack of consent is an element (element 6) or consent is a defense. Cases clearly list lack of consent with the elements. (See *Department of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1352 [129 Cal.Rptr.3d 719]; *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548 [87 Cal.Rptr.3d 602].) However, other cases have referred to consent as a defense, albeit in the context of a nuisance action involving parties with interests in the same property. (See *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 341–345, 23 Cal. Rptr. 2d 377; *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1138–1140 [281 Cal.Rptr. 827].)

If the claim is that the defendant failed to abate a nuisance, negligence must be proved. (*City of Pasadena*, *supra*, 228 Cal.App.4th at p. 1236.)

Element 9 must be supplemented with CACI No. 2022, *Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit*. (See *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 160–165 [184 Cal.Rptr.3d 26].) For instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.
- Acts Done Under Express Authority of Statute. Civil Code section 3482.
- "A nuisance is considered a 'public nuisance' when it 'affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.' A 'private nuisance' is defined to include any nuisance not covered by the definition of a public nuisance, and also includes some public nuisances. 'In other words, it is possible for a nuisance to be public and, from the perspective of individuals who suffer an interference with their use and enjoyment of land, to be private as well.' " (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 261–262 [207 Cal.Rptr.3d 532], internal citations omitted.)
- "The elements of a public nuisance, under the circumstances of this case, are as follows: (1) the 2007 poisoning obstructed the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) the 2007 poisoning affected a substantial number of people; (3) an ordinary person would be unreasonably annoyed or disturbed by the 2007 poisoning; (4) the seriousness of the harm occasioned by the 2007 poisoning outweighed its social utility; (5) plaintiffs did not consent to the 2007 poisoning; (6) plaintiffs suffered harm as a result of the 2007 poisoning that was different from the type of harm suffered by the general public; and (7) the 2007 poisoning was a substantial factor in causing plaintiffs' harm.[¶][] The elements of a private nuisance are the same except there is no requirement that plaintiffs prove a substantial number of people were harmed and plaintiffs suffered harm that was different from that suffered by the general public, but there are additional elements that plaintiffs owned, leased, occupied or controlled real property, that the 2007 poisoning interfered with plaintiffs' use of their property, and that plaintiffs were harmed thereby" (*Department of Fish & Game, supra,* 197 Cal.App.4th at p. 1352 [citing this instruction].)
- "In their first cause of action, plaintiffs allege the 2007 poisoning adversely affected tourism for a substantial period of time, caused plaintiffs to suffer serious losses, obstructed the free use of plaintiffs' property, and interfered with plaintiffs' comfortable enjoyment of their property or their businesses. Strictly speaking, this does not state a claim for either public or private nuisance. There is no allegation that plaintiffs did not consent to the 2007 poisoning, that an

ordinary person would have been annoyed or disturbed by the 2007 poisoning, or that the seriousness of the harm caused by the 2007 poisoning outweighed its public benefit." (*Department of Fish & Game, supra,* 197 Cal.App.4th at p. 1352.)

- "In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff's property; proof of interference with the plaintiff's use and enjoyment of that property is sufficient." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 [55 Cal.Rptr.2d 724, 920 P.2d 669].)
- "[T]he essence of a private nuisance is its interference with the use and enjoyment of land. The activity in issue must 'disturb or prevent the comfortable enjoyment of property,' such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery." (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534 [90 Cal.Rptr.2d 491], internal citations omitted.)
- "A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession." (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1178 [227 Cal.Rptr.3d 390].)
- "[T]o proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [29 Cal.Rptr.2d 664], internal citation omitted.)
- "So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance; . . . ." (*Mendez, supra*, 3 Cal.App.5th at p. 262.)
- "The requirements of *substantial damage* and *unreasonableness* are not inconsequential. These requirements stem from the law's recognition that: ' "Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of 'give and take, live and let live,' and *therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another*. Liability . . . is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation." ' " (*Mendez, supra*, 3 Cal.App.5th at p. 263, original italics.)
- "The first additional requirement for recovery of damages on a nuisance theory

is proof that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer 'substantial actual damage.' The Restatement recognizes the same requirement as the need for proof of 'significant harm,' which it variously defines as 'harm of importance' and a 'real and appreciable invasion of the plaintiff's interests' and an invasion that is 'definitely offensive, seriously annoying or intolerable.' The degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community? 'If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.' This is, of course, a question of fact that turns on the circumstances of each case." (*San Diego Gas & Electric Co., supra*, 13 Cal.4th at p. 938, internal citations omitted.)

- "The second additional requirement for nuisance is superficially similar but analytically distinct: 'The interference with the protected interest must not only be substantial, but it must also be unreasonable', i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.' The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' And again this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.' " (*San Diego Gas & Electric Co., supra*, 13 Cal.4th at pp. 938–939, internal citations omitted.)
- "Appellant first argues that the judgment is erroneous because there is no showing that any act or conduct of his caused the damage. It is true that there is neither showing nor finding of any negligent or wrongful act or omission of defendant proximately causing the falling of the trees. But no such showing is required. If the trees remained upright, with some of their branches extending over or upon plaintiff's land, they clearly would constitute a nuisance, which defendant could be required to abate." (*Mattos*, *supra*, 162 Cal.App.2d at p. 42.)
- "Although the central idea of nuisance is the unreasonable invasion of this interest and not the particular type of conduct subjecting the actor to liability, liability nevertheless depends on some sort of conduct that either directly and unreasonably interferes with it or creates a condition that does so. 'The invasion may be intentional and unreasonable. It may be unintentional but caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability. On any of these bases the defendant may be liable. On the other hand, the invasion may be intentional but

reasonable; or it may be entirely accidental and not fall within any of the categories mentioned above. In these cases there is no liability.' " (*Lussier*, *supra*, 206 Cal.App.3d at p. 100, internal citations omitted.)

- "A finding of an actionable nuisance does not require a showing that the defendant acted unreasonably. As one treatise noted, '[c]onfusion has resulted from the fact that the intentional interference with the plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable. This is simply because a reasonable person could conclude that the plaintiff's loss resulting from the intentional interference ought to be allocated to the defendant.' " (*Wilson v. Southern California Edison Co.* (2018) 21 Cal.App.5th 786, 804 [230 Cal.Rptr.3d 595], quoting Prosser & Keeton (5th ed. 1984) Torts § 88.)
- "We do not intend to suggest, however, that one is strictly liable for damages that arise when a natural condition of one's land interferes with another's free use and enjoyment of his property. Such a rule would, quite anomalously, equate natural conditions with dangerous animals, ultrahazardous activities, or defective products, for which strict liability is reserved." (*Lussier*, *supra*, 206 Cal.App.3d at pp. 101–102.)
- "Clearly, a claim of nuisance based on our example is easier to prove than one based on negligent conduct, for in the former, a plaintiff need only show that the defendant committed the acts that caused injury, whereas in the latter, a plaintiff must establish a duty to act and prove that the defendant's failure to act reasonably in the face of a known danger breached that duty and caused damages." (*Lussier*, *supra*, 206 Cal.App.3d at p. 106.)
- "We note, however, a unique line of cases, starting with *Grandona v. Lovdal* (1886) 70 Cal. 161 [11 P. 623], which holds that to the extent that the branches and roots of trees encroach upon another's land and cause or threaten damage, they may constitute a nuisance. Superficially, these cases appear to impose nuisance liability in the absence of wrongful conduct." (*Lussier*, *supra*, 206 Cal.App.3d at p. 102, fn. 5 [but questioning validity of such a rule], internal citations omitted.)
- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke, supra,* 169 Cal.App.4th at p. 1552, internal citations omitted.)
- "A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)
- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence. [Citations.]' However, ' " 'where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. . . .' [Citations.]' " (*City of Pasadena*, *supra*, 228 Cal.App.4th at p. 1236, internal citations omitted.)

- "We acknowledge that to recover on a nuisance claim the harm the plaintiff suffers need not be a physical injury. Thus, the absence of evidence in this case to establish that [plaintiff] 's physical injuries were caused by the stray voltage would not preclude recovery on her nuisance claim." (*Wilson, supra*, 234 Cal.App.4th at p. 159, internal citations omitted.)
- "[M]ere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property. . . ." (*McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254 [172 P.2d 758].)
- "It is the general rule that the unreasonable, unwarrantable or unlawful use by a person of his own property so as to interfere with the rights of others is a nuisance [citation]. In fact, any unwarranted activity which causes substantial injury to the property of another or obstructs its reasonable use and enjoyment is a nuisance which may be abated. And, even a lawful use of one's property may constitute a nuisance if it is part of a general scheme to annoy a neighbor and if the main purpose of the use is to prevent the neighbor from reasonable enjoyment of his own property [citation]." (*McBride*, *supra*, 18 Cal.App.5th at p. 1180.)
- " 'Occupancy goes to the holding, possessing or residing in or on something.' 'The rights which attend occupancy may be, arguably, many.' ' "Invasion of the right of private occupancy" resembles the definition of nuisance, an " 'interference with the interest in the private use and enjoyment of the land.' " [Citations.] 'The typical and familiar nuisance claim involves an activity or condition which causes damage or other interference with the enjoyment of adjoining or neighboring land." ' " (*Albert v. Truck Ins. Exchange* (2018) 23 Cal.App.5th 367, 380 [232 Cal.Rptr.3d 774, internal citations omitted.)
- "An invasion of the right of private occupancy does not have to be a physical invasion of the land; a nonphysical invasion of real property rights can interfere with the use and enjoyment of real property." (*Albert*, *supra*, 23 Cal.App.5th at p. 380.)
- "A fire hazard, at least when coupled with other conditions, can be found to be a public nuisance and abated." (*People v. Oliver* (1948) 86 Cal.App.2d 885, 889 [195 P.2d 926].)
- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. . . . ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.' " " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)
- "[W]here, as here, an owner of property seeks damages for creation of a nuisance by a prior lessee, the lessee has a defense that his use of the property

was lawful and was authorized by the lease; i.e., his use of the property was undertaken with the *consent* of the owner." (*Mangini, supra*, 230 Cal.App.3d at p. 1138, original italics.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 174

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.05 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.13 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 (Matthew Bender)

California Civil Practice: Torts §§ 17:1, 17:2, 17:4 (Thomson Reuters)

2022. Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit

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In determining whether the seriousness of the harm to [*name of plaintiff*] outweighs the public benefit of [*name of defendant*]'s conduct, you should consider a number of factors.

To determine the seriousness of the harm [*name of plaintiff*] suffered, you should consider the following:

a. **The extent of the harm, meaning how much the condition [*name of defendant*] caused interfered with [*name of plaintiff*]'s use or enjoyment of [his/her/*nonbinary pronoun*] property, and how long that interference lasted.**

b. **The character of the harm, that is, whether the harm involved a loss from the destruction or impairment of physical things that [*name of plaintiff*] was using, or personal discomfort or annoyance.**

c. **The value that society places on the type of use or enjoyment invaded. The greater the social value of the particular type of use or enjoyment of land that is invaded, the greater is the seriousness of the harm from the invasion.**

d. **The suitability of the type of use or enjoyment invaded to the nature of the locality. The nature of a locality is based on the primary kind of activity at that location, such as residential, industrial, or other activity.**

e. **The extent of the burden (such as expense and inconvenience) placed on [*name of plaintiff*] to avoid the harm.**

To determine the public benefit of [*name of defendant*]'s conduct, you should consider:

a. **The value that society places on the primary purpose of the conduct that caused the interference. The primary purpose of the conduct means [*name of defendant*]'s main objective for engaging in the conduct. How much social value a particular purpose has depends on how much its achievement generally advances or protects the public good.**

b. **The suitability of the conduct that caused the interference to the nature of the locality. The suitability of the conduct depends upon its compatibility to the primary activities carried on in the locality.**

c. **The practicability or impracticality of preventing or avoiding the**

invasion.

New December 2015

Directions for Use

This instruction must be given with CACI No. 2021, *Private Nuisance—Essential Factual Elements*. (See *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 160–165 [184 Cal.Rptr.3d 26].) CACI No. 2021 has been found to be inadequate to express the requirement that the plaintiff must suffer *serious* harm without this additional guidance to the jury on how to determine whether the seriousness of the plaintiff's harm outweighs the public benefit of the defendant's conduct (CACI No. 2021, element 8). (See *Id.* at pp. 162–163.)

Sources and Authority

- " 'The interference with the protected interest must not only be substantial, but it must also be unreasonable', i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.' The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' And again this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.' " (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938–939 [55 Cal.Rptr.2d 724, 920 P.2d 669], internal citations omitted.)
- "Had the jury been instructed on the proper factors to consider when weighing the gravity of the harm against the social utility of [defendant]'s conduct and found [defendant] liable, the statement of these elements would be sufficient because in finding in favor of [plaintiff] the jury necessarily would have concluded that the harm was substantial. Without such instruction, it is not." (*Wilson, supra*, 234 Cal.App.4th at p. 163.)
- Restatement Second of Torts, section 827 provides:

  In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

  (a) the extent of the harm involved;

  (b) the character of the harm involved;

  (c) the social value that the law attaches to the type of use or enjoyment invaded;

  (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and

(e) the burden on the person harmed of avoiding the harm.

- Restatement Second of Torts, section 828 provides:

  In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

  (a) the social value that the law attaches to the primary purpose of the conduct;

  (b) the suitability of the conduct to the character of the locality; and

  (c) the impracticability of preventing or avoiding the invasion.

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 190

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.05 (Matthew Bender)

9 California Real Estate Law and Practice, Ch. 320, *The Law of Nuisance*, § 320.15 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.20 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.47 (Matthew Bender)

2023. Failure to Abate Artificial Condition on Land Creating Nuisance

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[*Name of plaintiff*] claims that [*name of defendant*] unreasonably failed to put an end to an artificial condition on [*name of defendant*]'s land that was a [public/private] nuisance. To establish this claim, in addition to proving that the condition created a nuisance, [*name of plaintiff*] must also prove all of the following:

1. **That [*name of defendant*] was in possession of the land where the artificial condition existed;**
2. **That [*name of defendant*] knew or should have known of the condition and that it created a nuisance or an unreasonable risk of nuisance;**
3. **That [*name of defendant*] knew or should have known that [[*name of plaintiff*]/the affected members of the public] did not consent to the condition; and**
4. **That after a reasonable opportunity, [*name of defendant*] failed to take reasonable steps to put an end to the condition or to protect [[*name of plaintiff*]/the public] from the nuisance.**

New November 2018

Directions for Use

This instruction is based on the Restatement Second of Torts, section 839 (see *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, 618–622 [200 Cal.Rptr. 575]), which applies to both public and private nuisances. (Rest. 2d Torts, § 839, comment (a).) For a private nuisance, select the plaintiff in elements 3 and 4.

Give this instruction with either CACI No. 2020, *Public Nuisance—Essential Factual Elements,* or CACI No. 2021, *Private Nuisance—Essential Factual Elements.* For public nuisance, modify element 1 of CACI No. 2020 to replace "created a condition" with "allowed a condition to exist." For private nuisance, this instruction replaces element 3 of CACI No. 2021.

Sources and Authority

- "Under the common law, liability for a public nuisance may result *from the failure to act* as well as from affirmative conduct. Thus, for example, section 839 of the Restatement Second of Torts declares that 'A possessor of land is subject to liability for a nuisance caused while he is in possession by an abatable artificial condition on the land [such as the placement of fill], if the nuisance is otherwise actionable [e.g., prohibited by statute], and [para.] (a) the possessor

knows or should know of the condition and the nuisance or unreasonable risk of nuisance involved, and [para.] (b) he knows or should know that it exists without the consent of those affected by it, and [para.] (c) he has failed after a reasonable opportunity to take reasonable steps to abate the condition or to protect the affected persons against it.'" (*Leslie Salt Co., supra,* 153 Cal.App.3d at pp. 619–620.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 160

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 1045

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1230, 1300

2024–2029. Reserved for Future Use

2030. Affirmative Defense—Statute of Limitations—Trespass or Private Nuisance

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[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s claimed harm occurred before [***insert date three years before date of filing***].**

[If [*name of defendant***] proves that [***name of plaintiff***]'s claimed harm occurred before [***insert date three years before date of filing***], the lawsuit was still filed on time if [***name of plaintiff***] proves that the [trespass/nuisance] is continuous. A [trespass/nuisance] is continuous if it can be discontinued. Among the factors that indicate that the [trespass/nuisance] can be discontinued are the following:**

(a) That the [trespass/nuisance] is currently continuing;

(b) That the impact of the condition will vary over time;

(c) That the [trespass/nuisance] can be discontinued at any time, in a reasonable manner, and for reasonable cost, considering the benefits and detriments if it is discontinued.

[You must consider the continuous nature of the damage to the property that a nuisance causes, not the continuous nature of the acts causing the nuisance to occur.]]

New April 2008

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable three-year period for injury to real property. (See Code Civ. Proc., § 338(b).) This instruction may be used for a permanent trespass other than an action for damages for wrongful damage to timber, to which a five-year statute applies. (See Civ. Code, § 3346(c).) It may also be used for a permanent private nuisance. There is no limitation period for a public nuisance. (See Civ. Code, § 3490.) There is also essentially no statute of limitation for a continuing trespass or continuing private nuisance, but damages for future harm are not recoverable. (See *Lyles v. State of California* (2007) 153 Cal.App.4th 281, 291 [62 Cal.Rptr.3d 696] [nuisance]; *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 592 [63 Cal.Rptr.3d 165] [trespass].)

Include the optional second paragraph if there is an issue of fact as to whether the trespass or nuisance is permanent or continuous. If applicable, include the last sentence in the case of a nuisance.

If the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation

defense, CACI No. 455, *Statute of Limitations—Delayed Discovery,* may be adapted for use.

See also CACI No. 3903F, *Damage to Real Property (Economic Damage),* and CACI No. 3903G, *Loss of Use of Real Property (Economic Damage).*

Sources and Authority

- Three-Year Statute of Limitations. Code of Civil Procedure section 338.
- No Lapse of Time Can Legalize Public Nuisance. Civil Code section 3490.
- "[A] trespass may be continuing or permanent. A permanent trespass is an intrusion on property under circumstances that indicate an intention that the trespass shall be permanent. In these cases, the law considers the wrong to be completed at the time of entry and allows recovery of damages for past, present, and future harm in a single action, generally the diminution in the property's value. The cause of action accrues and the statute of limitations begins to run at the time of entry. . . . [¶] In contrast, a continuing trespass is an intrusion under circumstances that indicate the trespass may be discontinued or abated. In these circumstances, damages are assessed for present and past damages only; prospective damages are not awarded because the trespass may be discontinued or abated at some time, ending the harm. . . . Continuing trespasses are essentially a series of successive injuries, and the statute of limitations begins anew with each injury. In order to recover for all harm inflicted by a continuing trespass, the plaintiff is required to bring periodic successive actions." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 592.)
- "Two distinct classifications have emerged in nuisance law which determine the remedies available to injured parties and the applicable statute of limitations. On the one hand, permanent nuisances are of a type where 'by one act a permanent injury is done, [and] damages are assessed once for all.' . . . In such cases, plaintiffs ordinarily are required to bring one action for all past, present and future damage within three years after the permanent nuisance is erected. The statutory period is shorter for claims against public entities. (Gov. Code, § 911.2.) Damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes into existence. [¶] On the other hand, if a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. Recovery is limited, however, to actual injury suffered prior to commencement of each action. Prospective damages are unavailable." (*Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 868–869 [218 Cal.Rptr. 293, 705 P.2d 866], internal citations and footnotes omitted.)
- "Historically, the application of the statute of limitations for trespass has been the same as for nuisance and has depended on whether the trespass has been continuing or permanent." (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1148 [281 Cal.Rptr. 827].)
- "[G]enerally the principles governing the permanent or continuing nature of a

trespass or nuisance are the same and the cases discuss the two causes of action without distinction." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 594.)

- "Generally, whether a trespass is continuing or permanent is a question of fact properly submitted to the jury. A trial court may remove the issue of fact from the jury by directed verdict only if there is no evidence tending to prove the case of the party opposing the motion." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 597, internal citations omitted.)
- "[T]he key question [in determining whether a trespass is continuous or permanent] is whether the trespass or nuisance can be discontinued or abated and there are a number of tests used to answer this question. A respected legal treatise summarizes the various tests as follows: '[W]hether (1) the offense activity is currently continuing, which indicates that the nuisance is continuing, (2) the impact of the condition will vary over time, indicating a continuing nuisance, or (3) the nuisance can be abated at any time, in a reasonable manner and for reasonable cost, and is feasible by comparison of the benefits and detriments to be gained by abatement.' " (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at pp. 593–594, citing 8 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 22.39, pp. 148–149.)
- "The jury's conclusion that it was unknown whether the soil contamination could be abated by reasonable means at a reasonable cost means that plaintiff had failed to prove her claims of continuing nuisance and trespass." (*McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 86 [103 Cal.Rptr.3d 37].)
- "[T]he 'continuing' nature of a nuisance 'refers to the continuing damage caused by the offensive condition, not to the acts causing the offensive condition to occur.' " (*Lyles, supra,* 153 Cal.App.4th at p. 291, internal citation omitted.)
- "[A] cause of action for damage to real property accrues when the defendant's act causes '*immediate and permanent* injury' to the property or, to put it another way, when there is '[a]ctual and appreciable harm' to the property." (*Siegel v. Anderson Homes, Inc.* (2004) 118 Cal.App.4th 994, 1005 [13 Cal.Rptr.3d 462], original italics, internal citations omitted.)
- "Property damage cases . . . are different from medical malpractice cases in the sense that, when property is damaged, there is ordinarily some wrongful cause. Thus, when one's property is damaged, one should reasonably suspect that someone has done something wrong to him and, accordingly, be charged with knowledge of the information that would have been revealed by an investigation. That particular property damage could result from natural causes does not mean that the same property damage could result only from natural causes." (*Lyles, supra,* 153 Cal.App.4th at pp. 287–288.)
- "The traditional rule in tort cases is that the statute of limitations begins to run upon the *occurrence* of the last fact essential to the cause of action. Although sometimes harsh, the fact that plaintiff is neither aware of his cause of action nor of the identity of a wrongdoer will not toll the statute. [¶] The harshness of this

rule has been ameliorated in some cases where it is manifestly unjust to deprive plaintiffs of a cause of action before they are aware that they have been injured. This modified rule has been applied to latent defects in real property and improvements. In the case of such latent defects the statute of limitations begins to run only when 'noticeable damage occurs.' " (*Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 406–407 [163 Cal.Rptr. 711], internal citations omitted, disapproved on another ground in *Trope v. Katz* (1995) 11 Cal.4th 274, 292 [45 Cal.Rptr.2d 241, 902 P.2d 259], original italics.)

Secondary Sources

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass,* § 17.09[5] (Matthew Bender)

Brown et al., California Practice Guide: Civil Procedure Before Trial, Ch. 6-C, *Pleadings* ¶¶ 6:462–6:462.2 (The Rutter Group)

2 California Real Property Remedies and Damages, Ch. 11, *Remedies for Nuisance and Trespass* (Cont.Ed.Bar 2d ed.) §§ 11.38–11.40

1 California Forms of Pleading and Practice, Ch. 11, *Adjoining Landowners*, § 11.24 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, §§ 225.240–225.245 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.44 (Matthew Bender)

2031. Damages for Annoyance and Discomfort—Trespass or Nuisance

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If you decide that [*name of plaintiff***] has proved that [***name of defendant***] committed a [trespass/nuisance], [***name of plaintiff***] may recover damages that would reasonably compensate [him/her/***nonbinary pronoun***] for the annoyance and discomfort, including emotional distress or mental anguish, caused by the injury to [his/her/***nonbinary pronoun***] peaceful enjoyment of the property that [he/she/***nonbinary pronoun***] occupied**.

New December 2010; Revised November 2017

Directions for Use

Give this instruction if the plaintiff claims damages for annoyance and discomfort resulting from a trespass or nuisance, including emotional distress or mental anguish proximately caused by the trespass or nuisance. (*Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App.5th 1337, 1348–1349 [213 Cal.Rptr.3d 803]; but see *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 456 [102 Cal.Rptr.3d 32] [damages for annoyance and discomfort are distinct from general damages for mental or emotional distress]; see also *Vieira Enterprises, Inc. v. McCoy* (2017) 8 Cal.App.5th 1057, 1094 [214 Cal.Rptr.3d 193 [workability of distinction between damages for annoyance and discomfort and general damages "may be questioned"].)

There may also be a split of authority as to whether the plaintiff must have been in immediate possession of the property in order to recover for annoyance and discomfort. (Compare *Hensley, supra,* 7 Cal.App.5th at pp. 1352–1355 [no limitation] with *Kelly, supra,* 179 Cal.App.4th at p. 458 [plaintiff must be in immediate possession of the property]; see also *Vieira Enterprises, Inc., supra,* 8 Cal.App.5th at p. 1094 [not necessary that the plaintiff be present at the moment of a tortious invasion of the property].)

Sources and Authority

- "Once a cause of action for trespass or nuisance is established, an occupant of land may recover damages for annoyance and discomfort that would naturally ensue therefrom." (*Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 272 [288 P.2d 507].)
- "[T]he restrictions on emotional distress damages involved in breach of contract or negligence cases do not apply when a plaintiff's emotional distress is the result of the defendant's commission of a tort arising from an invasion of a property interest." (*Hensley, supra,* 7 Cal.App.5th at pp. 1356–1357.)
- "[O]nce a cause of action for trespass or nuisance is established, a landowner may recover for annoyance and discomfort, *including emotional distress or mental anguish,* proximately caused by the trespass or nuisance. . . . [¶] This is so even where the trespass or nuisance involves solely property damage."

(*Hensley, supra,* 7 Cal.App.5th at pp. 1348–1349, original italics.)

- "[Plaintiff]'s fear, stress and anxiety suffered as a direct and proximate result of the fire and its attendant damage, loss of use and enjoyment are compensable as damages for annoyance and discomfort." (*Hensley, supra,* 7 Cal.App.5th at p. 1351.)
- "We reject [defendant]'s contention that in order for emotional distress damages to 'naturally ensue' from a trespass or nuisance, the owner or occupant must be personally or physically present on the invaded property during the trespass or nuisance." (*Hensley, supra,* 7 Cal.App.5th at p. 1352.)
- "We do not question that a nonresident property owner may suffer mental or emotional distress from damage to his or her property. But annoyance and discomfort damages are distinct from general damages for mental and emotional distress. Annoyance and discomfort damages are intended to compensate a plaintiff for the loss of his or her peaceful occupation and enjoyment of the property. . . . 'We recognize that annoyance and discomfort by their very nature include a mental or emotional component, and that some dictionary definitions of these terms include the concept of distress. Nevertheless, the "annoyance and discomfort" for which damages may be recovered on nuisance and trespass claims generally refers to distress arising out of physical discomfort, irritation, or inconvenience caused by odors, pests, noise, and the like. Our cases have permitted recovery for annoyance and discomfort damages on nuisance and trespass claims while at the same time precluding recovery for "pure" emotional distress.' " (*Kelly*, *supra*, 179 Cal.App.4th at p. 456, internal citations omitted.)
- "California cases upholding an award of annoyance and discomfort damages have involved a plaintiff who was in immediate possession of the property as a resident or commercial tenant. We are aware of no California case upholding an award of annoyance and discomfort damages to a plaintiff who was not personally in immediate possession of the property." (*Kelly*, *supra*, 179 Cal.App.4th at p. 458, internal citations omitted.)
- "*Kelly* stands only for the proposition that legal occupancy is required to recover damages for annoyance and discomfort in a trespass case, and that standard requires immediate and personal possession, as a resident or commercial tenant would have. Here, there is no dispute the [plaintiffs] both owned and resided on their property, and they meet the legal standard of occupancy necessary to claim damages for annoyance, discomfort, inconvenience or mental anguish proximately caused by the trespass, as the jury was instructed without controversy in *Kelly. Kelly* does not hold that an occupant must be personally or physically present *at the time of the harmful invasion* to deem emotional distress damages "naturally ensuing" therefrom." (*Hensley, supra,* 7 Cal.App.5th at pp. 1354–1355, original italics, internal citation omitted.)
- "[I]t is not necessary that the plaintiff be present at the moment of a tortious invasion of the property. But it is necessary that the annoyance and discomfort arise from and relate to some personal effect of the *interference with use and*

enjoyment which lies at the heart of the tort of trespass." (*Vieira Enterprises, Inc., supra,* 8 Cal.App.5th at p. 1094, original italics.)

- "[A] plaintiff may recover damages for annoyance and discomfort proximately caused by tortious injuries to trees on her property if she was in immediate and personal possession of the property at the time of the trespass." (*Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1313 [212 Cal.Rptr.3d 920], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1915

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.23 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, § 550.21 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.145 (Matthew Bender)

2032–2099. Reserved for Future Use

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] [own/lease/occupy/control] the property?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[Did [*name of defendant*] intentionally [enter/ [or] cause [another person/[*insert name of thing*]] to enter] [*name of plaintiff*]'s property?]**

   [*or*]

   [Did [*name of defendant*], although not intending to do so, [recklessly/ [or] negligently] [enter/ [or] cause [another person/ [*insert name of thing*]] to enter] [*name of plaintiff*]'s property?]

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] enter the property without [*name of plaintiff*]'s permission?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s [entry/conduct] a substantial factor in causing [actual] harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised February 2005, April 2007, December 2010, June 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2000, *Trespass—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 3 can be modified, as in element 3 in CACI No. 2000.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2001. Trespass—Affirmative Defense—Necessity

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] [own/lease/occupy/control] the property?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] intentionally [enter/ [or] cause [another person/[*insert name of thing*]] to enter] [*name of plaintiff*]'s property?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] enter the property without [*name of plaintiff*]'s permission?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was it necessary, or did it reasonably appear to [*name of defendant*] to be necessary, to enter the land to prevent serious harm to a person or property?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of defendant*]'s [entry/conduct] a substantial factor in causing [actual] harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised February 2005, April 2007, October 2008, December 2010, June 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2000, *Trespass—Essential Factual Elements*, and CACI No. 2005, *Affirmative Defense—Necessity*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 3 can be modified, as in element 3 in CACI No. 2000.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages,

especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2002. Trespass—Extrahazardous Activities

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [own/lease/occupy/control] the property?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of defendant***] engaged in [***insert extrahazardous activity***]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***insert extrahazardous activity***] cause [***insert thing***] to enter [***name of plaintiff***]'s property?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of plaintiff***] give permission for the entry?**

   _____ Yes _____ No

   If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2001, *Trespass—Extrahazardous Activities*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 4 can be modified.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2003. Trespass to Timber (Civ. Code, § 3346)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] [own/lease/occupy/control] the property?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[Did [*name of defendant*] intentionally enter [*name of plaintiff*]'s property and [cut down or damage trees/take timber] located on the property?]**

   [*or*]

   [Did [*name of defendant*], although not intending to do so, [recklessly/ [or] negligently] enter [*name of plaintiff*]'s property and damage trees located on the property?]

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of plaintiff*] give permission to [cut down or damage the trees/take timber]?**

   _____ Yes _____ No

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2002, *Trespass to Timber—Essential Factual Elements*. The amount of actual damages found by the jury is to be doubled. (See Civ. Code, § 3346(a).) The court can do the computation based on the jury's award.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 3 can be modified, as in element 3 in CACI No. 2002.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2004. Trespass to Timber—Willful and Malicious Conduct (Civ. Code, § 3346; Code Civ. Proc., § 733)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] [own/lease/occupy/control] the property?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[Did [*name of defendant*] intentionally enter [*name of plaintiff*]'s property and [cut down or damage trees/take timber] located on the property?]**

   [*or*]

   [Did [*name of defendant*], although not intending to do so, recklessly enter [*name of plaintiff*]'s property and damage trees located on the property?]

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of plaintiff*] give permission to [cut down or damage the trees/take timber]?**

   _____ Yes _____ No

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [*name of defendant*] act willfully and maliciously?**

   _____ Yes _____ No

   Answer question 6.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2002, *Trespass to Timber—Essential Factual Elements*, and CACI No. 2003, *Damage to Timber—Willful and Malicious Conduct*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there is an issue regarding whether the defendant exceeded the scope of the

plaintiff's consent, question 3 can be modified as in element 3 in CACI No. 2002.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2005. Public Nuisance

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*], by acting or failing to act, create a condition that was harmful to health?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did the condition affect a substantial number of people at the same time?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Would an ordinary person have been reasonably annoyed or disturbed by the condition?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did the seriousness of the harm outweigh the social utility of [*name of defendant*]'s conduct?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [*name of plaintiff*] consent to [*name of defendant*]'s conduct?**

   _____ Yes _____ No

   If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Did [*name of plaintiff*] suffer harm that was different from the type of harm suffered by the general public?**

   _____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s harm?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2007, December 2010, December 2016, May 2024

Directions for Use

This form is based on CACI No. 2020, *Public Nuisance—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Other factual situations may be substituted in question 1 as in element 1 of CACI No. 2020.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

Depending on the facts of the case, question 1 can be modified, as in element 1 of CACI No. 2020.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2006. Private Nuisance

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] [own/lease/occupy/control] the property?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*], by acting or failing to act, create a condition or permit a condition to exist that was harmful to health?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did this condition substantially interfere with [*name of plaintiff*]'s use or enjoyment of [his/her/*nonbinary pronoun*] land?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Would an ordinary person have reasonably been annoyed or disturbed by [*name of defendant*]'s conduct?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [*name of plaintiff*] consent to [*name of defendant*]'s conduct?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did the seriousness of the harm outweigh the public benefit of [*name of defendant*]'s conduct?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other past economic loss	**$ _____]**

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other future economic loss	**$ _____]**

Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2007, December 2010, December 2011, December 2016, May 2017, May 2024

Directions for Use

This form is based on CACI No. 2021, *Private Nuisance—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Depending on the facts of the case, question 2 may be replaced with one of the other options from element 2 of CACI No. 2021.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2007–VF-2099. Reserved for Future Use

CONVERSION

2100. Conversion—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully exercised control over [his/her/***nonbinary pronoun***/its] personal property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/possessed/had a right to possess] [a/an] [***insert item of personal property***];**
2. **That [***name of defendant***] substantially interfered with [***name of plaintiff***]'s property by knowingly or intentionally [***insert one or more of the following:***]**

   [taking possession of the [*insert item of personal property***];] [or]**

   [preventing [*name of plaintiff***] from having access to the [***insert item of personal property***];] [or]**

   [destroying the [*insert item of personal property***];] [or]**

   [refusing to return the [*insert item of personal property***] after [***name of plaintiff***] demanded its return.]**
3. **That [***name of plaintiff***] did not consent;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2009, December 2010, May 2017

Directions for Use

The last option for element 2 may be used if the defendant's original possession of the property was not tortious. (See *Atwood v. S. Cal. Ice Co.* (1923) 63 Cal.App. 343, 345 [218 P. 283], disapproved on other grounds in *Wilson v. Crown Transfer & Storage Co.* (1927) 201 Cal. 701 [258 P. 596].)

Sources and Authority

- "Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240 [191 Cal.Rptr.3d 536, 354 P.3d 334].)
- "It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use." . . .' "

(*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1507 [85 Cal.Rptr.3d 268].)

- "[A]ny act of dominion wrongfully exerted over the personal property of another inconsistent with the owner's rights thereto constitutes conversion." (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 50 [108 Cal.Rptr.3d 455].)
- "To prove a cause of action for conversion, the plaintiff must show the defendant acted intentionally to wrongfully dispose of the property of another." (*Duke v. Superior Court* (2017) 18 Cal.App.5th 490, 508 [226 Cal.Rptr.3d 807].)
- "[Conversion] must be knowingly or intentionally done, but a *wrongful intent* is not necessary. Because the act must be knowingly done, 'neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.' It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion." (*Taylor v. Forte Hotels Int'l* (1991) 235 Cal.App.3d 1119, 1124 [1 Cal.Rptr.2d 189], original italics, internal citations omitted.)
- "[C]onversion is a strict liability tort. It does not require bad faith, knowledge, or even negligence; it requires only that the defendant have intentionally done the act depriving the plaintiff of his or her rightful possession." (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1158 [250 Cal.Rptr.3d 779, 446 P.3d 284].)
- " ' "Conversion is a strict liability tort," ' so the Bank cannot defeat the claim on the grounds that it accepted a forged signature in good faith. Financial institutions can be liable to their depositors for transferring money out of their accounts on forged instruments." (*Fong v. East West Bank* (2018) 19 Cal.App.5th 224, 235 [227 Cal.Rptr.3d 838], internal citation omitted.)
- "The rule of strict liability applies equally to purchasers of converted goods, or more generally to purchasers from sellers who lack the power to transfer ownership of the goods sold. That is, there is no general exception for bona fide purchasers." (*Regent Alliance Ltd. v. Rabizadeh* (2014) 231 Cal.App.4th 1177, 1181 [180 Cal.Rptr.3d 610], internal citations omitted.)
- "There are recognized exceptions to the general rule of strict liability. Some exceptions are based on circumstances in which 'the person transferring possession may have the legal power to convey to a bona fide transferee a good title,' as, for example, when 'a principal has clothed an agent in apparent authority exceeding that which was intended.' Another exception concerns goods obtained by means of a fraudulent misrepresentation. If the party who committed the fraud then sells the goods to 'a bona fide purchaser' who 'takes for value and without notice of the fraud, then such purchaser gets good title to the chattel and may not be held for conversion (though the original converter may be).' " (*Regent Alliance Ltd., supra*, 231 Cal.App.4th at p. 1183, internal citation omitted.)
- "[I]t is generally acknowledged that conversion is a tort that may be committed

only with relation to personal property and not real property." (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7 [89 Cal.Rptr. 323], disagreeing with *Katz v. Enos* (1945) 68 Cal.App.2d 266, 269 [156 P.2d 461].)

- "The first element of that cause of action is his ownership or right to possession of the property at the time of the conversion. Once it is determined that [plaintiff] has a right to reinstate the contract, he has a right to possession of the vehicle and standing to bring conversion. Unjustified refusal to turn over possession on demand constitutes conversion even where possession by the withholder was originally obtained lawfully and of course so does an unauthorized sale." (*Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609 [218 Cal.Rptr. 15], internal citations omitted.)
- " 'To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. . . . Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.' " (*Moore v. Regents of the Univ. of Cal.* (1990) 51 Cal.3d 120, 136 [271 Cal.Rptr. 146, 793 P.2d 479], internal citations omitted.)
- "In a conversion action the plaintiff need show only that he was entitled to possession at the time of conversion; the fact that plaintiff regained possession of the converted property does not prevent him from suing for damages for the conversion." (*Enterprise Leasing Corp. v. Shugart Corp*. (1991) 231 Cal.App.3d 737, 748 [282 Cal.Rptr. 620], internal citation omitted.)
- "Neither legal title nor absolute ownership of the property is necessary. . . . A party need only allege it is 'entitled to immediate possession at the time of conversion. . . .' . . . However, a mere contractual right of payment, without more, will not suffice." (*Plummer, supra,* 184 Cal.App.4th at p. 45, internal citation omitted.)
- "[A] claim for unpaid wages resembles other actions for a particular amount of money owed in exchange for contractual performance—a type of claim that has long been understood to sound in contract, rather than as the tort of conversion." (*Voris, supra,* 7 Cal.5th at p. 1156.)
- "The existence of a lien . . . can establish the immediate right to possess needed for conversion. 'One who holds property by virtue of a lien upon it may maintain an action for conversion if the property was wrongfully disposed of by the owner and without authority . . . .' Thus, attorneys may maintain conversion actions against those who wrongfully withhold or disburse funds subject to their attorney's liens." (*Plummer, supra,* 184 Cal.App.4th at p. 45, internal citation omitted.)
- "Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use. As [plaintiff] was a cotenant

and had the right of possession of the realty, which included the right to keep his personal property thereon, [defendant]'s act of placing the goods in storage, although not constituting the assertion of ownership and a substantial interference with possession to the extent of a conversion, amounted to an intermeddling. Therefore, [plaintiff] is entitled to actual damages in an amount sufficient to compensate him for any impairment of the property or loss of its use." (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551–552 [176 P.2d 1], internal citation omitted.)

- "[T]he law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property." (*Farrington v. A. Teichert & Son, Inc.* (1943) 59 Cal.App.2d 468, 474 [139 P.2d 80], internal citations omitted.)
- "As to intentional invasions of the plaintiff's interests, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort. 'The absence of lawful consent,' said Mr. Justice Holmes, 'is part of the definition of an assault.' The same is true of false imprisonment, conversion, and trespass." (*Tavernier v. Maes* (1966) 242 Cal.App.2d 532, 552 [51 Cal.Rptr. 575], internal citations omitted.)
- "If a defendant is authorized to make a specific use of a plaintiff's property, use in excess of that authorized may subject the defendant to liability for conversion, if such use seriously violates another's right to control the use of the property." (*Duke, supra,* 18 Cal.App.5th at p. 506.)
- "[D]amages for emotional distress growing out of a defendant's conversion of personal property are recoverable." (*Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App.5th.1337, 1358 [213 Cal.Rptr.3d 803].)
- " 'Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment.' A 'generalized claim for money [is] not actionable as conversion.' " (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395 [58 Cal.Rptr.3d 516], internal citations omitted.)
- "Generally, conversion has been held to apply to the taking of intangible property rights when 'represented by documents, such as bonds, notes, bills of exchange, stock certificates, and warehouse receipts.' As one authority has written, 'courts have permitted a recovery for conversion of assets reflected in such documents as accounts showing amounts owed, life insurance policies, and other evidentiary documents. These cases are far removed from the paradigm case of physical conversion; they are essentially financial or economic tort cases, not physical interference cases.' " (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 209 [166 Cal.Rptr.3d 877], internal citation omitted.)
- "[I]t is 'well settled in California that shares of corporate stock are subject to an action in conversion' and 'it is not necessary that possession of the certificate evidencing title be disturbed.' Instead, it is sufficient that there is interference

with the owner's 'free and unhampered right to dispose of property without limitations imposed by strangers to the title.' " (*Applied Medical Corp. v. Thomas* (2017) 10 Cal.App.5th 927, 938 [217 Cal.Rptr.3d 169].)

- "[T]here is no special rule preventing a depositor from pursuing a conversion action against the bank that holds his or her money. . . . 'The law applicable to conversion of personal property applies to instruments,' which includes certificates of deposit." (*Fong, supra,* 19 Cal.App.5th at pp. 232–233.)
- "Credit card, debit card, or PayPal information may be the subject of a conversion." (*Welco Electronics, Inc., supra*, 223 Cal.App.4th at p. 212, footnote omitted.)
- "One who buys property in good faith from a party lacking title and the right to sell may be liable for conversion. The remedies for conversion include specific recovery of the property, damages, and a quieting of title." (*State Farm Mut. Auto. Ins. Co. v. Department of Motor Vehicles* (1997) 53 Cal.App.4th 1076, 1081–1082 [62 Cal.Rptr.2d 178], internal citations omitted.)
- "In order to establish a conversion, the plaintiff 'must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.' Thus, a necessary element of the tort is an intent to exercise ownership over property which belongs to another. For this reason, conversion is considered an intentional tort." (*Collin v. American Empire Insurance Co.* (1994) 21 Cal.App.4th 787, 812 [26 Cal.Rptr.2d 391], internal citations omitted.)
- "A conversion can occur when a willful failure to return property deprives the owner of possession." (*Fearon v. Department of Corrections* (1984) 162 Cal.App.3d 1254, 1257 [209 Cal.Rptr. 309], internal citation omitted.)
- "A demand for return of the property is not a condition precedent to institution of the action when possession was originally acquired by a tort as it was in this case." (*Igauye v. Howard* (1952) 114 Cal.App.2d 122, 127 [249 P.2d 558].)
- " 'Negligence in caring for the goods is not an act of dominion over them such as is necessary to make the bailee liable as a converter.' Thus a warehouseman's negligence in causing a fire which destroyed the plaintiffs' goods will not support a conversion claim." (*Gonzales v. Pers. Storage* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473], internal citations omitted.)
- "Although damages for conversion are frequently the equivalent to the damages for negligence, i.e., specific recovery of the property or damages based on the value of the property, negligence is no part of an action for conversion." (*Taylor, supra* 235 Cal.App.3d at p. 1123, internal citation omitted.)
- "A person without legal title to property may recover from a converter if the plaintiff is responsible to the true owner, such as in the case of a bailee or pledgee of the property." (*Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1096 [64 Cal.Rptr.2d 457], internal citation omitted.)

- "With respect to plaintiffs' causes of action for conversion, '[o]ne is privileged to commit an act which would otherwise be a trespass to or a conversion of a chattel in the possession of another, for the purpose of defending himself or a third person against the other, under the same conditions which would afford a privilege to inflict a harmful or offensive contact upon the other for the same purpose.' 'For the purpose of defending his own person, an actor is privileged to make intentional invasions of another's interests or personality when the actor reasonably believes that such other person intends to cause a confinement or a harmful or offensive contact to the actor, of that such invasion of his interests is reasonably probable, and the actor reasonably believes that the apprehended harm can be safely prevented only by the infliction of such harm upon the other. A similar privilege is afforded an actor for the protection of certain third persons.' " (*Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 1072 [283 Cal.Rptr. 917], internal citations omitted [labeled "defense of justification"]; see Rest.2d Torts, § 261.)
- "We recognize that the common law of conversion, which developed initially as a remedy for the dispossession or other loss of chattel, may be inappropriate for some modern intangible personal property, the unauthorized use of which can take many forms. In some circumstances, newer economic torts have developed that may better take into account the nature and uses of intangible property, the interests at stake, and the appropriate measure of damages. On the other hand, if the law of conversion can be adapted to particular types of intangible property and will not displace other, more suitable law, it may be appropriate to do so. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 124 [55 Cal.Rptr.3d 621], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 810–831

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 2-C, *Tort Liability*, ¶ 2:427.4 et seq. (The Rutter Group)

Rylaarsdam & Turner, California Practice Guide: Civil Procedure Before Trial—Statutes of Limitations, Ch. 4-D, *Actions Involving Personal Property (Including Intangibles)*, ¶ 4:1101 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.40 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 150, *Conversion*, §§ 150.10, 150.40, 150.41 (Matthew Bender)

5 California Points and Authorities, Ch. 51, *Conversion*, § 51.21[3][b] (Matthew Bender)

2101. Trespass to Chattels—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully trespassed on [his/her/***nonbinary pronoun***/its] personal property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/possessed/had a right to possess] a [***insert item of personal property***];**
2. **That [***name of defendant***] intentionally [***insert one or more of the following:***]**

   [interfered with [*name of plaintiff***]'s use or possession of the [***insert item of personal property***];]**

   [*or*]

   [damaged the [*insert item of personal property***];]**
3. **That [***name of plaintiff***] did not consent;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Sources and Authority

- "Trespass to chattel, although seldom employed as a tort theory in California . . . , lies where an intentional interference with the possession of personal property has proximately caused injury. Prosser notes trespass to chattel has evolved considerably from its original common law application—concerning the asportation of another's tangible property—to include even the unauthorized use of personal property: 'Its chief importance now,' according to Prosser, 'is that there may be recovery . . . for interferences with the possession of chattels which are not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered. Trespass to chattels survives today, in other words, largely as a little brother of conversion.' " (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566–1567 [54 Cal.Rptr.2d 468], footnotes and internal citations omitted.)
- "Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use." (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551 [176 P.2d 1], internal citations omitted.)

- " 'Though not amounting to conversion, the defendant's interference must, to be actionable, have caused some injury to the chattel or to the plaintiff's rights in it. Under California law, trespass to chattels "lies where an intentional interference with the possession of personal property *has proximately caused injury*." In cases of interference with possession of personal property not amounting to conversion, "the owner has a cause of action for trespass or case, and *may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use*." . . .' " (*Jamgotchian v. Slender* (2009) 170 Cal.App.4th 1384, 1400–1401 [89 Cal.Rptr.3d 122], original italics, internal citations omitted.)
- "It is well settled that a person having neither the possession nor the right to the possession of personal chattels, cannot maintain trespass or trover for an injury done to the property." (*Triscony v. Orr* (1875) 49 Cal. 612, 617, internal citations omitted.)
- "[A] plaintiff alleging trespass to chattels based on unauthorized access to a computer system must allege damage or disruption to that computer system." (*Casillas v. Berkshire Hathaway Homestate Ins. Co.* (2022) 79 Cal.App.5th 755, 764 [294 Cal.Rptr.3d 841].)
- "[W]e uphold both the economic and emotional distress damages plaintiffs recovered for trespass to personal property arising from [defendant]'s act of intentionally striking [plaintiff's dog] with a bat." (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1608 [146 Cal.Rptr.3d 585].)
- Restatement Second of Torts, section 218, provides:

  "One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,

  (a) he dispossesses the other of the chattel, or

  (b) the chattel is impaired as to its condition, quality, or value, or

  (c) the possessor is deprived of the use of the chattel for a substantial time, or

  (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest."
- Restatement Second of Torts, section 222, comment (a), states: "Normally any dispossession is so clearly a serious interference with the right of control that it amounts to a conversion; and it is frequently said that any dispossession is a conversion. There may, however, be minor and unimportant dispossessions, such as taking another man's hat by mistake and returning it within two minutes upon discovery of the mistake, which do not seriously interfere with the other's right of control, and so do not amount to conversion. In such a case the remedy of the action of trespass remains, and will allow recovery of damages for the interference with the possession."

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 2-C, *Tort Liability*, ¶ 2:427.4 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 16, *Landlord-Tenant Tort Liabilities*, §§ 16.07, 40.43 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, § 550.13 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, §§ 225.260–225.262 (Matthew Bender)

2102. Presumed Measure of Damages for Conversion (Civ. Code, § 3336)

If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***/its] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

[*Name of plaintiff***] must prove the amount of [his/her/***nonbinary pronoun***/its] damages. However, [***name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **[The fair market value of the [***insert item of personal property***] at the time [***name of defendant***] wrongfully exercised control over it;]**

   [*or*]

   [Special damages resulting from [*name of defendant***]'s conduct;] [and]**

2. **Reasonable compensation for the time and money spent by [***name of plaintiff***] in attempting to recover the [***insert item of personal property***]; [and]**

3. **[Emotional distress suffered by [***name of plaintiff***] as a result of [***name of defendant***]'s conduct.]**

[In order to recover special damages, [*name of plaintiff***] must prove:**

1. **That [***describe special circumstances that require a measure of damages other than value***];**

2. **That it was reasonably foreseeable that special injury or harm would result from the conversion; and**

3. **That reasonable care on [***name of plaintiff***]'s part would not have prevented the loss.]**

["Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**

2. **That the buyer and seller know all the uses and purposes for which the [***insert item***] is reasonably capable of being used.]**

New September 2003

Directions for Use

The third element of listed damages, emotional distress, is bracketed because it appears that such damages are recoverable only if the second alternative measure of damages stated in the first paragraph of Civil Code section 3336 applies. (See *Gonzales v. Pers. Storage* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473].)

Sources and Authority

- Damages for Wrongful Conversion. Civil Code section 3336.
- Conversion of Negotiable Instruments. Commercial Code section 3420.
- Measure of Compensation for Property Taken. Code of Civil Procedure section 1263.320(a).
- "[W]e are of the opinion that section 3337 can only be held to apply to a situation where the property was voluntarily applied by the party guilty of conversion to the benefit of the injured party, and can have no application to a situation such as here where the application was compelled by a legal duty." (*Goldberg v. List* (1938) 11 Cal.2d 389, 393 [79 P.2d 1087].)
- "Although the first part of section 3336 appears to provide for alternative measures of recovery, the first of the two measures, namely the value of the property converted at the time and place of conversion with interest from that time, is generally considered to be the appropriate measure of damages in a conversion action. The determination of damages under the alternative provision is resorted to only where the determination on the basis of value at the time of conversion would be manifestly unjust." (*Myers v. Stephens* (1965) 233 Cal.App.2d 104, 116 [43 Cal.Rptr. 420], internal citations omitted.)
- "As a general rule, the value of the converted property is the appropriate measure of damages, and resort to the alternative occurs only where a determination of damages on the basis of value would be manifestly unjust. Accordingly, a person claiming damages under the alternative provision must plead and prove special circumstances that require a measure of damages other than value, and the jury must determine whether it was reasonably foreseeable that special injury or damage would result from the conversion." (*Lueter v. State of California* (2002) 94 Cal.App.4th 1285, 1302 [115 Cal.Rptr.2d 68], internal citations omitted.)
- "The damage measures set forth in the first paragraph of section 3336 are in the alternative. The first alternative is to compensate for the value of the property at the time of conversion with interest from the time of the taking. The second alternative is compensation in a sum equal to the amount of loss legally caused by the conversion and which could have been avoided with a proper degree of prudence. Both of these alternatives are in addition to the damage element for the time spent pursuing the converted property set forth in the second paragraph

of section 3336." (*Moreno v. Greenwood Auto Center* (2001) 91 Cal.App.4th 201, 209 [110 Cal.Rptr.2d 177], internal citations omitted.)

- "Conversion damages are calculated based on the detriment caused to the plaintiff. Such detriment caused by wrongful conversion of personal property is presumed to be the 'value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted.' ' "Money may be the subject of conversion if the claim involves a specific, identifiable sum." ' " (*Greif v. Sanin* (2022) 74 Cal.App.5th 412, 449 [289 Cal.Rptr.3d 484], internal citations omitted.)
- "Civil Code section 3336 sets out the presumptive measure of damages in conversion, which is rebuttable, save and except when section 3337 applies. Under Civil Code section 3337, a defendant cannot rebut the presumption by claiming that he applied the converted property to plaintiff's benefit when he took unlawful possession of the property from the beginning. Consequently, the effect of section 3337 is to prevent mitigation when property is stolen from the plaintiff and subsequently applied to his benefit. In this situation, the defendant will not be able to claim that his conversion benefited plaintiff; he will thereby be prevented from claiming an offset derived from his original wrong. In contrast to this situation, if the particular facts of a case indicate, as in the instant case, that the possession was lawful before the conversion occurred . . . Civil Code section 3337 is inapplicable, and a converter is not precluded from claiming mitigation of damages." (*Dakota Gardens Apartment Investors "B" v. Pudwill* (1977) 75 Cal.App.3d 346, 351–352 [142 Cal.Rptr. 126].)
- "[W]e conclude that notwithstanding further developments in the law of negligence, damages for emotional distress growing out of a defendant's conversion of personal property are recoverable." (*Gonzales, supra,* 56 Cal.App.4th at p. 477, internal citations omitted.)
- "In the absence of special circumstances the appropriate measure of damages for conversion of personal property is the fair market value of that property plus interest from the date of conversion, the standard first listed in section 3336, Civil Code. However, where proof establishes an injury beyond that which would be adequately compensated by the value of the property and interest, the court may award such amounts as will indemnify for all proximate reasonable loss caused by the wrongful act. Where damages for loss of use exceeds the legal rate of interest, it is appropriate to award the former, but not both." (*Lint v. Chisholm* (1981) 121 Cal.App.3d 615, 624–625 [177 Cal.Rptr. 314], internal citations omitted.)
- " 'To entitle a party to such compensation the [evidence] should tend to show that money was properly paid out and time properly lost in pursuit of the property, and how much.' Such evidence should be definite and certain. Expenses 'incurred in preparation for litigation and not in pursuit of property' cannot be allowed as damages under Civil Code section 3336. Additionally, any

such compensation must be fair, i.e., reasonable." (*Haines v. Parra* (1987) 193 Cal.App.3d 1553, 1559 [239 Cal.Rptr. 178], internal citations omitted.)

- "[A]lthough good faith and mistake are not defenses to an action for conversion, the plaintiff's damages will be reduced if the defendant returns the property or the plaintiff otherwise recovers the property." (*Krusi v. Bear, Stearns & Co.* (1983) 144 Cal.App.3d 664, 673 [192 Cal.Rptr. 793], internal citations omitted.)
- "Causes of action for conversion and trespass support an award for exemplary damages." (*Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 148 [173 Cal.Rptr. 751], internal citation omitted.)
- "Ordinarily 'value of the property' at the time of the conversion is determined by its market value at the time. However, '[w]here certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value . . . against a willful wrongdoer.' " (*In re Brian S.* (1982) 130 Cal.App.3d 523, 530 [181 Cal.Rptr. 778], internal citations omitted.)
- "In an action for damages for conversion, it is the rule that the plaintiff, although owning but a limited or qualified interest in the property, may, as against a stranger who has no ownership therein, recover the full value of the property converted." (*Camp v. Ortega* (1962) 209 Cal.App.2d 275, 286 [25 Cal.Rptr. 873], internal citations omitted.)
- "A plaintiff seeking recovery under the alternative provision of the statute must therefore plead and prove the existence of 'special circumstances which require a different measure of damages to be applied.' Having done so, the trier of fact must then determine 'whether it was reasonably forseeable to a prudent person, having regard for the accompanying circumstances, that injury or damage would likely result from his wrongful act.' " (*Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 215 [193 Cal.Rptr. 322], internal citations omitted.)
- "Defendants contend that the anticipated loss of profits is not 'the natural, reasonable and proximate result of the wrongful act complained of,' within the meaning of section 3336. Although no California case which has applied the alternative measure of damages in a conversion case has specifically defined this language, we are satisfied that its meaning is synonymous with the term 'proximate cause' or 'legal cause.' These terms mean, in essence, 'that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.' In determining whether this connection exists, the question is whether it was reasonably foreseeable to a prudent person, having regard for the accompanying circumstances, that injury or damage would likely result from his wrongful act. This question being one of fact to be determined generally by the trier of fact." (*Myers, supra,* 233 Cal.App.2d at pp. 119–120, internal citations omitted.)
- "In exceptional circumstances, to avoid injustice, loss of profits may be the measure." (*Newhart v. Pierce* (1967) 254 Cal.App.2d 783, 794 [62 Cal.Rptr. 553], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1906, 1907

4 Levy et al., California Torts, Ch. 50, *Damages*, §§ 50.01–50.03 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 150, *Conversion*, §§ 150.10, 150.16, 150.40–150.41 (Matthew Bender)

5 California Points and Authorities, Ch. 51, *Conversion* (Matthew Bender)

2103–2199. Reserved for Future Use

VF-2100. Conversion

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [own/possess/have a right to possess] a [***insert description of personal property***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] substantially interfere with [***name of plaintiff***]'s property by knowingly or intentionally [[taking possession of/preventing [***name of plaintiff***] from having access to] the [***insert description of personal property***]]/[destroying the [***insert description of personal property***]/refusing to return [***name of plaintiff***]'s [***insert description of personal property***] after [***name of plaintiff***] demanded its return]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] consent?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of plaintiff***] harmed?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of defendant***]'s conduct a substantial factor in causing [***name of plaintiff***]'s harm?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2005; Revised December 2009, December 2010, June 2011, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 2100, *Conversion—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the case involves multiple items of personal property as to which the evidence differs, users may need to modify question 2 to focus the jury on the different items.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2101–VF-2199. Reserved for Future Use

ECONOMIC INTERFERENCE

2200. Inducing Breach of Contract

[*Name of plaintiff*] claims that [*name of defendant*] intentionally caused [*name of third party*] to breach [his/her/*nonbinary pronoun*/its] contract with [*name of plaintiff*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That there was a contract between [*name of plaintiff*] and [*name of third party*];**
2. **That [*name of defendant*] knew of the contract;**
3. **That [*name of defendant*] intended to cause [*name of third party*] to breach the contract;**
4. **That [*name of defendant*]'s conduct caused [*name of third party*] to breach the contract;**
5. **That [*name of plaintiff*] was harmed; and**
6. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

If the validity of a contract is an issue, see the series of contracts instructions (CACI No. 300 et seq.).

Sources and Authority

- "[C]ases have pointed out that while the tort of inducing breach of contract requires proof of a breach, the cause of action for interference with contractual relations is distinct and requires only proof of interference." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1129 [270 Cal.Rptr. 1, 791 P.2d 587], internal citations omitted.)
- "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co.*, *supra*, 50 Cal.3d at p. 1126, internal citations omitted.)
- "[A] cause of action for intentional interference with contract requires an underlying enforceable contract. Where there is no existing, enforceable contract, only a claim for interference with prospective advantage may be pleaded."

(*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601 [52 Cal.Rptr.2d 877].)

- "The act of inducing the breach must be an intentional one. If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts." (*Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 37 [112 P.2d 631], internal citations omitted.)
- " 'To recover damages for inducing a breach of contract, the plaintiff need not establish that the defendant had full knowledge of the contract's terms. Comment i to Restatement Second of Torts, section 766, . . . states: "To be subject to liability [for inducing a breach of contract], the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract." ' " (*Jenni Rivera Enterprises, LLC v. Latin World Entertainment Holdings, Inc.* (2019) 36 Cal.App.5th 766, 783 [249 Cal.Rptr.3d 122].)
- "It is not enough that the actor intended to perform the acts which caused the result—he or she must have intended to cause the result itself." (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 261 [45 Cal.Rptr.2d 90].)
- "The question is whether a plaintiff must plead and prove that the defendant engaged in wrongful acts *with the specific intent* of interfering with the plaintiff's business expectancy. We conclude that specific intent is not a required element of the tort of interference with prospective economic advantage. While a plaintiff may satisfy the intent requirement by pleading specific intent, i.e., that the defendant desired to interfere with the plaintiff's prospective economic advantage, a plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1154 [131 Cal.Rptr.2d 29, 63 P.3d 937], original italics.)
- "The actionable wrong lies in the inducement to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable." (*Pacific Gas & Electric Co.*, *supra*, 50 Cal.3d at p. 1127.)
- " '[I]t may be actionable to induce a party to a contract to terminate the contract according to its terms.'. . .'[I]t is the contractual relationship, not any term of the contract, which is protected against outside interference.' " (*I-CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257, 289 [185 Cal.Rptr.3d 24], internal citation omitted.)
- "[T]he tort cause of action for interference with a contract does not lie against a party to the contract. [Citations.] [¶] . . . The tort duty not to interfere with the contract falls only on strangers-interlopers who have no legitimate interest in the scope or course of the contract's performance." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514 [28 Cal.Rptr.2d 475, 869 P.2d 454], internal citations omitted.)

- "[I]nterference with an at-will contract is actionable interference with the contractual relationship, on the theory that a contract 'at the will of the parties, respectively, does not make it one at the will of others. [Citations]' " (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1127, internal citations and quotations omitted.)
- "Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage, it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55 [77 Cal.Rptr.2d 709, 960 P.2d 513], internal citations omitted.)
- " '[A] person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other. [Citations.]' This is because, '[w]hatever interest society has in encouraging free and open competition by means not in themselves unlawful, contractual stability is generally accepted as of greater importance than competitive freedom.' A party may not, 'under the guise of competition actively and affirmatively induce the breach of a competitor's contract.' " (*I-CA Enterprises, Inc., supra,* 235 Cal.App.4th at p. 290, internal citations omitted.)
- "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1137.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 842–853

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.110–40.117 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.132 et seq. (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference*, § 122.20 et seq. (Matthew Bender)

2201. Intentional Interference With Contractual Relations—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with the contract between [him/her/***nonbinary pronoun***/it] and [***name of third party***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That there was a contract between [***name of plaintiff***] and [***name of third party***];**
2. **That [***name of defendant***] knew of the contract;**
3. **That [***name of defendant***]'s conduct prevented performance or made performance more expensive or difficult;**
4. **That [***name of defendant***] [intended to disrupt the performance of this contract/ [or] knew that disruption of performance was certain or substantially certain to occur];**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised June 2012, December 2013

Directions for Use

This tort is sometimes called intentional interference with performance of a contract. (See *Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280, 291 [136 Cal.Rptr.3d 97].) If the validity of a contract is an issue, see the series of contracts instructions (CACI No. 300 et seq.).

Sources and Authority

- "[A]llowing interference with at-will contract claims without requiring independent wrongfulness risks chilling legitimate business competition. An actionable claim for interference with contractual relations does not require that the defendant have the specific intent to interfere with a contract. A plaintiff states a claim so long as it alleges that the defendant knew interference was ' "certain or substantially certain to occur as a result of [defendant's] action." ' Without an independent wrongfulness requirement, a competitor's good faith offer that causes a business to withdraw from an at-will contract could trigger liability or at least subject the competitor to costly litigation. In fact, even if a business in an at-will contract solicits offers on its own initiative, a third party that submits an offer could face liability if it knew that acceptance of the offer would cause the soliciting business to withdraw from its existing contract. Allowing disappointed competitors to state claims for interference with at-will

contracts without alleging independently wrongful conduct may expose routine and legitimate business competition to litigation. [¶] We therefore hold that to state a claim for interference with an at-will contract by a third party, the plaintiff must allege that the defendant engaged in an independently wrongful act." (*Ixchel Pharma, LLC v. Biogen, Inc.* (2020) 9 Cal.5th 1130, 1148 [266 Cal.Rptr.3d 665, 470 P.3d 571], internal citation omitted.)

- "California recognizes a cause of action against *noncontracting parties* who interfere with the performance of a contract. 'It has long been held that *a stranger to a contract* may be liable in tort for intentionally interfering with the performance of the contract.' " (*Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 997 [230 Cal.Rptr.3d 98], original italics.)
- "[C]ases have pointed out that while the tort of inducing breach of contract requires proof of a breach, the cause of action for interference with contractual relations is distinct and requires only proof of interference." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1129 [270 Cal.Rptr. 1, 791 P.2d 587], internal citations omitted.)
- "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal.Rptr. 1, 791 P.2d 587], internal citations omitted.)
- "[A] cause of action for intentional interference with contract requires an underlying enforceable contract. Where there is no existing, enforceable contract, only a claim for interference with prospective advantage may be pleaded." (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601 [52 Cal.Rptr.2d 877].)
- "Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage, it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55 [77 Cal.Rptr.2d 709, 960 P.2d 513], internal citations omitted.)
- "The question is whether a plaintiff must plead and prove that the defendant engaged in wrongful acts *with the specific intent* of interfering with the plaintiff's business expectancy. We conclude that specific intent is not a required element of the tort of interference with prospective economic advantage. While a plaintiff may satisfy the intent requirement by pleading specific intent, i.e., that the defendant desired to interfere with the plaintiff's prospective economic advantage, a plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1154 [131

Cal.Rptr.2d 29, 63 P.3d 937], original italics.)

- "We caution that although we find the intent requirement to be the same for the torts of intentional interference with contract and intentional interference with prospective economic advantage, these torts remain distinct." (*Korea Supply Co., supra*, 29 Cal.4th at p. 1157.)
- "Plaintiff need not allege an actual or inevitable breach of contract in order to state a claim for disruption of contractual relations. We have recognized that interference with the plaintiff's performance may give rise to a claim for interference with contractual relations if plaintiff's performance is made more costly or more burdensome. Other cases have pointed out that while the tort of inducing breach of contract requires proof of a breach, the cause of action for interference with contractual relations is distinct and requires only proof of interference." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1129, internal citations omitted.)
- "*[A] contracting party* cannot be held liable in tort for conspiracy to interfere with its own contract." (*Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 961 [166 Cal.Rptr.3d 134], original italics.)
- "[O]ne, like [defendant] here, who is not a party to the contract or an agent of a party to the contract is a 'stranger' for purpose of the tort of intentional interference with contract. A nonparty to a contract that contemplates the nonparty's performance, by that fact alone, is not immune from liability for contract interference. Liability is properly imposed if each of the elements of the tort are otherwise satisfied." (*Redfearn*, *supra*, 20 Cal.App.5th at p. 1003.)
- "[I]nterference with an at-will contract is actionable interference with the contractual relationship, on the theory that a contract 'at the will of the parties, respectively, does not make it one at the will of others.' " (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1127, internal citations and quotations omitted.)
- "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1137.)
- "[A]n actor with ' "a financial interest in the business of another is privileged purposely to cause him not to enter into or continue a relation with a third person in that business if the actor [¶] (a) does not employ improper means, and [¶] (b) acts to protect his interest from being prejudiced by the relation[.]" ' " (*Asahi Kasei Pharma Corp, supra*, 222 Cal.App.4th at p. 962.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 854, 855, 875

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-F, *Intentional Interference With Contract Or Prospective Economic Advantage*, ¶ 5:461

et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.110–40.117 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.133 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference*, § 122.20 et seq. (Matthew Bender)

2202. Intentional Interference With Prospective Economic Relations—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with an economic relationship between [him/her/***nonbinary pronoun***/it] and [***name of third party***] that probably would have resulted in an economic benefit to [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of third party***] were in an economic relationship that probably would have resulted in an economic benefit to [***name of plaintiff***];**
2. **That [***name of defendant***] knew of the relationship;**
3. **That [***name of defendant***] engaged in [***specify conduct determined by the court to be wrongful***];**
4. **That by engaging in this conduct, [***name of defendant***] [intended to disrupt the relationship/ [or] knew that disruption of the relationship was certain or substantially certain to occur];**
5. **That the relationship was disrupted;**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised June 2013, December 2013

Directions for Use

Regarding element 3, the interfering conduct must be wrongful by some legal measure other than the fact of the interference itself. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 [45 Cal.Rptr.2d 436, 902 P.2d 740].) This conduct must fall outside the privilege of fair competition. (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603 [52 Cal.Rptr.2d 877], disapproved on other grounds in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159 fn. 11 [131 Cal.Rptr.2d 29, 63 P.3d 937].) Whether the conduct alleged qualifies as wrongful if proven or falls within the privilege of fair competition is resolved by the court as a matter of law. If the court lets the case go to trial, the jury's role is not to determine wrongfulness, but simply to find whether or not the defendant engaged in the conduct. If the conduct is tortious, the judge should instruct on the elements of the tort.

Sources and Authority

- "The tort of intentional or negligent interference with prospective economic

advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which fall outside the boundaries of fair competition." (*Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845 [17 Cal.Rptr.2d 757], internal citation omitted.)

- "The tort of interference with prospective economic advantage protects the same interest in stable economic relationships as does the tort of interference with contract, though interference with prospective advantage does not require proof of a legally binding contract. The chief practical distinction between interference with contract and interference with prospective economic advantage is that a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal.Rptr. 1, 791 P.2d 587], internal citations omitted.)
- "Intentional interference with prospective economic advantage has five elements: (1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action." (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512 [213 Cal.Rptr.3d 568, 388 P.3d 800]].)
- "The tort's requirements 'presuppose the relationship existed at the time of the defendant's allegedly tortious acts lest liability be imposed for actually and intentionally disrupting a relationship which has yet to arise.' " (*Roy Allan Slurry Seal, Inc., supra*, 2 Cal.5th at p. 518.)
- "The question is whether a plaintiff must plead and prove that the defendant engaged in wrongful acts *with the specific intent* of interfering with the plaintiff's business expectancy. We conclude that specific intent is not a required element of the tort of interference with prospective economic advantage. While a plaintiff may satisfy the intent requirement by pleading specific intent, i.e., that the defendant desired to interfere with the plaintiff's prospective economic advantage, a plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." (*Korea Supply Co., supra*, 29 Cal.4th at p. 1154, original italics.)
- "[A] plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." (*Della Penna, supra*, 11 Cal.4th at p. 393.)
- "With respect to the third element, a plaintiff must show that the defendant engaged in an independently wrongful act. It is not necessary to prove that the defendant acted with the specific intent, or purpose, of disrupting the plaintiff's

prospective economic advantage. Instead, 'it is sufficient for the plaintiff to plead that the defendant "[knew] that the interference is certain or substantially certain to occur as a result of his action." ' '[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.' '[A]n act must be wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive.' " (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1544–1545 [67 Cal.Rptr.3d 54], internal citations omitted.)

- "*Della Penna* did not specify what sort of conduct would qualify as 'wrongful' apart from the interference itself." (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 340 [60 Cal.Rptr.2d 539].)
- "Justice Mosk's concurring opinion in *Della Penna* advocates that proscribed conduct be limited to means that are independently tortious or a restraint of trade. The Oregon Supreme Court suggests that conduct may be wrongful if it violates 'a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession.' . . . Our Supreme Court may later have occasion to clarify the meaning of 'wrongful conduct' or 'wrongfulness,' or it may be that a precise definition proves impossible." (*Arntz Contracting Co. v. St. Paul Fire and Marine Insurance Co.* (1996) 47 Cal.App.4th 464, 477–478 [54 Cal.Rptr.2d 888], internal citations omitted.)
- "Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, defamation, trade libel or trade mark infringement." (*PMC, Inc., supra*, 45 Cal.App.4th at p. 603, internal citation omitted.)
- "[A] plaintiff need not allege the interference and a second act independent of the interference. Instead, a plaintiff must plead and prove that the conduct alleged to constitute the interference was independently wrongful, i.e., unlawful for reasons other than that it interfered with a prospective economic advantage. [Citations.]" (*Crown Imports, LLC v. Superior Court* (2014) 223 Cal.App.4th 1395, 1404 [168 Cal.Rptr.3d 228].)
- "The question has arisen as to whether, in order to be actionable as interference with prospective economic advantage, the interfering act must be independently wrongful *as to the plaintiff*. It need not be. There is 'no sound reason for requiring that a defendant's wrongful actions must be directed towards the plaintiff seeking to recover for this tort. The interfering party is liable to the interfered-with party [even] "when the independently tortious means the interfering party uses are independently tortious *only as to a third party*." ' " (*Crown Imports LLC, supra*, 223 Cal.App.4th at p. 1405, original italics.)
- "[T]o state a cause of action for intentional or negligent interference with prospective economic advantage, it is not necessary to also plead a separate, stand-alone tort cause of action." (*Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1006 [230 Cal.Rptr.3d 98], internal citations omitted.)

- "[O]ur focus for determining the wrongfulness of those intentional acts should be on the defendant's objective conduct, and evidence of motive or other subjective states of mind is relevant only to illuminating the nature of that conduct." (*Arntz Contracting Co., supra*, 47 Cal.App.4th at p. 477.)
- "[A]n essential element of the tort of intentional interference with prospective business advantage is the existence of a business relationship with which the tortfeasor interfered. Although this need not be a contractual relationship, an existing relationship is required." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 546 [30 Cal.Rptr.2d 706], internal citations omitted.)
- "If a party has no liability in tort for refusing to perform an existing contract, no matter what the reason, he or she certainly should not have to bear a burden in tort for refusing to *enter into* a contract where he or she has no obligation to do so. If that same party cannot conspire with a third party to breach or interfere with his or her own contract then certainly the result should be no different where the 'conspiracy' is to disrupt a relationship which has not even risen to the dignity of an existing contract and the party to that relationship was entirely free to 'disrupt' it on his or her own without legal restraint or penalty." (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 266 [45 Cal.Rptr.2d 90], original italics.)
- "Although varying language has been used to express this threshold requirement, the cases generally agree it must be reasonably probable that the prospective economic advantage would have been realized but for defendant's interference." (*Youst v. Longo* (1987) 43 Cal.3d 64, 71 [233 Cal.Rptr. 294, 729 P.2d 728], internal citations omitted.)
- "Under [the competition] privilege, ' "a competitor is free to divert business to himself as long as he uses fair and reasonable means.' [Citation.]' " (*I-CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257, 292–293 [185 Cal.Rptr.3d 24].)
- "Since the crux of the competition privilege is that one can interfere with a competitor's prospective contractual relationship with a third party as long as the interfering conduct is not independently wrongful (i.e., wrongful apart from the fact of the interference itself), *Della Penna*'s requirement that a plaintiff plead and prove such wrongful conduct in order to recover for intentional interference with prospective economic advantage has resulted in a shift of burden of proof. It is now the plaintiff's burden to prove, as an element of the cause of action itself, that the defendant's conduct was independently wrongful and, therefore, was not privileged rather than the defendant's burden to prove, as an affirmative defense, that it's [*sic*] conduct was not independently wrongful and therefore was privileged." (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 881 [60 Cal.Rptr.2d 830].)
- "[I]n the absence of other evidence, timing alone *may be sufficient* to prove causation . . . . Thus, . . . the real issue is whether, in the circumstances of the case, the proximity of the alleged cause and effect tends to demonstrate some

relevant connection. If it does, then the issue is one for the fact finder to decide." (*Overhill Farms, Inc. v. Lopez* (2010) 190 Cal.App.4th 1248, 1267 [119 Cal.Rptr.3d 127], original italics.)

- "There are three formulations of the manager's privilege: (1) absolute, (2) mixed motive, and (3) predominant motive." (*Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1391 [77 Cal.Rptr.2d 383].)
- "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co., supra*, 50 Cal.3d at p. 1137.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 854–855, 875

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-F, *Intentional Interference With Contract Or Prospective Economic Advantage*, ¶¶ 5:463, 5:470 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-G, *Intentional Interference With Contract Or Economic Advantage*, ¶ 11:138.5 (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.100–40.105 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.133 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference*, §§ 122.23, 122.32 (Matthew Bender)

2203. Intent

Revoked December 2013

2204. Negligent Interference With Prospective Economic Relations

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[*Name of plaintiff***] claims that [***name of defendant***] negligently interfered with a relationship between [him/her/***nonbinary pronoun***/it] and [***name of third party***] that probably would have resulted in an economic benefit to [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of third party***] were in an economic relationship that probably would have resulted in a future economic benefit to [***name of plaintiff***];**
2. **That [***name of defendant***] knew or should have known of this relationship;**
3. **That [***name of defendant***] knew or should have known that this relationship would be disrupted if [he/she/***nonbinary pronoun***/it] failed to act with reasonable care;**
4. **That [***name of defendant***] failed to act with reasonable care;**
5. **That [***name of defendant***] engaged in wrongful conduct through [***insert grounds for wrongfulness, e.g., breach of contract with another, misrepresentation, fraud, violation of statute***];**
6. **That the relationship was disrupted;**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s wrongful conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised November 2020

Directions for Use

Regarding the fifth element, the judge must specifically state for the jury the conduct that the judge has determined as a matter of law would satisfy the "wrongful conduct" standard. This conduct must fall outside the privilege of fair competition. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 [45 Cal.Rptr.2d 436, 902 P.2d 740]; *Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845 [17 Cal.Rptr.2d 757].) The jury must then decide whether the defendant engaged in the conduct as defined by the judge. If the conduct is tortious, judge should instruct on the elements of the tort.

Sources and Authority

- "The tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the

business relationship of another which fall outside the boundaries of fair competition." (*Settimo Associates, supra*, 14 Cal.App.4th at p. 845, internal citation omitted.)

- "The elements of negligent interference with prospective economic advantage are (1) the existence of an economic relationship between the plaintiff and a third party containing the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's knowledge (actual or construed) that the relationship would be disrupted if the defendant failed to act with reasonable care; (4) the defendant's failure to act with reasonable care; (5) actual disruption of the relationship; (6) and economic harm proximately caused by the defendant's negligence." (*Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1005 [230 Cal.Rptr.3d 98].)
- "The tort of negligent interference with prospective economic advantage is established where a plaintiff demonstrates that (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466].)
- " 'The tort of *negligent* interference with economic relationship arises only when the defendant owes the plaintiff a duty of care.' " (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 348 [60 Cal.Rptr.2d 539], original italics, internal citation omitted.)
- "Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity." (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804 [157 Cal.Rptr. 407, 598 P.2d 60].)
- The trial court should instruct the jury on the "independently wrongful" element of the tort of negligent interference with prospective economic advantage. (*National Medical Transportation Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 440 [72 Cal.Rptr.2d 720].)
- "Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, defamation, trade libel or trade mark infringement." (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603 [52 Cal.Rptr.2d 877], internal citation omitted, disapproved on other grounds in *Korea Supply Co. v. Lockheed Martin Corp.*

(2003) 29 Cal.4th 1134, 1159 fn. 11 [131 Cal.Rptr.2d 29, 63 P.3d 937].)

- "While the trial court and [defendant] are correct that a defendant incurs liability for interfering with another's prospective economic advantage only if the defendant's conduct was independently wrongful, we have been directed to no California authority, and have found none, for the trial court's conclusion that the wrongful conduct must be intentional or willful. The defendant's conduct must 'fall outside the boundaries of fair competition'. . . , but negligent misconduct or the violation of a statutory obligation suffice. The approved CACI No. 2204 does not indicate otherwise and, in fact, indicates that either a misrepresentation or 'violation of statute' is sufficient." (*Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1079–1080 [66 Cal.Rptr.3d 432], internal citations omitted.)
- "The fact that the defendant's conduct was independently wrongful is an element of the interference cause of action itself. In addition, the wrongful interfering act can be independently tortious only as to a third party; it need not be independently wrongful as to the plaintiff. Accordingly, . . . to state a cause of action for intentional or negligent interference with prospective economic advantage, it is not necessary to also plead a separate, stand-alone tort cause of action." (*Redfearn*, *supra*, 20 Cal.App.5th at p. 1006, internal citations omitted.)
- "[A]mong the criteria for establishing [the existence of] a duty of care is the 'blameworthiness' of the defendant's conduct. For negligent interference, a defendant's conduct is blameworthy only if it was independently wrongful apart from the interference itself." (*Lange v. TIG Ins. Co.* (1998) 68 Cal.App.4th 1179, 1187 [81 Cal.Rptr.2d 39], internal citations omitted.)
- "Under the privilege of free competition, a competitor is free to divert business to himself as long as he uses fair and reasonable means. Thus, the plaintiff must present facts indicating the defendant's interference is somehow wrongful—i.e., based on facts that take the defendant's actions out of the realm of legitimate business transactions." (*Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1153–1154 [265 Cal.Rptr. 330], internal citations omitted.)
- "Since the crux of the competition privilege is that one can interfere with a competitor's prospective contractual relationship with a third party as long as the interfering conduct is not independently wrongful (i.e., wrongful apart from the fact of the interference itself), *Della Penna*'s requirement that a plaintiff plead and prove such wrongful conduct in order to recover for intentional interference with prospective economic advantage has resulted in a shift of burden of proof. It is now the plaintiff's burden to prove, as an element of the cause of action itself, that the defendant's conduct was independently wrongful and, therefore, was not privileged rather than the defendant's burden to prove, as an affirmative defense, that it's [*sic*] conduct was not independently wrongful and therefore was privileged." (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 881 [60 Cal.Rptr.2d 830].)
- "There are three formulations of the manager's privilege: (1) absolute, (2) mixed

motive, and (3) predominant motive." (*Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1391 [77 Cal.Rptr.2d 383].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 867–869

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.104 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.33 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.135 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference*, § 122.70 (Matthew Bender)

2205. Intentional Interference With Expected Inheritance—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with [his/her/***nonbinary pronoun***] expectation of receiving an inheritance from the estate of [***name of decedent***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] expected to receive an inheritance from the estate of [***name of decedent***];**
2. **That [***name of defendant***] knew of the expectation;**
3. **That [***name of defendant***] engaged in [***specify conduct determined by the court to be wrongful***];**
4. **That by engaging in this conduct, [***name of defendant***] intended to interfere with [***name of plaintiff***]'s expected inheritance;**
5. **That there was a reasonable certainty that [***name of plaintiff***] would have received the inheritance if [***name of defendant***] had not interfered;**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[*Name of plaintiff***] does not have to have been named as a beneficiary in the will or trust or have been named to receive the particular property at issue. A reasonable certaintyof receipt is sufficient.**

New June 2013

Directions for Use

California recognizes the tort of intentional interference with expected inheritance (IIEI). (See *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039 [141 Cal.Rptr.3d 142].)

The wrongful conduct alleged in element 3 must have been directed toward someone other than the plaintiff. If the defendant's tortious conduct was directed at the plaintiff rather than at the testator, the plaintiff has an independent tort claim against the defendant and asserting the IIEI tort is unnecessary. It also must be wrongful for some reason other than the fact of the interference. (*Beckwith, supra*, 205 Cal.App.4th at pp. 1057–1058.) Whether the conduct alleged qualifies as wrongful if proven will be resolved by the court as a matter of law. The jury's role is not to determine wrongfulness, but simply to find whether or not the defendant engaged in the conduct. If the conduct is tortious, the judge should instruct on the elements of the tort.

Sources and Authority

- "To state a claim for IIEI, a plaintiff must allege five distinct elements. First, the plaintiff must plead he had an expectancy of an inheritance. It is not necessary to allege that 'one is in fact named as a beneficiary in the will or that one has been devised the particular property at issue. [Citation.] That requirement would defeat the purpose of an expectancy claim. [¶] . . . [¶] It is only the expectation that one will receive some interest that gives rise to a cause of action. [Citations.]' Second, as in other interference torts, the complaint must allege causation. 'This means that, as in other cases involving recovery for loss of expectancies . . . there must be proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator . . . if there had been no such interference.' Third, the plaintiff must plead intent, i.e., that the defendant had knowledge of the plaintiff's expectancy of inheritance and took deliberate action to interfere with it. Fourth, the complaint must allege that the interference was conducted by independently tortious means, i.e., the underlying conduct must be wrong for some reason other than the fact of the interference. Finally, the plaintiff must plead he was damaged by the defendant's interference." (*Beckwith, supra*, 205 Cal.App.4th at p. 1057, internal citations omitted.)
- "Additionally, an IIEI defendant must direct the independently tortious conduct at someone other than the plaintiff. The cases firmly indicate a requirement that '[t]he fraud, duress, undue influence, or other independent tortious conduct required for this tort is directed at the testator. The beneficiary is not directly defrauded or unduly influenced; the testator is.' In other words, the defendant's tortious conduct must have induced or caused the testator to take some action that deprives the plaintiff of his expected inheritance." (*Beckwith, supra*, 205 Cal.App.4th at pp. 1057–1058, internal citations omitted.)
- "[W]e conclude that a court should recognize the tort of IIEI if it is necessary to afford an injured plaintiff a remedy. The integrity of the probate system and the interest in avoiding tort liability for inherently speculative claims are very important considerations. However, a court should not take the 'drastic consequence of an absolute rule which bars recovery in all . . . cases[]' when a new tort cause of action can be defined in such a way so as to minimize the costs and burdens associated with it. As discussed above, California case law in analogous contexts shields defendants from tort liability when the expectancy is too speculative. In addition, case law from other jurisdictions bars IIEI claims when an adequate probate remedy exists. By recognizing similar restrictions in IIEI actions, we strike the appropriate balance between respecting the integrity of the probate system, guarding against tort liability for inherently speculative claims, and protecting society's interest in providing a remedy for injured parties." (*Beckwith, supra*, 205 Cal.App.4th at p. 1056, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 854

14 Witkin, Summary of California Law (11th ed. 2017) Wills, § 37, 598, 599

Ross et al., California Practice Guide: Probate, Ch. 15-A, *Will Contests*, ¶ 15:115.6 et seq. (The Rutter Group)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.133[2][b] (Matthew Bender)

2206–2209. Reserved for Future Use

2210. Affirmative Defense—Privilege to Protect Own Economic Interest

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[*Name of defendant***] claims that there was no intentional interference with contractual relations because [he/she/***nonbinary pronoun***/it] acted only to protect [his/her/***nonbinary pronoun***/its] legitimate economic interests. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] had a[n] [legitimate] economic interest in the contractual relations because [***specify existing economic interest***];**
2. **That [***name of defendant***] acted only to protect [his/her/***nonbinary pronoun***/its] own economic interest;**
3. **That [***name of defendant***] acted reasonably and in good faith to protect it; and**
4. **That [***name of defendant***] used appropriate means to protect it.**

New June 2016; Revised November 2020

Directions for Use

Give this instruction as an affirmative defense to a claim for intentional interference with contractual relations. (See CACI No. 2201.) The defense presents a justification based on the defendant's right to protect its own economic interest.

In element 1, the jury should be told the specific economic interest that the defendant was acting to protect. Include "legitimate" if the jury will be asked to determine whether that economic interest was legitimate, as opposed perhaps to pretextual or fraudulent.

Sources and Authority

- "In harmony with the general guidelines of the test for justification is the narrow protection afforded to a party where (1) he has a legally protected interest, (2) in good faith threatens to protect it, and (3) the threat is to protect it by appropriate means. Prosser adds: 'Where the defendant acts to further his own advantage, other distinctions have been made. If he has a present, existing economic interest to protect, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it; and for obvious reasons of policy he is likewise privileged to assert an honest claim, or bring or threaten a suit in good faith.' " (*Richardson v. La Rancherita* (1979) 98 Cal.App.3d 73, 81 [159 Cal.Rptr. 285], internal citation omitted.)
- "Justification for the interference is an affirmative defense and not an element of plaintiff's cause of action." (*Richardson, supra*, 98 Cal.App.3d at p. 80.)

- "Something other than sincerity and an honest conviction by a party in his position is required before justification for his conduct on the grounds of 'good faith' can be established. There must be an objective basis for the belief which requires more than reliance on counsel." (*Richardson, supra*, 98 Cal.App.3d at pp. 82–83.)
- "A thoroughly bad motive, that is, a *purpose solely to harm the plaintiff,* of course, is sufficient to exclude any apparent privilege which the interests of the parties might otherwise create, just as such a motive will defeat the immunity of any other conditional privilege. If the defendant does not act in a bona fide attempt to protect his own interest or the interest of others involved in the situation, he forfeits the immunity of the privilege. . . . *Conduct is actionable, when it is indulged solely to harm another, since the legitimate interest of the defendant is practically eliminated from consideration*. The defendant's interest, although of such a character as to justify an invasion of another's similar interest, is not to be taken into account when the defendant acts, not for the purpose of protecting that interest, but *solely* to damage the plaintiff." (*Bridges v. Cal-Pacific Leasing Co.* (1971) 16 Cal.App.3d 118, 132 [93 Cal.Rptr. 796], original italics.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 876

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.119 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.137 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference*, § 122.42 et seq. (Matthew Bender)

2211–2299. Reserved for Future Use

VF-2200. Inducing Breach of Contract

We answer the questions submitted to us as follows:

1. **Was there a contract between [***name of plaintiff***] and [***name of third party***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] know of the contract?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] intend to cause [***name of third party***] to breach the contract?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***]'s conduct cause [***name of third party***] to breach the contract?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2200, *Inducing Breach of Contract*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-

3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2201. Intentional Interference With Contractual Relations

We answer the questions submitted to us as follows:

1. **Was there a contract between [*name of plaintiff*] and [*name of third party*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] know of the contract?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*]'s conduct prevent performance or make performance more expensive or difficult?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of defendant*] [intend to disrupt the performance of this contract/ [or] know that disruption of performance was certain or substantially certain to occur]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2201, *Intentional Interference With Contractual Relations—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual

forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2202. Intentional Interference With Prospective Economic Relations

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] and [***name of third party***] have an economic relationship that probably would have resulted in an economic benefit to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] know of the relationship?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] engage in [***specify conduct determined by the court to be wrongful if proved***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **By engaging in this conduct, did [***name of defendant***] [intend to disrupt the relationship/ [or] know that disruption of the relationship was certain or substantially certain to occur]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was the relationship disrupted?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2013, December 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2202, *Intentional Interference With Prospective Economic Relations—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2203. Negligent Interference With Prospective Economic Relations

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] and [***name of third party***] have an economic relationship that probably would have resulted in an economic benefit to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] know or should [he/she/***nonbinary pronoun***/it] have known of the relationship?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] know or should [he/she/***nonbinary pronoun***/it] have known that this relationship would be disrupted if [he/she/***nonbinary pronoun***/it] failed to act with reasonable care?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] fail to act with reasonable care?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] engage in wrongful conduct through [***insert grounds for wrongfulness***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was the relationship disrupted?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of defendant*]'s wrongful conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify

the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2204, *Negligent Interference With Prospective Economic Relations*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2204–VF-2299. Reserved for Future Use

INSURANCE LITIGATION

2300. Breach of Contractual Duty to Pay a Covered Claim—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*] breached its duty to pay [him/her/*nonbinary pronoun*/it] for a loss covered under an insurance policy. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] suffered a loss, [all or part of] which was covered under an insurance policy with [*name of defendant*];**
2. **That [*name of defendant*] was notified of the loss [as required by the policy]; and**
3. **The amount of the covered loss that [*name of defendant*] failed to pay.**

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for first party coverage claims. Use the bracketed language in element 2 if the jury is required to resolve a factual dispute over whether the manner in which the insurer received notice conformed to the policy requirements for notice. For a claim arising under an insurance binder rather than an issued policy, see CACI No. 2301, *Breach of Insurance Binder—Essential Factual Elements*. If the policy at issue has been lost or destroyed, read CACI No. 2305, *Lost or Destroyed Insurance Policy*. For instructions on general breach of contract issues, see the Contracts series (CACI No. 300 et seq.).

Sources and Authority

- "Wrongful failure to provide coverage or defend a claim is a breach of contract." (*Isaacson v. California Insurance Guarantee Assn.* (1988) 44 Cal.3d 775, 791 [244 Cal.Rptr. 655, 750 P.2d 297].)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 15-D, *Filing Considerations*, ¶¶ 15:52, 15:924 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) General Principles of Contract and Bad Faith Actions, §§ 24.2, 24.23

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, § 82.50[2][c] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.83, 120.90, 120.115 (Matthew Bender)

2301. Breach of Insurance Binder—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] breached its duty to pay [him/her/***nonbinary pronoun***/it] for a loss or liability covered under a temporary insurance contract called an insurance binder. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] or its authorized agent agreed, orally or in writing, to provide [***name of plaintiff***] with an insurance binder;**
2. **That [***name of plaintiff***] [paid/was obligated to pay] for the insurance binder [or that payment was waived];**
3. **That [***name of plaintiff***] suffered a loss during the time the insurance binder was in effect;**
4. **That [all or part of] the loss was covered under the [insurance binder] [terms of the insurance policy [***name of defendant***] would have issued to [***name of plaintiff***]];**
5. **That [***name of defendant***] was notified of the loss [as required by the insurance binder]; and**
6. **The amount of the covered loss or liability that [***name of defendant***] failed to pay.**

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for an alleged breach of a contract of temporary insurance coverage. The court must interpret as a matter of law whether an ordinary person in the applicant's circumstances would conclude, based on the language of the application, that coverage began immediately. Do not use this instruction unless the court has decided this issue.

Use bracketed language in element 5 if the jury is required to resolve a factual dispute over whether the manner in which the insurer received notice conformed to the policy requirements for notice. Element 4 should be modified if there is an issue regarding whether the insurance company's agent made oral statements at variance with the policy language.

Note that the statutory requirements for a "binder" under Insurance Code section 382.5 do not apply to life or disability insurance, for insurance of any kind in the amount of $1 million or more, or to an oral binder (see Ins. Code, § 382.5(a)).

Sources and Authority

- Binders. Insurance Code section 382.5.
- Cancelation of Temporary Insurance. Insurance Code section 481.1.
- "Under California law, a contract of temporary insurance may arise from completion of an application for insurance and payment of the first premium if the language of the application would lead an ordinary lay person to conclude that coverage was immediate." (*Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 47 [1 Cal.Rptr.2d 339].)
- "[A] binder is an independent contract, separate and distinct from the permanent insurance policy. It is intended to give temporary protection pending the investigation of the risk by the insurer and until issuance of a formal policy or rejection of the insurance application by the insurer." (*Ahern, supra,* 1 Cal.App.4th at p. 48.)
- "[P]racticality dictates that a temporary insurance binder issued upon an application for insurance cannot contain all of the details and terms of the proposed insurance contract. . . . [I]nsurance binders are adequate if they indicate the subject matter, the coverage period, the rate and the amount of insurance. (*National Emblem Insurance Co. v. Rios* (1969) 275 Cal.App.2d 70, 76 [79 Cal.Rptr. 583], internal citations omitted.)
- "Whether or not a valid binder exists is a question of fact insofar as a finding comprehends issues relating to the credibility of witnesses or the weight of the evidence, but a question of law insofar as a finding embraces a conclusion that such factual elements do not constitute a valid oral binder." (*Spott Electrical Co. v. Industrial Indemnity Co.* (1973) 30 Cal.App.3d 797, 805 [106 Cal.Rptr. 710], internal citations omitted.)
- " 'For the sake of convenience, contracts of insurance sometimes exist in two forms: (1) A preliminary contract intended to protect the applicant pending investigation of the risk by the company or until the policy can be properly issued. (2) The final contract or policy itself. . . . An agent possessing authority to bind the company by contracts of insurance has authority to bind it by a preliminary or temporary contract of insurance. . . .' This preliminary contract is sometimes called 'cover note' or 'binder.' . . . 'A valid temporary or preliminary contract of present insurance may be made orally, or it may be partly in parol and partly in writing.' " (*Parlier Fruit Co. v. Fireman's Fund Insurance Co.* (1957) 151 Cal.App.2d 6, 19–20 [311 P.2d 62], internal quotation marks and citation omitted.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 54, 55

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 2-D, *When Insurance Effective; Coverage of Losses Before Policy Issued*, ¶¶ 2:101–2:137 (The Rutter Group)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar)

Determining Whether Enforceable Obligation Exists, §§ 5.17–5.20

2 California Insurance Law & Practice, Ch. 9, *Issuance of Insurance Policies*, § 9.06[1]–[7] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.15 (Matthew Bender)

11 California Legal Forms: Transaction Guide, Ch. 26A, *Title Insurance*, §§ 26A.15, 26A.220 (Matthew Bender)

2302. Breach of Contract for Temporary Life Insurance—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*] breached an agreement to pay life insurance benefits. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] or its authorized agent received [*name of decedent*]'s application for life insurance;**
2. **That [*name of decedent*] paid the first insurance premium;**
3. **That [*name of decedent*] died [on/after/before] [*insert relevant date*]; and**
4. **The amount of the insurance benefits that [*name of defendant*] failed to pay.**

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for an alleged breach of a contract of temporary life insurance coverage. The court must interpret as a matter of law whether an ordinary person in the applicant's circumstances would conclude, based on the language of the application, that coverage began immediately. Do not use this instruction unless the court has decided this issue.

Sources and Authority

- Death of Insured Before Issuance of Policy. Insurance Code section 10115.
- "We are of the view that a contract of insurance arose upon defendant's receipt of the completed application and the first premium payment. . . . The understanding of an ordinary person is the standard [that] must be used in construing the contract, and such a person upon reading the application would believe that he would secure the benefit of immediate coverage by paying the premium in advance of delivery of the policy." (*Ransom v. The Penn Mutual Life Insurance Co.* (1954) 43 Cal.2d 420, 425 [274 P.2d 633].)
- "[A]n insurance company is not precluded from imposing conditions precedent to the effectiveness of insurance coverage despite the advance payment of the first premium. However, . . . any such condition must be stated in conspicuous, unambiguous and unequivocal language which an ordinary layman can understand." (*Thompson v. Occidental Life Insurance Co. of California* (1973) 9 Cal.3d 904, 912 [109 Cal.Rptr. 473, 513 P.2d 353].)

- Temporary life insurance coverage "is not terminated until the applicant receives from the insurer both a notice of the rejection of his application and a refund of his premium." (*Smith v. Westland Life Insurance Co*. (1975) 15 Cal.3d 111, 120 [123 Cal.Rptr. 649, 539 P.2d 433].)
- "Under California law, a contract of temporary insurance may arise from completion of an application for insurance and payment of the first premium if the language of the application would lead an ordinary lay person to conclude that coverage was immediate." (*Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 47 [1 Cal.Rptr.2d 339] [automobile insurance].)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 54–56

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 2-D, *When Insurance Effective; Coverage of Losses Before Policy Issued*, ¶¶ 2:134–2:137, 6:428–6:448 (The Rutter Group)

2 California Insurance Law & Practice, Ch. 9, *Issuance of Insurance Policies*, § 9.07 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.19–120.20 (Matthew Bender)

2303. Affirmative Defense—Insurance Policy Exclusion

[*Name of defendant***] claims that [***name of plaintiff***]'s [liability/loss] is not covered because it is specifically excluded under the policy. To succeed, [***name of defendant***] must prove that [***name of plaintiff***]'s [liability/loss] [arises out of/is based on/occurred because of] [***state exclusion under the policy***]. This exclusion applies if [***set forth disputed factual issues that jury must determine***].**

New September 2003; Revised October 2008, June 2014, May 2021

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

Give this instruction if the court has determined that an exclusionary clause in an insurance policy might apply to foreclose coverage, but the applicability turns on a question of fact. Identify with specificity the disputed factual issues the jury must resolve to determine whether the exclusion applies.

This instruction can be used in cases involving either a third party liability or a first party loss policy. Use CACI No. 2306, *Covered and Excluded Risks—Predominant Cause of Loss*, rather than this instruction, if a first party loss policy is involved and there is evidence that a loss was caused by both covered and excluded perils.

Sources and Authority

- "The burden of bringing itself within any exculpatory clause contained in the policy is on the insurer." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 880 [151 Cal.Rptr. 285, 587 P.2d 1098].)
- "The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded." (*Aydin Corp. v. First State Insurance Co.* (1998) 18 Cal.4th 1183, 1188 [77 Cal.Rptr.2d 537, 959 P.2d 1213].)
- Once the insurer proves that the specific exclusion applies, the insured "should bear the burden of *establishing* the exception because 'its effect is to reinstate coverage that the exclusionary language otherwise bars.' " (*Aydin Corp.*, *supra*, 18 Cal.4th at p. 1188.)
- "The interpretation of an exclusionary clause is an issue of law subject to this court's independent determination." (*Marquez Knolls Property Owners Assn., Inc. v. Executive Risk Indemnity, Inc.* (2007) 153 Cal.App.4th 228, 233 [62 Cal.Rptr.3d 510].)
- "[T]he question of what caused the loss is generally a question of fact, and the

loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate cause." (*State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1131–1132 [2 Cal.Rptr.2d 183, 820 P.2d 285].)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 85, 88

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 15-I, *Trial*, ¶¶ 15:911–15:912 (The Rutter Group)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.63

4 California Insurance Law and Practice, Ch. 41, *Liability Insurance in General*, § 41.11 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.502 (Matthew Bender)

2304. Exception to Insurance Policy Exclusion—Burden of Proof

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[*Name of plaintiff***] claims that [his/her/***nonbinary pronoun***/its] [liability/loss] is covered under an exception to a specific coverage exclusion under the policy. To establish this coverage, [***name of plaintiff***] must prove that [his/her/***nonbinary pronoun***/its] [liability/loss] [arises out of/is based on/occurred because] [***state exception to policy exclusion***].**

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

Use this instruction only if the insurer is asserting that the insured's claim is subject to an exclusion.

Sources and Authority

- "The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded." (*Aydin Corp. v. First State Insurance Co.* (1998) 18 Cal.4th 1183, 1188 [77 Cal.Rptr.2d 537, 959 P.2d 1213], internal citations omitted.)
- Once the insurer proves that the specific exclusion applies, the insured "should bear the burden of *establishing* the exception because 'its effect is to reinstate coverage that the exclusionary language otherwise bars.' " (*Aydin Corp., supra,* 18 Cal.4th at p. 1188.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 15-I, *Trial* ¶¶ 15:913–15:915.5 (The Rutter Group)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.63

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.40, 120.42 (Matthew Bender)

2305. Lost or Destroyed Insurance Policy

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*/it] was covered under an insurance policy that was lost or destroyed. To establish coverage under a lost policy, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was insured under the lost policy during the period in question; and**
2. **That the terms of the policy included the following:**
   a. **[*describe each policy provision essential to the claimed coverage*].**

[*Name of plaintiff*] is not required to prove the exact words of the lost policy, but only the substance of the policy's terms essential to [his/her/*nonbinary pronoun*/its] claim for insurance benefits.

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

Read this instruction in conjunction with CACI No. 2300, *Breach of Contractual Duty to Pay a Covered Claim—Essential Factual Elements.* Whether the terms of a lost policy must be established by a heightened degree of proof appears to be an open issue. The Supreme Court in *Dart Industries, Inc. v. Commercial Union Insurance Co.* (2002) 28 Cal.4th 1059 [124 Cal.Rptr.2d 142, 52 P.3d 79], expressly declined to address the issue of the necessary degree of proof. (*Id* at p. 1072, fn. 4.)

This instruction is intended for use in cases where the plaintiff insured claims coverage for a loss under an insurance policy that was lost or destroyed without fraudulent intent on the part of the insured. The admission of oral testimony of the contents of a lost document requires the court to determine certain preliminary facts: (1) the proponent does not have possession or control of a copy of the policy; and (2) the policy was lost or destroyed without fraudulent intent on the part of the proponent. (Evid. Code, §§ 402(b), 1521, 1523(b).)

Sources and Authority

- Proof of Content of Writing. Evidence Code section 1521(a).
- Oral Testimony of Content of Writing. Evidence Code section 1523(b).
- "In an action on an insurance policy that has not been lost or destroyed, it is well settled that '[t]he burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage.

And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded.' . . . [¶] We see no reason not to apply this rule to a policy that has been lost or destroyed without fraudulent intent on the part of the insured. Thus, the claimant has the burden of proving (1) the fact that he or she was insured under the lost policy during the period in issue, and (2) the substance of each policy provision essential to the claim for relief, i.e., essential to the particular coverage that the insured claims. Which provisions those are will vary from case to case; the decisions often refer to them simply as the material terms of the lost policy. In turn, the insurer has the burden of proving the substance of any policy provision 'essential to the . . . defense,' i.e., any provision that functions to defeat the insured's claim. Those provisions, too, will be case specific." (*Dart Industries, Inc., supra,* 28 Cal.4th at p. 1068, internal citations and footnotes omitted.)

- "A corollary of the rule that the contents of lost documents may be proved by secondary evidence is that the law does not require the contents of such documents be proved verbatim." (*Dart Industries, Inc.*, *supra*, 28 Cal.4th at p. 1069.)
- "The rule . . . for the admission of secondary evidence of a lost paper, requires 'that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be found;' and further, 'the party is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.' " (*Dart Industries, Inc., supra*, 28 Cal.4th at p. 1068, internal citation omitted.)
- "No fixed rule as to the necessary proof to establish loss [of a written instrument], or what constitutes reasonable search, can be formulated. . . . The sole object of such proof is to raise a reasonable presumption merely that the instrument is lost, and this is a preliminary inquiry addressed to the discretion of the judge." (*Kenniff v. Caulfield* (1903) 140 Cal. 34, 41 [73 P. 803].)
- "Preliminary proof of the loss or destruction is required and it is committed to the trial court's discretion to determine whether the evidence so offered is or is not sufficient." (*Guardianship of Levy* (1955) 137 Cal.App.2d 237, 249 [290 P.2d 320].)

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, §§ 60–62, 71–72, 75, 77

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 15-I, *Trial*, ¶¶ 15:978–15:994 (The Rutter Group)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Identifying Sources of Coverage, § 8.8

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.42 (Matthew Bender)

2306. Covered and Excluded Risks—Predominant Cause of Loss

You have heard evidence that the claimed loss was caused by a combination of covered and excluded risks under the insurance policy. When a loss is caused by a combination of covered and excluded risks under the policy, the loss is covered only if the most important or predominant cause is a covered risk.

[[*Name of defendant***] claims that [***name of plaintiff***]'s loss is not covered because the loss was caused by a risk excluded under the policy. To succeed, [***name of defendant***] must prove that the most important or predominant cause of the loss was [***describe excluded peril or event***], which is a risk excluded under the policy.]**

[or]

[[*Name of plaintiff***] claims that the loss was caused by a risk covered under the policy. To succeed, [***name of plaintiff***] must prove that the most important or predominant cause of the loss was [***describe covered peril or event***], which is a risk covered under the policy.]**

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction in intended for use in first party property insurance cases where there is evidence that a loss was caused by both covered and excluded perils. In most cases the court will determine as a question of law what perils are covered and excluded under the policy.

Depending on the type of insurance at issue, the court must select the bracketed paragraph that presents the correct burden of proof. For all-risk homeowner's policies, for example, once the insured establishes basic coverage, the insurer bears the burden of proving the loss was caused by an excluded peril. In contrast, for "named perils" policies (for example, fire insurance) the insured bears the burden of proving the loss was caused by the specified peril. (See *Strubble v. United Services Automobile Assn.* (1973) 35 Cal.App.3d 498, 504 [110 Cal.Rptr. 828].)

Sources and Authority

- Remote Cause of Loss. Insurance Code section 530.
- Excluded Peril: But-For Causation. Insurance Code section 532.
- "[In] determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause—the one that sets others

in motion—is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster." (*Sabella v. Wisler* (1963) 59 Cal.2d 21, 31–32 [27 Cal.Rptr. 689, 377 P.2d 889], internal quotation marks and citation omitted.)

- "*Sabella* defined 'efficient proximate cause' alternatively as the 'one that sets others in motion,' and as 'the predominating or moving efficient cause.' We use the term 'efficient proximate cause' (meaning predominating cause) when referring to the *Sabella* analysis because we believe the phrase 'moving cause' can be misconstrued to deny coverage erroneously, particularly when it is understood literally to mean the 'triggering' cause." (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 403 [257 Cal.Rptr. 292, 770 P.2d 704], internal citations omitted.)
- "The efficient proximate cause referred to in *Sabella* has also been called the predominant cause or the most important cause of the loss. 'By focusing the causal inquiry on the most important cause of a loss, the efficient proximate cause doctrine creates a "workable rule of coverage that provides a fair result within the reasonable expectations of both the insured and the insurer." ' " (*Vardanyan v. AMCO Ins. Co.* (2015) 243 Cal.App.4th 779, 787 [197 Cal.Rptr.3d 195], internal citation omitted.)
- "[T]he 'cause' of loss in the context of a property insurance contract is totally different from that in a liability policy. This distinction is critical to the resolution of losses involving multiple causes. Frequently property losses occur which involve more than one peril that might be considered legally significant. . . . 'The task becomes one of identifying the most important cause of the loss and attributing the loss to that cause.' [¶] On the other hand, the right to coverage in the third party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty." (*Garvey, supra,* 48 Cal.3d at pp. 406–407, internal quotation marks, italics, and citations omitted.)
- "[I]n an action upon an all-risks policy (unlike a specific peril policy), the insured does not have to prove that the peril proximately causing his loss was covered by the policy. This is because the policy covers *all* risks save for those risks specifically excluded by the policy. The insurer, though, since it is denying liability upon the policy, must prove the policy's noncoverage of the insured's loss—that is, that the insured's loss was proximately caused by a peril specifically excluded from the coverage of the policy." (*Vardanyan, supra,* 243 Cal.App.4th at pp. 796–797, original italics.)
- "A policy cannot extend coverage for a specified peril, then exclude coverage for a loss caused by a combination of the covered peril and an excluded peril, without regard to whether the covered peril was the predominant or efficient proximate cause of the loss. Other Coverage 9 identifies the perils that are covered when the loss involves collapse. If any other peril contributes to the loss, whether the loss is covered or excluded depends upon which peril is the predominant cause of the loss. To the extent the term 'caused only by one or more' of the listed perils can be construed to mean the contribution of any

unlisted peril, in any way and to any degree, would result in the loss being excluded from coverage, the provision is an unenforceable attempt to contract around the efficient proximate cause doctrine. ¶ Accordingly, CACI No. 2306 . . . was the correct instruction to give to the jury." *Vardanyan, supra,* 243 Cal.App.4th at p. 796.)

- "[T]he scope of coverage under an all-risk homeowner's policy includes all risks except those specifically excluded by the policy. When a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss. . . . [T]he question of what caused the loss is generally a question of fact, and the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate, cause." (*State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1131–1132 [2 Cal.Rptr.2d 183, 820 P.2d 285], internal citation omitted.)
- "[A]n insurer is not absolutely prohibited from drafting and enforcing policy provisions that provide or leave intact coverage for some, but not all, manifestations of a particular peril. This is, in fact, an everyday practice that normally raises no questions regarding section 530 or the efficient proximate cause doctrine." (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 759 [27 Cal.Rptr.3d 648, 110 P.3d 903].)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 6A-E, *First Party Coverages—Causation Principles,* ¶¶ 6:134–6:143, 6:253 (The Rutter Group)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.42

3 California Insurance Law & Practice, Ch. 9, *Homeowners and Related Policies*, § 36.42 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.113 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.50 (Matthew Bender)

2307. Insurance Agency Relationship Disputed

[*Name of plaintiff***] claims that [***name of agent***] was [***name of defendant***]'s agent and that [***name of defendant***] is therefore [responsible for/bound by] [***name of agent***]'s [conduct/ representations].**

If [*name of plaintiff***] proves that [***name of defendant***] gave [***name of agent***] the [authority/apparent authority] to act on behalf of [***name of defendant***], then [***name of agent***] was [***name of defendant***]'s agent. This authority may be shown by words or may be implied by the parties' conduct. This authority cannot be shown by the words of [***name of agent***] alone.**

[In some circumstances, an individual can be the agent of both the insured and the insurance company. [*Name of plaintiff***] claims that [***name of agent***] was [[***name of defendant***]/[***name of plaintiff***]]'s agent for the purpose of [***describe limited agency; e.g., "collecting insurance payments"***] and therefore [***describe dispute; e.g., "the insurer received plaintiff's payment"***]. [***Name of defendant***] claims that [***name of agent***] was [[***name of defendant***]/[***name of plaintiff***]]'s agent for the purpose of [***describe limited agency***] and therefore [***describe dispute***].]**

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction must be modified based on the evidence presented and theories of liability in the case. The distinction between an agent and a broker relationship may be crucial in determining, for example, whether an insurance salesperson's representations bind the insurer, or whether the insurance salesperson has assumed a specific duty to the insured.

If ostensible agency is an issue, the court may modify and give CACI No. 3709, *Ostensible Agent*, in the Vicarious Responsibility series.

Sources and Authority

- "Insurance Agent" Defined. Insurance Code section 31.
- "Insurance Broker" Defined. Insurance Code section 33.
- Actual or Ostensible Authority of Agent. Civil Code section 2315.
- "An individual cannot act as an insurance agent in California without a valid license issued by the commissioner of insurance. In addition to possessing a license, an insurance agent must be authorized by an insurance carrier to transact insurance business on the carrier's behalf. This authorization must be evidenced

by a notice of agency appointment on file with the Department of Insurance. An agent is generally not limited in the number of agency appointments that he or she may have; thus, an agent may solicit business on behalf of a variety of different insurance carriers, and still technically be an agent of each of those carriers." (*Loehr v. Great Republic Insurance Co.* (1990) 226 Cal.App.3d 727, 732–733 [276 Cal.Rptr. 667], internal citations omitted.)

- "An agent's primary duty is to represent the insurer in transactions with insurance applicants and policyholders. Each company the agent represents must file a notice of appointment with the DOI's commissioner. Because an agent represents the insurer, an agent's representations to an insured regarding coverage are treated as representations by the insurer. Generally, some hallmarks of an insurance agent (as opposed to a broker) are licensure, notice of appointment as an agent and the power to bind the insurer. In contrast, a broker's primary duty is to represent the applicant/insured, and his or her actions are not generally binding on the insurer. 'Put quite simply, insurance brokers, with no binding authority, are *not* agents of insurance companies, but are rather independent contractors . . . .' Of course, these labels alone are not determinative of the relationship, and the specific facts of each transaction must be reviewed. The general laws of agency inform any such review." (*Douglas v. Fidelity National Ins. Co.* (2014) 229 Cal.App.4th 392, 410–411 [177 Cal.Rptr.3d 271], original italics, internal citations omitted.)
- "[S]tatutes defining 'broker' are not determinative of the actual relationship in a particular case. The actual relationship is determined by what the parties do and say, not by the name they are called." (*Maloney v. Rhode Island Insurance Co.* (1953) 115 Cal.App.2d 238, 245 [251 P.2d 1027], internal citations omitted.)
- "While we note many similarities in the services performed and the monetary functions of agents and brokers, there is a more fundamental legal distinction between insurance agents and brokers. Put quite simply, insurance brokers, with no binding authority, are not agents of insurance companies, but are rather independent contractors . . . ." (*Marsh & McLennan of California, Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 118 [132 Cal.Rptr. 796].)
- "Although an insurance broker is ordinarily the agent of the insured and not of the insurer, he may become the agent of the insurer as well as for the insured." (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 213 [137 Cal.Rptr. 118], internal citations omitted.)
- "When the broker accepts the policy from the insurer and the premium from the assured, he has elected to act for the insurer to deliver the policy and to collect the premium." (*Maloney, supra*, 115 Cal.App.2d at p. 244.)
- "Generally speaking, a person may do by agent any act which he might do himself. An agency is either actual or ostensible. 'An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.' To establish ostensible authority in an agent, it must be shown the principal, intentionally or

by want of ordinary care has caused or allowed a third person to believe the agent possesses such authority." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [269 Cal.Rptr. 617], internal citations omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 2A, *Agents and Brokers*, ¶¶ 2:12–2:24, 2:31–2:43 (The Rutter Group)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Determining Whether Enforceable Obligation Exists, §§ 5.4–5.8

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Actions Against Agents and Brokers, §§ 29.2–29.5

2 California Insurance Law & Practice, Ch. 9, *Issuance of Insurance Policies*, § 9.02 (Matthew Bender)

5 California Insurance Law & Practice, Ch. 61, *Operating Requirements of Agents and Brokers*, § 61.01[4] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.114 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.18, 120.110, 120.170, 120.383, 120.392, 120.403 (Matthew Bender)

2308. Affirmative Defense—Misrepresentation or Concealment in Insurance Application

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[*Name of insurer***] claims that no insurance contract was created because [***name of insured***] [concealed an important fact/made a false representation] in [his/her/***nonbinary pronoun***/its] application for insurance. To establish this defense, [***name of insurer***] must prove all of the following:**

1. **That [***name of insured***] submitted an application for insurance with [***name of insurer***];**
2. **That in the application for insurance [***name of insured***], whether intentionally or unintentionally, [failed to state/represented] that [***insert omission or alleged misrepresentation***];**
3. **[That the application asked for that information;]**
4. **That [***name of insured***] knew that [***specify facts that were misrepresented or omitted***]; and**
5. **That [***name of insurer***] would not have issued the insurance policy if [***name of insured***] had stated the true facts in the application.**

New September 2003; Revised April 2004, October 2004, June 2015, May 2020

Directions for Use

This instruction presents an insurer's affirmative defense to a claim for coverage. The defense is based on a misrepresentation or omission made by the insured in the application for the insurance. (See *Douglas v. Fid. Nat'l Ins. Co.* (2014) 229 Cal.App.4th 392, 408 [177 Cal.Rptr.3d 271].) If the policy at issue is a standard fire insurance policy, replace "intentionally or unintentionally" in element 2 with "willfully." (See Ins. Code, § 2071.) Otherwise, the insurer is not required to prove an intent to deceive; negligence or inadvertence is enough if the misrepresentation or omission is material. (*Douglas, supra*, 229 Cal.App.4th at p. 408.) Element 5 expresses materiality.

Element 3 applies only if plaintiff omitted information, not if the plaintiff misrepresented information.

While no intent to mislead is required, the insured must know the facts that constitute the omission or misrepresentation (see element 4). For example, if the application does not disclose that property on which insurance is sought is being used commercially, the applicant must have known that the property is being used commercially. (See Ins. Code, § 332.) It is not a defense, however, if the insured gave incorrect or incomplete responses on the application because the insured failed to appreciate the significance of some information known to him or her. (See

Thompson v. Occidental Life Insurance Co. of California (1973) 9 Cal.3d 904, 916 [109 Cal.Rptr. 473, 513 P.2d 353].)

If it is alleged that omission occurred in circumstances other than a written application, this instruction should be modified accordingly.

Sources and Authority

- Rescission of Contract. Civil Code section 1689(b)(1).
- Time of Insurer's Rescission of Policy. Insurance Code section 650.
- Concealment by Failure to Communicate. Insurance Code section 330.
- Concealment Entitles Insurer to Rescind. Insurance Code section 331.
- Duty to Communicate in Good Faith. Insurance Code section 332.
- Materiality. Insurance Code section 334.
- Intentional Omission of Information Tending to Prove Falsity. Insurance Code section 338.
- False Representation: Time for Rescission. Insurance Code section 359.
- "It is well established that material misrepresentations or concealment of material facts in an application for insurance entitle an insurer to rescind an insurance policy, even if the misrepresentations are not intentionally made. Additionally, '[a] misrepresentation or concealment of a material fact in an insurance application also establishes a complete defense in an action on the policy. [Citations.] As with rescission, an insurer seeking to invalidate a policy based on a material misrepresentation or concealment as a defense need not show an intent to deceive. [Citations.]' " (*Douglas, supra*, 229 Cal.App.4th at p. 408, internal citations omitted.)
- "When the [automobile] insurer fails . . . to conduct . . . a reasonable investigation [of insurability] it cannot assert . . . a right of rescission" under section 650 of the Insurance Code as an affirmative defense to an action by an injured third party. (*Barrera v. State Farm Mutual Automobile Insurance Co.* (1969) 71 Cal.2d 659, 678 [79 Cal.Rptr. 106, 456 P.2d 674].)
- "[A]n insurer has a right to know all that the applicant for insurance knows regarding the state of his health and medical history. Material misrepresentation or concealment of such facts [is] grounds for rescission of the policy, and an actual intent to deceive need not be shown. Materiality is determined solely by the probable and reasonable effect [that] truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." (*Thompson, supra*, 9 Cal.3d at pp. 915–916, internal citations omitted.)
- "[A]lthough an insurer generally 'has the right to rely on the applicant's answers without verifying their accuracy[,] . . . [¶][] . . . [t]he insurer cannot rely on answers given where the applicant-insured was *misled* by vague or ambiguous

questions.' " (*Duarte v. Pacific Specialty Ins. Co.* (2017) 13 Cal.App.5th 45, 54 [220 Cal.Rptr.3d 170], original italics.)

- "[I]f the applicant for insurance had no present knowledge of the facts sought, or failed to appreciate the significance of information related to him, his incorrect or incomplete responses would not constitute grounds for rescission. Moreover, '[questions] concerning illness or disease do not relate to minor indispositions but are to be construed as referring to serious ailments which undermine the general health.' Finally, as the misrepresentation must be a material one, 'incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer.' And the trier of fact is not required to believe the 'post mortem' testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed." (*Thompson, supra*, 9 Cal.3d at p. 916, internal citations omitted.)
- "[T]he burden of proving misrepresentation [for purposes of rescission] rests upon the insurer." (*Thompson, supra*, 9 Cal.3d at p. 919.)
- "To prevail, the insurer must prove that the insured made a material 'false representation' in an insurance application. 'A representation is false when the facts fail to correspond with its assertions or stipulations.' The test for materiality of the misrepresentation or concealment is the same as it is for rescission, 'a misrepresentation or concealment is material if a truthful statement would have affected the insurer's underwriting decision.' " (*Douglas, supra*, 229 Cal.App.4th at p. 408, internal citations omitted.)
- "The materiality of a representation made in an application for a contract of insurance is determined by a *subjective* standard (i.e., its effect on the *particular* insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause . . . , the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the *objective* standard of its effect upon a *reasonable* insurer." (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415, fn.7 [249 Cal.Rptr. 568], original italics, internal citation omitted.)
- "The insurer is not required to show a causal relationship between the material misrepresentation or concealment of material fact and the nature of the claim." (*Duarte, supra,* 13 Cal.App.5th at p. 53.)
- "Cancellation and rescission are not synonymous. One is prospective, while the other is retroactive." (*Fireman's Fund American Insurance Co. v. Escobedo* (1978) 80 Cal.App.3d 610, 619 [145 Cal.Rptr. 785].)
- "[U]pon a rescission of a policy of insurance, based upon a material concealment or misrepresentation, all rights of the insured thereunder (except the right to recover any consideration paid in the purchase of the policy) are

extinguished . . . ." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639].)

- "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. . . . [T]his would require the refund by [the insurer] of any premiums and the repayment by the defendants of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co., supra*, 198 Cal.App.3d at p. 184, internal citation omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 5-F, *Rescission by Insurer*, ¶¶ 5:143–5:146, 5:153–5:159.1, 5:160–5:287, 15:241–15:256 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Rescission and Reformation, §§ 21.2–21.12, 21.35–21.37

2 California Insurance Law & Practice, Ch. 8, *The Insurance Contract*, § 8.10[1] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.18 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.250, 120.251, 120.260 (Matthew Bender)

2309. Termination of Insurance Policy for Fraudulent Claim

[*Name of insurer***] claims that [***name of insured***] [is not entitled to recover under/is not entitled to benefits under] the insurance policy because [he/she/***nonbinary pronoun***] made a false claim. To establish this claim, [***name of insurer***] must prove all of the following:**

1. **That [***name of insured***] made a claim for insurance benefits under a policy with [***name of insurer***];**
2. **That [***name of insured***] represented to [***name of insurer***] that [***insert allegedly false representation***];**
3. **That [***name of insured***]'s representation was not true;**
4. **That [***name of insured***] knew that the representation was not true;**
5. **That [***name of insured***] intended that [***name of insurer***] rely on this representation in [investigating/paying] [***name of insured***]'s claim for insurance benefits; and**
6. **That the representation that [***insert allegedly false representation***], if true, would affect a reasonable insurance company's [investigation of/decision to pay] a claim for insurance benefits.**

New September 2003

Directions for Use

If the insured's misrepresentation or concealment in the insurance application is raised as an affirmative defense by the insurer, this instruction may be modified for use. The elements of the defense would be the same as stated above.

Sources and Authority

- Rescission of Contract. Civil Code section 1689(b)(1).
- Intentional Omission of Information Tending to Prove Falsity. Insurance Code section 338.
- False Representation: Time for Rescission. Insurance Code section 359.
- "The materiality of a representation made in an application for a contract of insurance is determined by a *subjective* standard (i.e., its effect on the *particular* insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause . . ., the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the *objective* standard of its effect upon a *reasonable* insurer." (*Cummings v. Fire*

Insurance Exchange (1988) 202 Cal.App.3d 1407, 1415, fn.7 [249 Cal.Rptr. 568], original italics, internal citation omitted.)

- "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. . . . [T]his would require the refund by [the insurer] of any premiums and the repayment by the [insureds] of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639], internal citation omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 5-F, *Rescission by Insurer*, ¶¶ 5:143–5:146, 5:153–5:159.1, 5:160, 5:249–5:260.5, 15:241–15:256 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Rescission and Reformation, §§ 21.2–21.4, 21.35–21.37

2 California Insurance Law & Practice, Ch. 8, *The Insurance Contract*, § 8.10[1] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.250–120.251 (Matthew Bender)

2310–2319. Reserved for Future Use

2320. Affirmative Defense—Failure to Provide Timely Notice

[*Name of defendant*] claims that it does not have to pay the [judgment against/settlement by] [*name of plaintiff*] because it did not receive timely notice of the [lawsuit/[*insert other*]]. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of plaintiff*] did not give [*name of defendant*] notice [or that [*name of defendant*] did not receive notice by some other means] [within the time specified in the policy/within a reasonable time] of the [lawsuit/[*insert other*]]; and**
2. **That [*name of defendant*] was prejudiced by [*name of plaintiff*]'s failure to give timely notice.**

To establish prejudice, [*name of defendant*] must show a substantial likelihood that, with timely notice, it would have [taken steps that would have substantially reduced or eliminated [*name of plaintiff*]'s liability] [or] [settled for a substantially smaller amount].

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. The defense does not apply to "claims made" policies (see *Pacific Employers Insurance Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1357–1360 [270 Cal.Rptr. 779]). This instruction also may be modified for use as a defense to a judgment creditor's action to recover on a liability policy.

Sources and Authority

- "The right of an injured party to sue an insurer on the policy after obtaining judgment against the insured is established by statute. An insurer may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, but the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby. Similarly, it has been held that prejudice must be shown with respect to breach of a notice clause." (*Campbell v. Allstate Insurance Co.* (1963) 60 Cal.2d 303, 305–306 [32 Cal.Rptr. 827, 384 P.2d 155], internal citations omitted.)
- "The burden of establishing prejudice is on the insurance company, and prejudice is not presumed by delay alone. To establish prejudice, the ' "insurer must show it lost something that would have changed the handling of the

underlying claim." ' " (*Lat v. Farmers New World Life Ins. Co.* (2018) 29 Cal.App.5th 191, 196–197 [239 Cal.Rptr.3d 796], internal citations omitted.)

- "[P]rejudice is not shown simply by displaying end results; the probability that such result could or would have been avoided absent the claimed default or error must also be explored." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 883, fn. 12 [151 Cal.Rptr. 285, 587 P.2d 1098].)
- "Prejudice is a question of fact on which the insurer has the burden of proof. The insured's delay does not itself satisfy the burden of proof. The insurer establishes actual and substantial prejudice by proving more than delayed or late notice. It must show ' "a substantial likelihood that, with timely notice, and notwithstanding a denial of coverage or reservation of rights, it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability." ' " (*Pitzer College v. Indian Harbor Ins. Co.* (2019) 8 Cal.5th 93, 105 [251 Cal.Rptr.3d 701, 447 P.3d 669].)
- "If the insurer asserts that the underlying claim is not a covered occurrence or is excluded from basic coverage, then earlier notice would only result in earlier denial of coverage. To establish actual prejudice, the insurer must show a substantial likelihood that, with timely notice, and notwithstanding a denial of coverage or reservation of rights, it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability." (*Safeco Ins. Co. of America v. Parks* (2009) 170 Cal.App.4th 992, 1004 [88 Cal.Rptr.3d 730].)
- "Under the notice prejudice rule, an insurance company may not deny an insured's claim under an occurrence policy based on lack of timely notice or proof of claim unless it can show actual prejudice from the delay. The rule is based on the rationale that ' "[t]he primary and essential part of the contract [is] insurance coverage, not the procedure for determining liability . . ." [citations], and that "the notice requirement serves to protect insurers from prejudice, . . . not . . . to shield them from their contractual obligations" through "a technical escape-hatch".' " (*Lat, supra*, 29 Cal.App.5th at p. 196, internal citations omitted.)
- "[The notice-prejudice rule] does not apply to every time limit on any insurance policy. [¶] Where the policy provides that special coverage for a particular type of claim is conditioned on express compliance with a reporting requirement, the time limit is enforceable without proof of prejudice. Such reporting time limits often are found in provisions for expanded liability coverage that the insurer usually does not cover. The insurer makes an exception and extends special coverage conditioned on compliance with a reporting requirement and other conditions. The reporting requirement becomes 'the written notice necessary to trigger the expanded coverage afforded' by the special policy provision." (*Venoco, Inc. v. Gulf Underwriters Ins. Co.* (2009) 175 Cal.App.4th 750, 760 [96 Cal.Rptr.3d 409], internal citations omitted.)
- "With respect to notice provisions, one Court of Appeal has explained: '[A]n

"occurrence" policy provides coverage for any acts or omissions that arise during the policy period even though the claim is made after the policy has expired.' . . . [¶] . . . [¶] Occurrence policies were developed to provide coverage for damage caused by collision, fire, war, and other identifiable events. . . . Because the occurrence of these events was relatively easy to ascertain, the insurer was able to 'conduct a prompt investigation of the incident . . . .' . . . Notice provisions contained in such occurrence policies were 'included to aid the insurer in investigating, settling, and defending claims[.]' . . . If an insured breaches a notice provision, resulting in substantial prejudice to the defense, the insurer is relieved of liability." (*Belz v. Clarendon America Ins. Co.* (2007) 158 Cal.App.4th 615, 626 [69 Cal.Rptr.3d 864], internal citation omitted.)

- "The 'general rule' is that an insurer is not bound by a judgment unless it had notice of the pendency of the action. . . . However, if an insurer denies coverage to the insured, the insured's contractual obligation to notify the insurer ceases." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 238 [178 Cal.Rptr. 343, 636 P.2d 32], internal citations omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation, Ch.15-I, *Trial* ¶¶ 15:917–15:920 (The Rutter Group)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Identifying Sources of Coverage, §§ 8.24–8.26

4 California Insurance Law & Practice, Ch. 41, *Liability Insurance in General*, § 41.65[1]–[9] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.500 (Matthew Bender)

2321. Affirmative Defense—Insured's Breach of Duty to Cooperate in Defense

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[*Name of defendant***] claims that it does not have to pay the [judgment against/settlement by] [***name of plaintiff***] because [***name of plaintiff***] failed to cooperate in [his/her/***nonbinary pronoun***/its] defense. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] failed to cooperate in the defense of the lawsuit against [him/her/***nonbinary pronoun***/it];**
2. **That [***name of defendant***] used reasonable efforts to obtain [***name of plaintiff***]'s cooperation; and**
3. **That [***name of defendant***] was prejudiced by [***name of plaintiff***]'s failure to cooperate in [his/her/***nonbinary pronoun***/its] defense.**

To establish prejudice, [*name of defendant***] must show a substantial likelihood that, if [***name of plaintiff***] had cooperated, [***name of defendant***] would have [taken steps that would have substantially reduced or eliminated [***name of plaintiff***]'s liability] [or] [settled for a substantially smaller amount].**

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. This instruction also may be modified for use as a defense to a judgment creditor's action to recover on a liability policy.

Depending on the facts of the case, the second element of this instruction may not always be necessary.

Sources and Authority

- "The right of an injured party to sue an insurer on the policy after obtaining judgment against the insured is established by statute. An insurer may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, but the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby. . . . [¶] The burden of proving that a breach of a cooperation clause resulted in prejudice is on the insurer." (*Campbell v. Allstate Insurance Co.* (1963) 60 Cal.2d 303, 305–306 [32 Cal.Rptr. 827, 384 P.2d 155], internal citations omitted.)

- "[W]e apprehend that *Campbell* stands for these propositions: (1) that breach by an insured of a cooperation . . . clause may not be asserted by an insurer unless the insurer was substantially prejudiced thereby; (2) that prejudice is not presumed as a matter of law from such breach; (3) that the burden of proving prejudicial breach is on the insurer; and (4) that, although the issue of prejudice is ordinarily one of fact, it may be established as a matter of law by the facts proved." (*Northwestern Title Security Co. v. Flack* (1970) 6 Cal.App.3d 134, 141 [85 Cal.Rptr. 693].)
- " '[C]ooperation clauses serve an important purpose. "[A] condition of a policy requiring the cooperation and assistance of the assured in opposing a claim or an action lodged against him by an injured person is material to the risk and of the utmost importance in a practical sense. Without such cooperation and assistance the insurer is severely handicapped and may in some instances be absolutely precluded from advancing any defense." . . . "[S]uch provisions 'enable the [insurer] to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to facts, material to [its] rights, to enable [it] to decide upon [its] obligations, and to protect [itself] against false claims.' " . . . Where an insured violates a cooperation clause, the insurer's performance is excused if its ability to provide a defense has been substantially prejudiced.' " (*Belz v. Clarendon America Ins. Co.* (2007) 158 Cal.App.4th 615, 626 [69 Cal.Rptr.3d 864].)
- "[A]n insurer, in order to establish it was prejudiced by the failure of the insured to cooperate in his defense, must establish at the very least that if the cooperation clause had not been breached there was a substantial likelihood the trier of fact would have found in the insured's favor." (*Billington v. Interinsurance Exchange of Southern California* (1969) 71 Cal.2d 728, 737 [79 Cal.Rptr. 326, 456 P.2d 982].)
- "[I]f the trial court finds . . . that the insurer failed to diligently seek its insured's presence a finding that he breached the cooperation clause would not be justified." (*Billington, supra*, 71 Cal.2d at p. 744.)
- "[P]rejudice is not shown simply by displaying end results; the probability that such results could or would have been avoided absent the claimed default or error must also be explored." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 883, fn. 12 [151 Cal.Rptr. 285, 587 P.2d 1098].)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation, Ch.15-I, *Trial*, ¶¶ 15:917–15:919 (The Rutter Group)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Insured's Role in Defense, §§ 11.2–11.26

4 California Insurance Law & Practice, Ch. 41, *Liability Insurance in General*, § 41.64[1]–[11] (Matthew Bender)

2322. Affirmative Defense—Insured's Voluntary Payment

[*Name of defendant***] claims that it does not have to pay [***specify, e.g., the amount of the settlement***] because [***name of plaintiff***] made a voluntary payment. To succeed on this defense, [***name of defendant***] must prove the following:**

1. [*Select either or both of the following:*]

[That [*name of plaintiff***] made a payment to [***name of third party claimant***] in [partial/full] settlement of [***name of third party claimant***]'s claim against [***name of plaintiff***]; [or]]**

[That [*name of plaintiff***] [made a payment/ [or] assumed an obligation/ [or] incurred an expense] to [***name***] with regard to [***name of third party claimant***]'s claim against [***name of plaintiff***]];**

AND

2. That [*name of defendant***] did not give its consent or approval for the [payment/ [or] obligation/ [or] expense].**

New April 2007

Directions for Use

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. This instruction also may be modified for use as a defense to a judgment creditor's action to recover on a liability policy. This defense is not available if the insurer refused to defend before the voluntary payment was made. (See *21st Century Ins. Co. v. Superior Court (Tapia)* (2015) 240 Cal.App.4th 322, 328 [192 Cal.Rptr.3d 530].)

A voluntary-payments clause in an insurance policy typically provides that the insured may not voluntarily make a payment, assume an obligation, or incur an expense without the insurer's consent. (See, e.g., *Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 976 [94 Cal.Rptr.2d 516].) In element 1, select the appropriate options depending on the acts alleged. Modify, as necessary, depending on the actual language of the policy. Use the first option if the insured has made a payment in settlement of the claim. Use the second option if the insured has made a payment, assumed an obligation, or incurred an expense for other reasons, such as to an attorney for legal services, or to a creditor of the claimant, such as a provider of medical or repair services.

Sources and Authority

- "The general validity of no-voluntary-payment provisions in liability insurance policies is well established. . . . [S]uch clauses are common 'to prevent collusion as well as to invest the insurer with the complete control and direction of the defense or compromise of suits or claims.' " (*Insua v. Scottsdale Ins. Co.* (2002) 104 Cal.App.4th 737, 742 [129 Cal.Rptr.2d 138], internal citations omitted.)
- "California law enforces . . . no-voluntary-payments provisions in the absence of economic necessity, insurer breach, or other extraordinary circumstances. They are designed to ensure that responsible insurers that promptly accept a defense tendered by their insureds thereby gain control over the defense and settlement of the claim. That means insureds cannot unilaterally settle a claim before the establishment of the claim against them and the insurer's refusal to defend in a lawsuit to establish liability . . . . [T]he decision to pay any remediation costs outside the civil action context raises a 'judgment call left solely to the insurer.' In short, the provision protects against coverage by fait accompli." (*Low v. Golden Eagle Ins. Co.* (2003) 110 Cal.App.4th 1532, 1544 [2 Cal.Rptr.3d 761], internal citations omitted.)
- " 'Typically, a breach of that provision occurs, if at all, before the insured has tendered the defense to the insurer.' . . . [A voluntary-payments] provision *is* [also] enforceable posttender until the insurer wrongfully denies tender. '[I]t is only when the insured has requested *and been denied a defense by the insurer* that the insured may ignore the policy's provisions forbidding the incurring of defense costs without the insurer's prior consent and under the compulsion of that refusal undertake his own defense at the insurer's expense.' " (*Low, supra,* 110 Cal.App.4th at pp. 1546–1547, original italics, internal citations omitted.)
- " '[T]he existence or absence of prejudice to [the insurer] is simply irrelevant to [its] duty to indemnify costs incurred *before* notice. The policy plainly provides that notice is a *condition precedent* to the insured's right to be indemnified; a fortiori the right to be indemnified cannot relate back to payments made or obligations incurred before notice.' . . . The prejudice requirement . . . applies only to the insurer's attempt to assert lack of notice as a *policy defense* against payment even of losses and costs incurred *after* belated notice." (*Jamestown Builders, Inc. v. General Star Indemnity Co.* (1999) 77 Cal.App.4th 341, 350 [91 Cal.Rptr.2d 514], original italics, internal citations omitted.)
- "[W]e hold that California's notice-prejudice rule is applicable to a consent provision in a first party policy where coverage does not depend on the existence of a third party claim or potential claim." (*Pitzer College v. Indian Harbor Ins. Co.* (2019) 8 Cal.5th 93, 109 [251 Cal.Rptr.3d 701, 447 P.3d 669].)
- " 'There may be exceptions to the prohibition on voluntary payments, as where the insured is unaware of the identity of the insurer, the payment is necessary for reasons beyond the insured's control, or the insured faces a situation requiring an immediate response to protect its legal interests.' In a circumstance of that

nature, the insured's payment is considered *involuntary*." (*Belz v. Clarendon America Ins. Co.* (2007) 158 Cal.App.4th 615, 628 [69 Cal.Rptr.3d 864], original italics, internal citation omitted.)

- "If an insurer *refuses* to defend, the insured is free to enter into a non-collusive settlement and then maintain *or* assign an action against the insurer for breach of the duty to defend. In the subsequent action the amount of the settlement *will* be presumptive evidence of the amount of the insured's liability." (*21st Century Ins. Co.*, *supra*, 240 Cal.App.4th at p. 328, original italics.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 459, 464

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 7A-L, *Conditions* ¶¶ 7:439.5–7:439.10 (The Rutter Group)

California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar), §§ 2.7, 3.27, 8.32, 11.14, 23.38

25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution*, § 300.73[6] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, §§ 308.500, 308.502 (Matthew Bender)

2323–2329. Reserved for Future Use

2330. Implied Obligation of Good Faith and Fair Dealing Explained

In every insurance policy there is an implied obligation of good faith and fair dealing that neither the insurance company nor the insured will do anything to injure the right of the other party to receive the benefits of the agreement.

To fulfill its implied obligation of good faith and fair dealing, an insurance company must give at least as much consideration to the interests of the insured as it gives to its own interests.

To breach the implied obligation of good faith and fair dealing, an insurance company must unreasonably act or fail to act in a manner that deprives the insured of the benefits of the policy. To act unreasonably is not a mere failure to exercise reasonable care. It means that the insurer must act or fail to act without proper cause. However, it is not necessary for the insurer to intend to deprive the insured of the benefits of the policy.

New September 2003; Revised December 2007, December 2015

Directions for Use

This instruction may be used to introduce a "bad-faith" claim arising from an alleged breach of the implied covenant of good faith and fair dealing.

Sources and Authority

- "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198].)
- "It is important to recognize the reason for the possibility of tort, and perhaps even punitive damages on top of regular tort damages, for an insurance company's unreasonable breach of an insurance contract. Insurance contracts are unique in that, if the insurance company breaches them, the policyholder suffers a loss (often a catastrophic loss) that cannot, by definition, be compensated by obtaining another contract. [Citations.] [¶] Thus, without the possibility of tort damages hanging over its head when it makes a claims decision, an insurance company may choose not to deal in good faith when a policyholder makes a claim. The insurance company could arbitrarily deny a claim, thus gambling with the policyholder's 'benefits of the agreement.' [Citation.] If the insurance company gambled wrong, it would be no worse off than it would have been if it had honored the claim in the first place. In effect, if the law confined the exposure of the insurance company under such circumstances to only contract damages, it would be pardoned and still retain the fruits of its offense." (*Pulte*

Home Corp. v. American Safety Indemnity Co. (2017) 14 Cal.App.5th 1086, 1125 [223 Cal.Rptr.3d 47].)

- "For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, it again must give at least as much consideration to the latter's interests as it does to its own." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 818–819 [169 Cal.Rptr. 691, 620 P.2d 141].)
- "[T]o establish the insurer's 'bad faith' liability, the insured must show that the insurer has (1) withheld benefits due under the policy, and (2) that such withholding was 'unreasonable' or 'without proper cause.' The actionable withholding of benefits may consist of the denial of benefits due; paying less than due; and/or unreasonably delaying payments due." (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1209 [87 Cal.Rptr.3d 556], internal citations omitted.)
- " '[T]he covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive.' . . . [A]n insured plaintiff need only show, for example, that the insurer unreasonably refused to pay benefits or failed to accept a reasonable settlement offer; there is no requirement to establish *subjective* bad faith." (*Bosetti v. United States Life Ins. Co. in the City of New York* (2009) 175 Cal.App.4th 1208, 1236 [96 Cal.Rptr.3d 744], original italics, internal citations omitted.)
- "To establish bad faith, a policy holder must demonstrate misconduct by the insurer more egregious than an incorrect denial of policy benefits." (*Case v. State Farm Mutual Automobile Ins. Co., Inc.* (2018) 30 Cal.App.5th 397, 402 [241 Cal.Rptr.3d 458].)
- "Bad faith may involve negligence, or negligence may be indicative of bad faith, but negligence alone is insufficient to render the insurer liable." (*Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689 [319 P.2d 69].)
- "Thus, a breach of the implied covenant of good faith and fair dealing involves something more than a breach of the contract or mistaken judgment. There must be proof the insurer failed or refused to discharge its contractual duties not because of an honest mistake, bad judgment, or negligence, 'but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.' " (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 [43 Cal.Rptr.3d 468], internal citations omitted.)
- "[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 [56 Cal.Rptr.3d 312].)
- "Subterfuges and evasions violate the obligation of good faith in performance

even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." (*R. J. Kuhl Corp. v. Sullivan* (1993) 13 Cal.App.4th 1589, 1602 [17 Cal.Rptr.2d 425].)

- "[A]n insurer is not required to pay every claim presented to it. Besides the duty to deal fairly with the insured, the insurer also has a duty to its other policyholders and to the stockholders (if it is such a company) not to dissipate its reserves through the payment of meritless claims. Such a practice inevitably would prejudice the insurance seeking public because of the necessity to increase rates, and would finally drive the insurer out of business." (*Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 30 [148 Cal.Rptr. 653], overruled on other grounds in *Egan, supra*, 24 Cal.3d at p. 824 fn. 7.)
- "Unique obligations are imposed upon true fiduciaries which are not found in the insurance relationship. For example, a true fiduciary must first consider and always act in the best interests of its trust and not allow self-interest to overpower its duty to act in the trust's best interests. An insurer, however, may give its own interests consideration equal to that it gives the interests of its insured; it is not required to disregard the interests of its shareholders and other policyholders when evaluating claims; and it is not required to pay noncovered claims, even though payment would be in the best interests of its insured." (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148–1149 [271 Cal.Rptr. 246], internal citations omitted.)
- "[I]n California, an insurer has the same duty to act in good faith in the uninsured motorist context as it does in any other insurance context." (*Maslo v. Ameriprise Auto & Home Ins.* (2014) 227 Cal.App.4th 626, 636 [173 Cal.Rptr.3d 854].)
- " '[P]erformance of an act specifically authorized by the policy cannot, as a matter of law, constitute bad faith.' [¶] [I]n the insurance context, . . . ' "courts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power." ' The possible exception would be ' "those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement." ' " (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 557–558 [204 Cal.Rptr.3d 433], internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, § 340

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 11-B, *Theories For Extracontractual Liability—In General*, ¶¶ 11:7–11:8.1 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-A, *Definition of Terms*, ¶¶ 12:1–12:10 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-B, *Capsule History Of Insurance "Bad Faith" Cases*, ¶¶ 12:13–12:23 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-C, *Theory Of Recovery—Breach Of Implied Covenant Of Good Faith And Fair Dealing ("Bad Faith")*, ¶¶ 12:27–12:54 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-D, *Who May Sue For Tortious Breach Of Implied Covenant (Proper Plaintiffs)*, ¶¶ 12:56–12:90.17 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-E, *Persons Who May Be Sued For Tortious Breach Of Implied Covenant (Proper Defendants)*, ¶¶ 12:92–12:118 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-F, *Compare—Breach Of Implied Covenant By Insured*, ¶¶ 12:119–12:121 (The Rutter Group)

1 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Overview of Rights and Obligations of Policy, §§ 2.9–2.15

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.01 (Matthew Bender)

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20–24.21, 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24[1] (Matthew Bender)

11 California Legal Forms, Ch. 26A, *Title Insurance*, § 26A.17[9] (Matthew Bender)

2331. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] breached the obligation of good faith and fair dealing by [failing to pay/delaying payment of] benefits due under the insurance policy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] suffered a loss covered under an insurance policy with [***name of defendant***];**
2. **That [***name of defendant***] was notified of the loss;**
3. **That [***name of defendant***], unreasonably [failed to pay/delayed payment of] policy benefits;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s [failure to pay/delay in payment of] policy benefits was a substantial factor in causing [***name of plaintiff***]'s harm.**

To act or fail to act "unreasonably" means that the insurer had no proper cause for its conduct. In determining whether [*name of defendant***] acted unreasonably, you should consider only the information that [***name of defendant***] knew or reasonably should have known at the time when it [failed to pay/delayed payment of] policy benefits.**

New September 2003; Revised December 2007, April 2008, December 2009, December 2015

Directions for Use

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

If there is a genuine issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad-faith liability imposed on the insurer for advancing its side of that dispute. This is known as the "genuine dispute" doctrine. The genuine-dispute doctrine is subsumed within the test of reasonableness or proper cause (element 3). No specific instruction on the doctrine need be given. (See *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 792–794 [90 Cal.Rptr.3d 74].)

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

Sources and Authority

- If an insurer "fails to deal *fairly and in good faith* with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. . . . [¶] . . . [W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." (*Gruenberg v. Aetna Insurance Co.* (1973) 9 Cal.3d 566, 574–575 [108 Cal.Rptr. 480, 510 P.2d 1032], original italics.)
- "An insurer's obligations under the implied covenant of good faith and fair dealing with respect to first party coverage include a duty not to unreasonably withhold benefits due under the policy. An insurer that unreasonably delays, or fails to pay, benefits due under the policy may be held liable in tort for breach of the implied covenant. The withholding of benefits due under the policy may constitute a breach of contract even if the conduct was reasonable, but liability in tort arises only if the conduct was unreasonable, that is, without proper cause. In a first party case, as we have here, the withholding of benefits due under the policy is not unreasonable if there was a genuine dispute between the insurer and the insured as to coverage or the amount of payment due." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [53 Cal.Rptr.3d 245], internal citations omitted.)
- "[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause." (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1151 [271 Cal.Rptr. 246], internal citations omitted.)
- "The standard of good faith and fairness examines the reasonableness of the insurer's conduct, and mere errors by an insurer in discharging its obligations to its insured ' "does not necessarily make the insurer liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been *unreasonable*. [Citations.]" ' " (*Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717], original italics.)
- " 'Although an insurer's bad faith is ordinarily a question of fact to be determined by a jury by considering the evidence of motive, intent and state of mind, "[t]he question becomes one of law . . . when, because there are no conflicting inferences, reasonable minds could not differ." ' " (*Pulte Home Corp. v. American Safety Indemnity Co.* (2017) 14 Cal.App.5th 1086, 1119 [223 Cal.Rptr.3d 47].)
- "Generally, the reasonableness of an insurer's conduct 'must be evaluated in light of the totality of the circumstances surrounding its actions.' " (*Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 654 [203 Cal.Rptr.3d 785].)
- "[T]he adequacy of the insurer's claims handling is properly assessed in light of

conduct by the insured delaying resolution of a claim." (*Case v. State Farm Mutual Automobile Ins. Co., Inc.* (2018) 30 Cal.App.5th 397, 413 [241 Cal.Rptr.3d 458].)

- " '[A]n insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith[,] even though it might be liable for breach of contract.' That is because 'whe[n] there is a genuine issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute.' " (*Case, supra*, 30 Cal.App.5th at p. 402, internal citation omitted.)
- "The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A *genuine* dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds. . . . 'The genuine issue rule in the context of bad faith claims allows a [trial] court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable—for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law. . . . On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably.' " (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724 [68 Cal.Rptr.3d 746, 171 P.3d 1082], original italics, internal citations omitted.)
- "[T]he reasonableness of the insurer's decisions and actions must be evaluated as of the time that they were made; the evaluation cannot fairly be made in the light of subsequent events that may provide evidence of the insurer's errors. [Citation.]" (*Zubillaga v. Allstate Indemnity Co.* (2017) 12 Cal.App.5th 1017, 1028 [219 Cal.Rptr.3d 620].)
- "[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 [56 Cal.Rptr.3d 312].)
- "While many, if not most, of the cases finding a genuine dispute over an insurer's coverage liability have involved *legal* rather than *factual* disputes, we see no reason why the genuine dispute doctrine should be limited to legal issues. That does not mean, however, that the genuine dispute doctrine may properly be applied in every case involving purely a factual dispute between an insurer and its insured. This is an issue which should be decided on a case-by-case basis." (*Chateau Chamberay Homeowners Assn., supra*, 90 Cal.App.4th at p. 348, original italics, footnote and internal citations omitted.)
- "[I]f the conduct of [the insurer] in defending this case was objectively reasonable, its subjective intent is irrelevant." (*Bosetti v. United States Life Ins.*

Co. in the City of New York (2009) 175 Cal.App.4th 1208, 1236 [96 Cal.Rptr.3d 744]; cf. *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372 [6 Cal.Rptr.2d 467, 826 P.2d 710] ["[I]t has been suggested the covenant has both a subjective and objective aspect—subjective good faith and objective fair dealing. A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable."].)

- "[W]hile an insurer's subjective bad intentions are not a sufficient basis on which to establish a bad faith cause of action, an insurer's subjective mental state may nonetheless be a circumstance to be considered in the evaluation of the *objective* reasonableness of the insurer's actions." (*Bosetti, supra*, 175 Cal.App.4th at p. 1239, original italics.)
- "[A]n insured cannot maintain a claim for tortious breach of the implied covenant of good faith and fair dealing absent a covered loss. If the insurer's investigation—adequate or not—results in a correct conclusion of no coverage, no tort liability arises for breach of the implied convenant." (*Benavides v. State Farm General Ins. Co.* (2006) 136 Cal.App.4th 1241, 1250 [39 Cal.Rptr.3d 650], internal citations omitted; cf. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1236 [83 Cal.Rptr.3d 410] ["[B]reach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing. . . . [E]ven an insurer that pays the full limits of its policy may be liable for breach of the implied covenant, if improper claims handling causes detriment to the insured"].)
- " '[D]enial of a claim on a basis unfounded in the facts known to the insurer, or contradicted by those facts, may be deemed unreasonable. "A trier of fact may find that an insurer acted unreasonably if the insurer ignores evidence available to it which supports the claim. The insurer may not just focus on those facts which justify denial of the claim." ' " (*Maslo v. Ameriprise Auto & Home Ins.* (2014) 227 Cal.App.4th 626, 634 [173 Cal.Rptr.3d 854].)
- "We conclude . . . that the duty of good faith and fair dealing on the part of defendant insurance companies is an absolute one. . . . [T]he nonperformance by one party of its contractual duties cannot excuse a breach of the duty of good faith and fair dealing by the other party while the contract between them is in effect and not rescinded." (*Gruenberg, supra*, 9 Cal.3d at p. 578.)
- "Thus, an insurer may be liable for bad faith in failing to attempt to effectuate a prompt and fair settlement (1) where it unreasonably demands arbitration, or (2) where it commits other wrongful conduct, such as failing to investigate a claim. An insurer's statutory duty to attempt to effectuate a prompt and fair settlement is not abrogated simply because the insured's damages do not plainly exceed the policy limits. Nor is the insurer's duty to investigate a claim excused by the arbitrator's finding that the amount of damages was lower than the insured's initial demand. Even where the amount of damages is lower than the policy limits, an insurer may act unreasonably by failing to pay damages that are certain and demanding arbitration on those damages." (*Maslo, supra*, 227

Cal.App.4th at pp. 638–639 [uninsured motorist coverage case].)

- "[T]he insurer's duty to process claims fairly and in good faith [is] a nondelegable duty." (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 848 [263 Cal.Rptr. 850].)
- "[I]n [a bad-faith action] 'damages for emotional distress are compensable as *incidental damages flowing from the initial breach*, not as a separate cause of action.' Such claims of emotional distress must be incidental to 'a substantial invasion of property interests.' " (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1214 [87 Cal.Rptr.3d 556], original italics, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 341–343

Croskey et al., California Practice Guide: Insurance Litigation. Ch. 12C-C, *Bad Faith—Requirements for First Party Bad Faith Action*, ¶¶ 12:822–12:1016 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) General Principles of Contract and Bad Faith Actions, §§ 24.25–24.45A

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, §§ 13.03[2][a]–[c], 13.06 (Matthew Bender)

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20–24.21, 24.40 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.140 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.21, 82.50 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

11 California Legal Forms, Ch. 26A, *Title Insurance*, § 26A.17 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.208 (Matthew Bender)

2332. Bad Faith (First Party)—Failure to Properly Investigate Claim—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*] acted unreasonably, that is, without proper cause, by failing to conduct a proper investigation of [his/her/*nonbinary pronoun*/its] claim. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] suffered a loss covered under an insurance policy issued by [*name of defendant*];**
2. **That [*name of plaintiff*] properly presented a claim to [*name of defendant*] to be compensated for the loss;**
3. **That [*name of defendant*], failed to conduct a full, fair, prompt, and thorough investigation of all of the bases of [*name of plaintiff*]'s claim;**
4. **That [*name of plaintiff*] was harmed; and**
5. **That [*name of defendant*]'s failure to properly investigate the claim was a substantial factor in causing [*name of plaintiff*]'s harm.**

When investigating [*name of plaintiff*]'s claim, [*name of defendant*] had a duty to diligently search for and consider evidence that supported coverage of the claimed loss.

New September 2003; Revised December 2005, December 2007, April 2008, December 2015, June 2016

Directions for Use

This instruction sets forth a claim for breach of the implied covenant of good faith and fair dealing based on the insurer's failure or refusal to conduct a proper investigation of the plaintiff's claim. The claim alleges that the insurer acted unreasonably, that is, without proper cause, by failing to properly investigate the claim. (See *Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [53 Cal.Rptr.3d 245].)

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

Sources and Authority

- "[A]n insurer may breach the covenant of good faith and fair dealing when it

fails to properly investigate its insured's claim." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 817 [169 Cal.Rptr. 691, 620 P.2d 141].)

- "To fulfill its implied obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort. And an insurer cannot reasonably and in good faith deny payments to its insured without fully investigating the grounds for its denial." (*Frommoethelydo v. Fire Insurance Exchange* (1986) 42 Cal.3d 208, 214–215 [228 Cal.Rptr. 160, 721 P.2d 41], internal citation omitted.)
- "To protect [an insured's] interests it is essential that an insurer fully inquire into possible bases that might support the insured's claim. Although we recognize that distinguishing fraudulent from legitimate claims may occasionally be difficult for insurers, . . . an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial." (*Egan, supra,* 24 Cal.3d at p. 819.)
- "When investigating a claim, an insurance company has a duty to diligently search for evidence which supports its insured's claim. If it seeks to discover only the evidence that defeats the claim it holds its own interest above that of the insured." (*Mariscal v. Old Republic Life Ins. Co.* (1996) 42 Cal.App.4th 1617, 1620 [50 Cal.Rptr.2d 224].)
- "An insurer is not permitted to rely selectively on facts that support its position and ignore those facts that support a claim. Doing so may constitute bad faith." (*Mazik v. Geico General Ins. Co*. (2019) 35 Cal.App.5th 455, 462 [247 Cal.Rptr.3d 450].)
- "While we agree with the trial court . . . that the insurer's interpretation of the language of its policy which led to its original denial of [the insured]'s claim was reasonable, it does not follow that [the insurer]'s resulting claim denial can be justified in the absence of a full, fair and thorough investigation of *all* of the bases of the claim that was presented." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1066 [56 Cal.Rptr.3d 312], original italics.)
- "An unreasonable failure to investigate amounting to . . . unfair dealing may be found when an insurer fails to consider, or seek to discover, evidence relevant to the issues of liability and damages. . . . [¶] The insurer's willingness to reconsider its denial of coverage and to continue an investigation into a claim has been held to weigh in favor of its good faith." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 880 [93 Cal.Rptr.2d 364], internal citation omitted.)
- "[The insurer], of course, was not obliged to accept [the doctor]'s opinion without scrutiny or investigation. To the extent it had good faith doubts, the insurer would have been within its rights to investigate the basis for [plaintiff]'s claim by asking [the doctor] to reexamine or further explain his findings, having a physician review all the submitted medical records and offer an opinion, or, if necessary, having its insured examined by other physicians (as it later did). What

it could not do, consistent with the implied covenant of good faith and fair dealing, was *ignore* [the doctor]'s conclusions without any attempt at adequate investigation, and reach contrary conclusions lacking any discernable medical foundation." (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 722 [68 Cal.Rptr.3d 746, 171 P.3d 1082], original italics.)

- "[W]hether an insurer breached its duty to investigate [is] a question of fact to be determined by the particular circumstances of each case." (*Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 196 [197 Cal.Rptr. 501].)
- "[L]iability in tort arises only if the conduct was unreasonable, that is, without proper cause." (*Rappaport-Scott, supra*, 146 Cal.App.4th at p. 837.)
- "[W]ithout actual presentation of a claim by the insured in compliance with claims procedures contained in the policy, there is no duty imposed on the insurer to investigate the claim." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 57 [221 Cal.Rptr. 171].)
- "It would seem reasonable that any responsibility to investigate on an insurer's part would not arise unless and until the threshold issue as to whether a claim was filed, or a good faith effort to comply with claims procedure was made, has been determined. In no event could an insured fail to keep his/her part of the bargain in the first instance, and thereafter seek recovery for breach of a duty to pay seeking punitive damages based on an insurer's failure to investigate a nonclaim." (*Paulfrey, supra,* 150 Cal.App.3d at pp. 199–200.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, § 348

Croskey et al., California Practice Guide: Insurance Litigation, Chapter 12C-D, *Bad Faith—First Party Cases—Application—Matters Held "Unreasonable"*, ¶¶ 12:848–12:904 (The Rutter Group)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Investigating the Claim, §§ 9.2, 9.14–9.22

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.04[1]–[3] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.11 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.153, 120.184 (Matthew Bender)

2333. Bad Faith (First Party)—Breach of Duty to Inform Insured of Rights—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] breached the obligation of good faith and fair dealing by failing to reasonably inform [him/her/***nonbinary pronoun***/it] of [his/her/***nonbinary pronoun***/its] rights and obligations under an insurance policy. To succeed, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] suffered a loss covered under an insurance policy with [***name of defendant***];**
2. **That [***name of defendant***] [denied coverage for/refused to pay] [***name of plaintiff***]'s loss;**
3. **That under the policy [***name of plaintiff***] had the [right/obligation] to [***describe right or obligation at issue; e.g., "to request arbitration within 180 days"***];**
4. **That [***name of defendant***] did not reasonably inform [***name of plaintiff***] of [his/her/***nonbinary pronoun***/its] [right/obligation] to [***describe right or obligation***];**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s failure to reasonably inform [***name of plaintiff***] was a substantial factor in causing [his/her/***nonbinary pronoun***/its] harm.**

New September 2003; Revised May 2020

Directions for Use

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use in appropriate cases if the insured alleges that the insurer breached the implied covenant of good faith and fair dealing by failing to reasonably inform the insured of the insured's remedial rights and obligations under an insurance policy.

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

Sources and Authority

- The insurer's implied duty of good faith and fair dealing includes "the duty reasonably to inform an insured of the insured's rights and obligations under the insurance policy. In particular, in situations in which an insured's lack of

knowledge may potentially result in a loss of benefits or a forfeiture of rights, an insurer [is] required to bring to the insured's attention relevant information so as to enable the insured to take action to secure rights afforded by the policy." (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 428 [158 Cal.Rptr. 828, 600 P.2d 1060].)

- The trial court in the instant case found that [the insurer] knew that in many instances its insureds would not be aware of the arbitration clause and that, despite this knowledge, [it] deliberately decided not to inform its insureds of the arbitration procedure. In this context, the practical effect of the insurer's practice was to transform its arbitration clause into a unilateral provision, establishing a procedure to which the insurer could require its insureds to resort when [it] deemed it advisable, but one that would not generally provide a speedy, economic or readily accessible remedy for the bulk of [its] uninformed insureds. [¶] We think the trial court was fully justified in finding that [the insurer] had breached its duty of good faith and fair dealing in adopting such a course of conduct. (*Davis, supra,* 25 Cal.3d at pp. 430–431.)
- "When a court is reviewing claims under an insurance policy, it must hold the insured bound by clear and conspicuous provisions in the policy even if evidence suggests that the insured did not read or understand them. Once it becomes clear to the insurer that its insured disputes its denial of coverage, however, the duty of good faith does not permit the insurer passively to assume that its insured is aware of his rights under the policy. The insurer must instead take affirmative steps to make sure that the insured is informed of his remedial rights." (*Sarchett v. Blue Shield of California* (1987) 43 Cal.3d 1, 14–15 [233 Cal.Rptr. 76, 729 P.2d 267], plurality opinion.)
- But see *Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1155 [50 Cal.Rptr.2d 178] [while insurer may not misrepresent facts or fail to clarify an insured's obvious misunderstanding of the policy coverage, it does not have an ongoing duty to keep the insured informed of his or her rights once those rights have been clearly set forth in the policy].)
- "In order to find a forfeiture by the insurer of the right to arbitration, we understand *Davis* and *Sarchett* to require conduct *designed* to mislead policyholders." (*Chase, supra,* 42 Cal.App.4th at p. 1157, original italics.)
- An insurer owes a duty to an additional insured under an automobile policy to disclose within a reasonable time the existence and amount of any underinsured motorist coverage. (*Ramirez v. USAA Casualty Insurance Co.* (1991) 234 Cal.App.3d 391, 397–402 [285 Cal.Rptr. 757].)
- "California courts have imposed a duty on the insurer to advise its insureds of the availability of and procedure for initiating arbitration; to notify him of a 31-day option period in which to convert his group insurance policy into individual coverage after termination; and to notify an assignee of a life insurance policy taken as security for a loan to the insured of previous assignments of the policy known to the insurer." (*Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d

685, 692 [187 Cal.Rptr. 214], internal citations omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12C-D, *Application—Matters Held "Unreasonable"*, ¶¶ 12:953–12:963 (The Rutter Group)

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.05 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.22 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.383–120.384, 120.390 (Matthew Bender)

2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*] breached the obligation of good faith and fair dealing because [*name of defendant*] failed to accept a reasonable settlement demand for a claim against [*name of plaintiff*]. To establish [*name of plaintiff*]'s claim against [*name of defendant*], [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was insured under a policy of liability insurance issued by [*name of defendant*];**
2. **That [*name of claimant*] made a claim against [*name of plaintiff*] that was covered by [*name of defendant*]'s insurance policy;**
3. **That [*name of claimant*] made a reasonable demand to settle [his/her/*nonbinary pronoun*] claim against [*name of plaintiff*] for an amount within policy limits;**
4. **That [*name of defendant*] failed to accept this settlement demand;**
5. **That [*name of defendant*]'s failure to accept the settlement demand was the result of unreasonable conduct by [*name of defendant*]; and**
6. **[That a judgment was entered against [*name of plaintiff*] for a sum of money greater than the policy limits.]**

   [*or*]

   [That [*name of defendant*]'s failure to accept the settlement demand was a substantial factor in causing [*name of plaintiff*]'s harm.]

"Policy limits" means the highest amount of insurance coverage available under the policy for the claim against [*name of plaintiff*].

A settlement demand for an amount within policy limits is reasonable if [*name of defendant*] knew or should have known at the time it failed to accept the demand that a potential judgment against [*name of plaintiff*] was likely to exceed the amount of the demand based on [*name of claimant*]'s injuries or losses and [*name of plaintiff*]'s probable liability. However, the demand may be unreasonable for reasons other than the amount demanded.

An insurance company's unreasonable conduct may be shown by its action or by its failure to act. An insurance company's conduct is unreasonable when, for example, it does not give at least as much consideration to the interests of the insured as it gives to its own

interests.

New September 2003; Revised December 2007, June 2012, December 2012, June 2016, November 2021, May 2022

Directions for Use

This instruction is for use in an "excess judgment" case; that is, one in which judgment was against the insured for an amount over the policy limits, after the insurer rejected a settlement demand within policy limits. Use the first option for element 6 if the plaintiff is seeking only the amount of the excess judgment. Use the second option for element 6 if the plaintiff is seeking damages separate from or in addition to the excess judgment. (See *Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42].) If there has been both an excess judgment and other damages, modify element 6 as appropriate to address all damages involved in the case.

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case. For example, if the plaintiff is the insured's assignee, modify the instruction as needed to reflect the underlying facts and relationship between the parties.

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

If it is alleged that a demand was made in excess of the policy limits and there is a claim that the defendant should have contributed the policy limits toward a settlement, then this instruction will need to be modified.

This instruction should also be modified if the insurer did not accept the policy-limits demand because of potential remaining exposure to the insured, such as a contractual indemnity claim or exposure to other claimants.

Sources and Authority

- "[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [¶] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198], citation omitted.)
- "Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Insurance*

Co. of New Haven, Connecticut (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173].)

- "In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer." (*Crisci*, *supra*, 66 Cal.2d at p. 429.)
- "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. . . . [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744], internal citation omitted.)
- "[A]n insurer is required to act in good faith in dealing with its insured. Thus, in deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured's interests may require the insurer to settle the claim within the policy limits. An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits." (*Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 724–725 [117 Cal.Rptr.2d 318, 41 P.3d 128].)
- "The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim." (*Crisci*, *supra*, 66 Cal.2d at p. 431.)
- "The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer's duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble—on which only the insured might lose." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)
- "An insured's claim for bad faith based on an alleged wrongful refusal to settle

first requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The offer satisfies this first element if (1) its terms are clear enough to have created an enforceable contract resolving all claims had it been accepted by the insurer, (2) all of the third party claimants have joined in the demand, (3) it provides for a complete release of all insureds, and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured's exposure." (*Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717], internal citations omitted.)

- "An insurer's duty to accept a reasonable settlement offer is not absolute. ' "[I]n deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured's interests *may* require the insurer to settle the claim within the policy limits. An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits." ' [¶] Therefore, failing to accept a reasonable settlement offer does not necessarily constitute bad faith. '[T]he crucial issue is . . . the basis for the insurer's decision to reject an offer of settlement.' " *(Pinto v. Farmers Ins. Exchange* (2021) 61 Cal.App.5th 676, 688 [276 Cal.Rptr.3d 13], original italics, internal citations omitted.)
- "A claim for bad faith based on the wrongful refusal to settle thus requires proof the insurer unreasonably failed to accept an offer. [¶] Simply failing to settle does not meet this standard." (*Pinto, supra,* 61 Cal.App.5th at p. 688, internal citation omitted.)
- "To be liable for bad faith, an insurer must not only cause the insured's damages, it must act or fail to act without proper cause, for example by placing its own interests above those of its insured." (*Pinto, supra,* 61 Cal.App.5th at p. 692.)
- "A bad faith claim requires 'something beyond breach of the contractual duty itself, and that something more is ' "refusing, *without proper cause*, to compensate its insured for a loss covered by the policy . . . ." [Citation.] Of course, the converse of "without proper cause" is that declining to perform a contractual duty under the policy *with proper cause* is not a breach of the implied covenant.' " (*Graciano, supra*, 231 Cal.App.4th at p. 433, original italics.)
- "Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)
- "The third party is entitled to set a reasonable time limit within which the insurer must accept the settlement proposal . . . ." (*Graciano, supra*, 231 Cal.App.4th at p. 434.)

- "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994 [136 Cal.Rptr. 331].)
- "A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. . . . Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable." (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43], internal citations omitted.)
- "An insurer's wrongful failure to settle may be actionable even without rendition of an excess judgment. An insured may recover for bad faith failure to settle, despite the lack of an excess judgment, where the insurer's misconduct goes beyond a simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment." (*Howard, supra,* 187 Cal.App.4th at p. 527, internal citations omitted.)
- " 'An insurer who denies coverage *does so at its own risk and although its position may not have been entirely groundless*, if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract.' Accordingly, contrary to the defendant's suggestion, an insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer." (*Johansen, supra*, 15 Cal.3d at pp. 15–16, original italics, footnotes and internal citation omitted.)
- "[W]here the *kind* of claim asserted is not covered by the insurance contract (and not simply the *amount* of the claim), an insurer has no obligation to pay money in settlement of a noncovered claim, because 'The insurer does not . . . insure the entire range of an insured's well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims.' " (*Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705], original italics.)
- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32], internal citation omitted.)
- "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded." (*Hamilton, supra*, 27 Cal.4th at p. 725, internal citations omitted.)
- "[I]nsurers do have a 'selfish' interest (that is, one that is peculiar to themselves)

in imposing a blanket rule which effectively precludes disclosure of policy limits, and that interest can adversely affect the possibility that an excess claim against a policyholder might be settled within policy limits. Thus, a palpable conflict of interest exists in at least one context where there is no formal settlement offer. We therefore conclude that a formal settlement offer is not an absolute prerequisite to a bad faith action in the wake of an excess verdict when the claimant makes a request for policy limits and the insurer refuses to contact the policyholder about the request." (*Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1398–1399 [93 Cal.Rptr.3d 763].)

- "For bad faith liability to attach to an insurer's failure to pursue settlement discussions, in a case where the insured is exposed to a judgment beyond policy limits, there must be, at a minimum, some evidence either that the injured party has communicated to the insurer an interest in settlement, or some other circumstance demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated. In the absence of such evidence, or evidence the insurer by its conduct has actively foreclosed the possibility of settlement, there is no 'opportunity to settle' that an insurer may be taxed with ignoring." (*Reid v. Mercury Ins. Co.* (2013) 220 Cal.App.4th 262, 272 [162 Cal.Rptr.3d 894].)
- "[F]ailing to accept a reasonable settlement offer does not necessarily constitute bad faith. '[T]he crucial issue is . . . the basis for the insurer's decision to reject an offer of settlement.' '[M]ere errors by an insurer in discharging its obligations to its insured " 'does not necessarily make the insurer liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been *unreasonable*.' " ' " (*Pinto, supra,* 61 Cal.App.5th at p. 688, original italics, internal citations omitted.)
- "In short, so long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake." (*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1460 [7 Cal.Rptr.2d 513, 521].)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 366–368

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-A, *Implied Covenant Liability—Introduction*, ¶¶ 12:202–12:224 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:226–12:548 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-C, *Bad Faith Liability Despite Settlement Of Third Party Claims*, ¶¶ 12:575–12:581.12 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, *Refusal To Defend Cases*, ¶¶ 12:582–12:686 (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Settle, §§ 26.1–26.35

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.07[1]–[3] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.195, 120.199, 120.205, 120.207 (Matthew Bender)

2335. Bad Faith—Advice of Counsel

[*Name of defendant***] did not breach the obligation of good faith and fair dealing if it reasonably relied on the advice of its lawyer. [***Name of defendant***]'s reliance was reasonable if:**

1. **[***Name of defendant***] acted in reliance on the opinion and advice of its lawyer;**
2. **The lawyer's advice was based on full disclosure by [***name of defendant***] of all relevant facts that it knew, or could have discovered with reasonable effort;**
3. **[***Name of defendant***] reasonably believed the advice of the lawyer was correct; [and]**
4. **In relying on its lawyer's advice, [***name of defendant***] gave at least as much consideration to [***name of plaintiff***]'s interest as it gave its own interest; [and]**

[5. [*Name of defendant***] was willing to reconsider and act accordingly when it determined that the lawyer's advice was incorrect.]**

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

The "advice of counsel defense" is not a true affirmative defense, but rather negates an essential element of the insured's cause of action for bad faith. (See *State Farm Mutual Automobile Insurance Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725–726 [279 Cal.Rptr. 116].)

Advice of counsel is irrelevant, however, when an insurer denies coverage and for that reason refuses a reasonable settlement offer. (See, e.g., *Johansen v. California State Auto. Asso. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744] ["an insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer"].)

Sources and Authority

- "An insurer may defend itself against allegations of bad faith and malice in claims handling with evidence the insurer relied on the advice of competent counsel. The defense of advice of counsel is offered to show the insurer had 'proper cause' for its actions even if the advice it received is ultimately unsound

or erroneous." (*State Farm Mutual Automobile Insurance Co., supra,* 228 Cal.App.3d at p. 725, internal citations omitted.)

- "If the insurer has exercised good faith in all of its dealings under its policy, and if the settlement which it has rejected has been fully and fairly considered and has been based upon an honest belief that the insurer could defeat the action or keep any possible judgment within the limits of the policy, and its judgments are based on a fair review of the evidence after reasonable diligence in ascertaining the facts, and upon sound legal advice, a court should not subject the insurer to further liability if it ultimately turns out that its judgment is a mistaken judgment . . . ." (*State Farm Mutual Automobile Insurance Co., supra*, 228 Cal.App.3d at p. 725, internal citation omitted.)
- "[I]t is a complete defense to a claim of extreme and outrageous conduct when the evidence shows (1) the defendant acted on the opinion and advice of counsel; (2) counsel's advice was based on full disclosure of all the facts by defendant or the advice was initiated by counsel based on counsel's familiarity with the case; and (3) the defendant's reliance on the advice of counsel was in good faith." (*Melorich Builders, Inc. v. Superior Court* (1984) 160 Cal.App.3d 931, 936–937 [207 Cal.Rptr. 47] [intentional infliction of emotional distress action].)
- "Good faith reliance on counsel's advice simply negates allegations of bad faith and malice as it tends to show the insurer had proper cause for its actions. Because advice of counsel is directed to an essential element of a plaintiff's cause of action, it does not constitute new matter and need not be specifically alleged." (*State Farm Mutual Automobile Insurance Co.*, *supra*, 228 Cal.App.3d at. pp. 725–726.)
- "An insurer's receipt of and reliance on [the written opinion of its legal counsel] is a relevant circumstance to be considered on the issue of its alleged bad faith." (*Mock v. Mich. Millers Mut. Ins. Co.* (1992) 4 Cal.App.4th 306, 326, fn. 20 [5 Cal.Rptr.2d 594].)
- "Exemplary damages are not recoverable against a defendant who acts in good faith and under the advice of counsel." (*Fox v. Aced* (1957) 49 Cal.2d 381, 385 [317 P.2d 608].)
- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32], internal citation omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12D-G, *Insurer's Reliance on Advice of Counsel*, ¶¶ 12:1248–12:1260 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) General Principles of Contract and Bad Faith Actions, §§ 24.52–24.55

2 California Uninsured Motorist Law, Ch. 21, *Defending an Uninsured Motorist*

Claim, §§ 21.20, 21.31 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, § 82.55 (Matthew Bender)

2336. Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements

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[*Name of plaintiff*] claims [he/she/*nonbinary pronoun*/it] was harmed by [*name of defendant*]'s breach of the obligation of good faith and fair dealing because [*name of defendant*] failed to defend [*name of plaintiff*] in a lawsuit that was brought against [him/her/*nonbinary pronoun*/it]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was insured under an insurance policy with [*name of defendant*];**
2. **That a lawsuit was brought against [*name of plaintiff*];**
3. **That [*name of plaintiff*] gave [*name of defendant*] timely notice that [he/she/*nonbinary pronoun*/it] had been sued;**
4. **That [*name of defendant*], unreasonably, that is, without proper cause, failed to defend [*name of plaintiff*] against the lawsuit;**
5. **That [*name of plaintiff*] was harmed; and**
6. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New October 2004; Revised December 2007, December 2014, December 2015

Directions for Use

The instructions in this series assume that the plaintiff is an insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

The court will decide the issue of whether the claim was potentially covered by the policy. (See *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 52 [221 Cal.Rptr. 171].) If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute establishes a possibility of coverage and thus a duty to defend. (*North Counties Engineering, Inc. v. State Farm General Ins. Co.* (2014) 224 Cal.App.4th 902, 922 [169 Cal.Rptr.3d 726].) Therefore, the jury does not resolve factual disputes that determine coverage.

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

Sources and Authority

- "A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause. On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will

result.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* 78 Cal.App.4th 847, 881 [93 Cal.Rptr.2d 364], internal citations omitted.)

- "To prevail in an action seeking declaratory relief on the question of the duty to defend, 'the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.' The duty to defend exists if the insurer 'becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement.' " (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308 [97 Cal.Rptr.3d 298, 211 P.3d 1083], original italics, internal citation omitted.)
- " '[A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. . . . This duty . . . is separate from and broader than the insurer's duty to indemnify. . . .' " "[F]or an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. . . . Hence, the duty 'may exist even where coverage is in doubt and ultimately does not develop.' . . ." . . .' " (*State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323 [78 Cal.Rptr.3d 828], internal citations omitted.)
- "If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1506 [86 Cal.Rptr.3d 515].)
- " 'The proper focus is on the facts alleged in the complaint, rather than the alleged theories for recovery. . . . "The ultimate question is whether the facts alleged 'fairly apprise' the insurer that the suit is upon a covered claim." ' " (*Albert v. Truck Ins. Exchange* (2018) 23 Cal. App. 5th 367, 378 [232 Cal.Rptr.3d 774].)
- "The duty to defend was not a question of fact for the jury; the trial court was compelled to determine as a matter of law that [indemnitee]'s claim was embraced by the indemnity agreement." (*Centex Homes v. R-Help Construction Co., Inc*. (2019) 32 Cal.App.5th 1230, 1236 [244 Cal.Rptr.3d 574].)
- "A duty to defend can be extinguished only prospectively and not retrospectively." (*Navigators Specialty Ins. Co. v. Moorefield Construction, Inc.* (2016) 6 Cal.App.5th 1258, 1284 [212 Cal.Rptr.3d 231].)
- "[F]acts known to the insurer and extrinsic to the third party complaint can

generate a duty to defend, even though the face of the complaint does not reflect a potential for liability under the policy. [Citation.] This is so because current pleading rules liberally allow amendment; the third party plaintiff cannot be the arbiter of coverage." (*Tidwell Enterprises, Inc. v. Financial Pacific Ins. Co., Inc.* (2016) 6 Cal.App.5th 100, 106 [210 Cal.Rptr.3d 634].)

- "An insurer does not have a continuing duty to investigate the potential for coverage if it has made an informed decision on coverage at the time of tender. However, where the information available at the time of tender shows no coverage, but information available later shows otherwise, a duty to defend may then arise." (*American States Ins. Co. v. Progressive Casualty Ins. Co.* (2009) 180 Cal.App.4th 18, 26 [102 Cal.Rptr.3d 591], internal citations omitted.)
- "The duty does not depend on the labels given to the causes of action in the underlying claims against the insured; 'instead it rests on whether the *alleged facts or known extrinsic facts* reveal a *possibility* that the claim may be covered by the policy.' " (*Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.* (2012) 207 Cal.App.4th 969, 976 [144 Cal.Rptr.3d 12], original italics, disapproved on other grounds in *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 295 [172 Cal.Rptr.3d 653, 326 P.3d 253].)
- "The obligation of the insurer to defend is of vital importance to the insured. 'In purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources and expertise of his insurer than if compelled to handle and finance the presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own.' 'The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability.' " (*Amato v. Mercury Casualty Co. (Amato II)* (1997) 53 Cal.App.4th 825, 831–832 [61 Cal.Rptr.2d 909], internal citations omitted.)
- "An anomalous situation would be created if, on the one hand, an insured can sue for the tort of breach of the implied covenant if the insurer accepts the defense and later refuses a reasonable settlement offer, but, on the other hand, an insured is denied tort recovery if the insurer simply refuses to defend. . . . This dichotomy could have the effect of encouraging an insurer to stonewall the insured at the outset by simply refusing to defend." (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319–1320 [52 Cal.Rptr.2d 385].)
- "[T]he mere existence of a legal dispute does not create a potential for coverage: 'However, we have made clear that where the third party suit never presented any potential for policy coverage, the duty to defend does not arise in the first instance, and the insurer may properly deny a defense. *Moreover, the law governing the insurer's duty to defend need not be settled at the time the insurer makes its decision*.' " (*Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 209 [97 Cal.Rptr.3d 568], original italics.)

- "The trial court erroneously thought that because the case law was 'unsettled' when the insurer first turned down the claim, that unsettledness created a potential for a covered claim. . . . [I]f an insurance company's denial of coverage is reasonable, as shown by substantial case law in favor of its position, there can be no bad faith even though the insurance company's position is *later* rejected by our state Supreme Court." (*Griffin Dewatering Corp., supra*, 176 Cal.App.4th at p. 179, original italics.)
- "Unresolved factual disputes impacting insurance coverage do not absolve the insurer of its duty to defend. 'If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend.' " (*Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 520 [115 Cal.Rptr.3d 42].)
- " 'If the insurer is obliged to take up the defense of its insured, it must do so as soon as possible, both to protect the interests of the insured, and to limit its own exposure to loss. . . . [T]he duty to defend must be assessed at the outset of the case.' It follows that a belated offer to pay the costs of defense may mitigate damages but will not cure the initial breach of duty." (*Shade Foods, Inc., supra,* 78 Cal.App.4th at p. 881, internal citations omitted.)
- "When a complaint states multiple claims, some of which are potentially covered by the insurance policy and some of which are not, it is a mixed action. In these cases, 'the insurer has a duty to defend as to the claims that are at least potentially covered, having been paid premiums by the insured therefor, but does not have a duty to defend as to those that are not, not having been paid therefor.' However, in a ' "mixed" action, the insurer has a duty to defend the action in its entirety.' Thereafter, the insurance company is entitled to seek reimbursement for the cost of defending the claims that are not potentially covered by the policy." (*Gonzalez v. Fire Ins. Exchange* (2015) 234 Cal.App.4th 1220, 1231 [184 Cal.Rptr.3d 394], internal citations omitted.)
- "No tender of defense is required if the insurer has already denied coverage of the claim. In such cases, notice of suit and tender of the defense are excused because other insurer has already expressed its unwillingness to undertake the defense." (Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12D-G, *Insurer's Reliance on Advice of Counsel* ¶ 7:614 (The Rutter Group).)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 427, 428

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, *Third Party Cases—Refusal To Defend Cases*, ¶¶ 12:598–12:650.5 (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Defend, §§ 25.1–26.38

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.08 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.10–82.16 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

2337. Factors to Consider in Evaluating Insurer's Conduct

In determining whether [*name of defendant***] acted unreasonably, that is, without proper cause, you may consider whether the defendant did any of the following:**

[(a) Misrepresented to [*name of plaintiff***] relevant facts or insurance policy provisions relating to any coverage at issue.]**

[(b) Failed to acknowledge and act reasonably promptly after receiving communications about [*name of plaintiff***]'s claim arising under the insurance policy.]**

[(c) Failed to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under its insurance policies.]

[(d) Failed to accept or deny coverage of claims within a reasonable time after [*name of plaintiff***] completed and submitted proof-of-loss requirements.]**

[(e) Did not attempt in good faith to reach a prompt, fair, and equitable settlement of [*name of plaintiff***]'s claim after liability had become reasonably clear.]**

[(f) Required [*name of plaintiff***] to file a lawsuit to recover amounts due under the policy by offering substantially less than the amount that [he/she/***nonbinary pronoun***/it] ultimately recovered in the lawsuit, even though [***name of plaintiff***] had made a claim for an amount reasonably close to the amount ultimately recovered.]**

[(g) Attempted to settle [*name of plaintiff***]'s claim for less than the amount to which a reasonable person would have believed [***name of plaintiff***] was entitled by referring to written or printed advertising material accompanying or made part of the application.]**

[(h) Attempted to settle the claim on the basis of an application that was altered without notice to, or knowledge or consent of, [*name of plaintiff***], [his/her/***nonbinary pronoun***/its] representative, agent, or broker.]**

[(i) Failed, after payment of a claim, to inform [*name of plaintiff***] at [his/her/***nonbinary pronoun***/its] request, of the coverage under which payment was made.]**

[(j) Informed [*name of plaintiff***] of its practice of appealing from arbitration awards in favor of insureds or claimants for the**

purpose of forcing them to accept settlements or compromises less than the amount awarded in arbitration.]

[(k) Delayed the investigation or payment of the claim by requiring [*name of plaintiff***], [or [his/her/***nonbinary pronoun***] physician], to submit a preliminary claim report, and then also required the submission of formal proof-of-loss forms, both of which contained substantially the same information.]**

[(*l*) Failed to settle a claim against [*name of plaintiff***] promptly once [his/her/***nonbinary pronoun***/its] liability had become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.]**

[(m) Failed to promptly provide a reasonable explanation of its reasons for denying the claim or offering a compromise settlement, based on the provisions of the insurance policy in relation to the facts or applicable law.]

[(n) Directly advised [*name of plaintiff***] not to hire an attorney.]**

[(o) Misled [*name of plaintiff***] as to the applicable statute of limitations, that is, the date by which an action against [***name of defendant***] on the claim had to be filed.]**

[(p) Delayed the payment or provision of hospital, medical, or surgical benefits for services provided with respect to acquired immune deficiency syndrome (AIDS) or AIDS-related complex for more than 60 days after it had received [*name of plaintiff***]'s claim for those benefits, doing so in order to investigate whether [***name of plaintiff***] had the condition before obtaining the insurance coverage. However, the 60-day period does not include any time during which [***name of defendant***] was waiting for a response for relevant medical information from a healthcare provider.]**

The presence or absence of any of these factors alone is not enough to determine whether [*name of defendant***]'s conduct was or was not unreasonable, that is, without proper cause. You must consider [***name of defendant***]'s conduct as a whole in making this determination.**

New April 2008; Revised December 2015, May 2020

Directions for Use

Although there is no private cause of action under Insurance Code section 790.03(h) (see *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 304–305 [250 Cal.Rptr. 116, 758 P.2d 58]), this instruction may be given in an insurance bad-faith action to assist the jury in determining whether the insurer's

conduct was unreasonable or without proper cause. (See *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1078 [56 Cal.Rptr.3d 312], internal citations omitted.)

Include only the factors that are relevant to the case.

Sources and Authority

- Bad-Faith Insurance Practices. Insurance Code section 790.03.
- "[Plaintiff] was not seeking to recover on a claim based on a violation of Insurance Code section 790.03, subdivision (h). Rather, her claim was based on a claim of common law bad faith arising from [defendant]'s breach of the implied covenant of good faith and fair dealing which she is entitled to pursue. [Plaintiff]'s reliance upon the [expert's] declaration was for the purpose of providing evidence supporting her contention that [defendant] had breached the implied covenant by its actions. This is a *proper* use of evidence of an insurer's violations of the statute and the corresponding regulations." (*Jordan, supra,* 148 Cal.App.4th at p. 1078, original italics, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance §§ 360, 361, 365, 461

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 14-A, *Statutory and Administrative Regulation—The California Regulator*, ¶ 14:109 et seq. (The Rutter Group)

1 California Liability Insurance Practice: Claims and Litigation, Ch. 24, *General Principles of Contract and Bad Faith* (Cont.Ed.Bar) § 24.30 et seq.

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.25 (Matthew Bender)

1 Rushing et al., Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 2, *Unfair Competition*, 2.11 (Matthew Bender)

2338–2349. Reserved for Future Use

2350. Damages for Bad Faith

If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***/its] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

The amount of damages must include an award for all harm that was caused by [*name of defendant***], even if the particular harm could not have been anticipated.**

[*Name of plaintiff***] must prove the amount of [his/her/***nonbinary pronoun***/its] damages. However, [***name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **[Mental suffering/anxiety/humiliation/emotional distress;] [and]**
2. **[The cost of attorney fees to recover the insurance policy benefits;] [and]**
3. **[***Insert other applicable item of damage.***]**

[No fixed standard exists for deciding the amount of damages for [*insert item of mental or emotional distress***]. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.]**

[To recover for future [*insert item of mental or emotional distress***], [***name of plaintiff***] must prove that [he/she/***nonbinary pronoun***] is reasonably certain to suffer that harm.]**

[To recover attorney fees [*name of plaintiff***] must prove that because of [***name of defendant***]'s breach of the obligation of good faith and fair dealing it was reasonably necessary for [him/her/***nonbinary pronoun***/it] to hire an attorney to recover the policy benefits. [***Name of plaintiff***] may recover attorney fees [he/she/***nonbinary pronoun***/it] incurred to obtain policy benefits but not attorney fees [he/she/***nonbinary pronoun***/it] incurred for other purposes.]**

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For instructions on damages for pain and suffering, see CACI No. 3905, *Items of Noneconomic Damage*, and CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*. For instructions on punitive damages, see other instructions in the Damages series.

Sources and Authority

- "When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss—damages—proximately caused by the tort." (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817 [210 Cal.Rptr. 211, 693 P.2d 796].)
- "The fees recoverable . . . may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract. Fees attributable to obtaining any portion of the plaintiff's award which exceeds the amount due under the policy are not recoverable. [¶] Since the attorney's fees are recoverable as damages, the determination of the recoverable fees must be made by the trier of fact unless the parties stipulate otherwise." (*Brandt, supra*, 37 Cal.3d at p. 819.)
- "If . . . the matter is to be presented to the jury, the court should instruct along the following lines: 'If you find (1) that the plaintiff is entitled to recover on his cause of action for breach of the implied covenant of good faith and fair dealing, and (2) that because of such breach it was reasonably necessary for the plaintiff to employ the services of an attorney to collect the benefits due under the policy, then and only then is the plaintiff entitled to an award for attorney's fees incurred to obtain the policy benefits, which award must not include attorney's fees incurred to recover any other portion of the verdict.' " (*Brandt*, *supra*, 37 Cal.3d at p. 820.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 13-B, *Extracontractual Compensatory Damages*, ¶¶ 13:120–13:144 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) General Principles of Contract and Bad Faith Actions, §§ 24.70–24.71

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.03[5][c] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 25, *Uninsured Motorist Bad Faith Litigation*, §§ 25.40–25.44 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

2351. Insurer's Claim for Reimbursement of Costs of Defense of Uncovered Claims

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[*Name of insurer***] claims that it is entitled to partial reimbursement from [***name of insured***] for the costs that it spent in defending [***name of insured***] in the lawsuit brought by [***name of plaintiff in underlying suit***] against [***name of insured***]. [***Name of insurer***] may obtain reimbursement only for those defense costs that it proves can be allocated solely to claims that are not even potentially covered by the insurance policy.**

I have determined that the following claims in [*name of plaintiff in underlying suit***]'s lawsuit were not even potentially covered by the policy: [***specify***]. You must determine the dollar amount of [***name of insurer***]'s costs of defense that were attributable only to these claims. Costs for work that also helped the defense of the other claims that were potentially covered should not be included.**

New December 2015

Directions for Use

This instruction is for use if the insurer has provided a defense under a reservation of rights to deny indemnity if coverage cannot be established. In such a case, the insurer can seek reimbursement of the cost of defense that can be allocated solely to claims for which there was no possible potential coverage. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 57–58 [65 Cal.Rptr.2d 366, 939 P.2d 766].)

If the insurer denies a defense, but the court finds that there is coverage for some but not all claims in the underlying case, it would appear that the insured can recover all costs of defense from the insurer. The insurer is not entitled to apportion the costs of defense (damages) between covered and uncovered claims if it denies a defense. (See *Hogan v. Midland Nat'l Ins. Co.* (1970) 3 Cal.3d 553, 563–564 [91 Cal.Rptr. 153, 476 P.2d 825].) Therefore, this instruction may not be modified for use in a denial-of-coverage case.

Sources and Authority

- "An insurer may obtain reimbursement only for defense costs that can be allocated solely to the claims that are not even potentially covered. To do that, it must carry the burden of proof as to these costs by a preponderance of the evidence. And to do that, . . . it must accomplish a task that, 'if ever feasible," may be "extremely difficult.' " (*Buss, supra*, 16 Cal.4th at pp. 57–58, original italics.)
- "Whether [insurer] will be able to carry its burden of proof by a preponderance of the evidence that specific costs can be allocated solely to the causes of action that were not even potentially covered is far from plain. But there is at least a

triable issue of material fact that it can. It must be allowed the attempt." (*Buss, supra*, 16 Cal.4th at p. 61.)

- "By law applied in hindsight, courts can determine that no potential for coverage, and thus no duty to defend, ever existed. If that conclusion is reached, the insurer, having reserved its right, may recover from its insured the costs it expended to provide a defense which, under its contract of insurance, it was never obliged to furnish." (*Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 658 [31 Cal.Rptr.3d 147, 115 P.3d 460].)
- "The ultimate determination that the loss was caused by a noncovered occurrence does not mean that [third party]'s lawsuit (and [developer]'s cross-complaint) never presented any *potential* for policy coverage. If that were so, a determination an insurer has no duty to indemnify would automatically extinguish the duty to defend retrospectively and give the insurer the right to seek reimbursement from the insured. That result is inconsistent with the firmly established principle that the duty to defend is broader than the duty to indemnify." (*Navigators Specialty Ins. Co. v. Moorefield Construction, Inc.* (2016) 6 Cal.App.5th 1258, 1285 [212 Cal.Rptr.3d 231], original italics.)
- " 'Under the policy, the insurer does not have a duty to defend the insured as to the claims that are not even potentially covered. With regard to defense costs for these claims, the insurer has not been paid premiums by the insured. It did not bargain to bear these costs. . . . The "enrichment" of the insured by the insurer through the insurer's bearing of unbargained-for defense costs is inconsistent with the insurer's freedom under the policy and therefore must be deemed 'unjust.' " If [insurer], after providing an entire defense, can prove that a claim was 'not even potentially covered because it did not even possibly embrace any triggering harm of the specified sort within its policy period or periods caused by an included occurrence,' it should have that opportunity. This task ' "if ever feasible," may be "extremely difficult." ' " (*State v. Pac. Indem. Co.* (1998) 63 Cal.App.4th 1535, 1550 [75 Cal.Rptr.2d 69], internal citations omitted.)
- "The cases which have considered apportionment of attorneys' fees upon the wrongful refusal of an insurer to defend an action against its insured generally have held that the insurer is liable for the total amount of the fees despite the fact that some of the damages recovered in the action against the insured were outside the coverage of the policy." (*Hogan, supra*, 3 Cal.3d at p. 564.)
- "The insurer, not the insured, has the burden of proving by a preponderance of the evidence that 'the settlement payments were allocable to claims not actually covered, and the defense costs were allocable to claims not even potentially covered.' " (*Navigators Specialty Ins. Co, supra,* 6 Cal.App.5th at p. 1287.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, § 381

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.08 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.123

(Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.51 (Matthew Bender)

2352–2359. Reserved for Future Use

2360. Judgment Creditor's Action Against Insurer—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] must pay [all or part of] a judgment against [***name of insured***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] brought a lawsuit for [personal injury/ wrongful death/property damage] against [***name of insured***] and a judgment was entered against [***name of insured***];**
2. **That [all or part of] [***name of insured***]'s liability under the judgment is covered by an insurance policy with [***name of defendant***]; and**
3. **The amount of the judgment [covered by the policy].**

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for a judgment creditor's action against an insurer to collect on an insurance policy pursuant to Insurance Code section 11580(b)(2). This instruction should be used only where there are factual issues on any of the above elements. This instruction may need to be augmented with instructions on specific factual findings.

Note that Insurance Code section 11580 requires that the policy be "issued or delivered to [a] person in this state." This issue should be added as an element if it is disputed in the case.

Sources and Authority

- Judgment Creditor's Action Against Insurer. Insurance Code section 11580(b)(2).
- "A direct action under section 11580 is a contractual action on the policy to satisfy a judgment up to policy limits." (*Wright v. Fireman's Fund Insurance Co.* (1992) 11 Cal.App.4th 998, 1015 [14 Cal.Rptr.2d 588].)
- "[I]t is not necessary for property damage to be caused by a vehicle or draught animal in order to bring a direct action against an insurer under section 11580." (*People ex rel. City of Willits v. Certain Underwriters at Lloyd's of London* (2002) 97 Cal.App.4th 1125, 1131–1132].)
- "Because the insurer's duties flow to its insured alone, a third party claimant may not bring a direct action against an insurance company. As a general rule, a third party may directly sue an insurer only when there has been an assignment

of rights by, or a final judgment against, the insured." (*Shaolian v. Safeco Insurance Co.* (1999) 71 Cal.App.4th 268, 271 [83 Cal.Rptr.2d 702], internal citations omitted.)

- "Under section 11580 a third party claimant bringing a direct action against an insurer should . . . prove 1) it obtained a judgment for bodily injury, death, or property damage, 2) the judgment was against a person insured under a policy that insures against [the] loss or damage . . . , 3) the liability insurance policy was issued by the defendant insurer, 4) the policy covers the relief awarded in the judgment, 5) the policy either contains a clause that authorizes the claimant to bring an action directly against the insurer or the policy was issued or delivered in California and insures against [the] loss or damage . . . ." (*Wright, supra,* 11 Cal.App.4th at p. 1015.)
- "Under Insurance Code section 11580, a third party creditor bringing a direct action against an insurer to recover the proceeds of an insurance policy must *plead and prove* not only that it obtained a judgment for bodily injury, but that 'the judgment was against a person insured under a policy . . .' and 'the policy covers the relief awarded in the judgment . . . .' " (*Miller v. American Home Assurance Co.* (1996) 47 Cal.App.4th 844, 847–848 [54 Cal.Rptr.2d 765], original italics, internal citation omitted.)
- "[Insurance Code Section 11580(b)(2)] and the standard policy language permit an action against an insurer only when the underlying judgment is final and 'final,' for this purpose, means an appeal from the underlying judgment has been concluded or the time within which to appeal has passed." (*McKee v. National Union Fire Insurance Co. of Pittsburgh, PA.* (1993) 15 Cal.App.4th 282, 285 [19 Cal.Rptr.2d 286].)
- "[W]here the insurer may be subject to a direct action under Insurance Code section 11580 by a judgment creditor who has or will obtain a default judgment in a third party action against the insured, intervention is appropriate. . . . Where an insurer has failed to intervene in the underlying action or to move to set aside the default judgment, the insurer is bound by the default judgment." (*Reliance Insurance Co. v. Superior Court* (2000) 84 Cal.App.4th 383, 386–387 [100 Cal.Rptr.2d 807], internal citations omitted.)
- "The [standard] 'no action' clause gives the insurer the right to control the defense of the claim—to decide whether to settle or to adjudicate the claim on its merits. When the insurer provides a defense to its insured, the insured has no right to interfere with the insurer's control of the defense, and a stipulated judgment between the insured and the injured claimant, without the consent of the insurer, is ineffective to impose liability upon the insurer." (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 787 [84 Cal.Rptr.2d 43], internal citations omitted.)
- A standard "no action" clause in an indemnity insurance policy "provides that [the insurer] may be sued directly if the amount of the insured's obligation to pay was finally determined either by judgment against the insured after actual

trial or by 'written agreement of the insured, the claimant and the company.' " (*Rose v. Royal Insurance Co. of America* (1991) 2 Cal.App.4th 709, 716–717 [3 Cal.Rptr.2d 483].)

- "[A] trial does not have to be adversarial to be considered an 'actual trial' under the 'no action' clause, or to be considered binding against the insurer in a section 11580 proceeding. . . . [W]e conclude that the term 'actual trial' in the standard 'no action' clause has two components: (1) an independent adjudication of facts based on an evidentiary showing; and (2) a process that does not create the potential for abuse, fraud or collusion." (*National Union Fire Insurance Co. v. Lynette C.* (1994) 27 Cal.App.4th 1434, 1449 [33 Cal.Rptr.2d 496].)
- "A defending insurer cannot be bound by a settlement made without its participation and without any actual commitment on its insured's part to pay the judgment, even where the settlement has been found to be in good faith for purposes of [Code of Civil Procedure] section 877.6." (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 730 [117 Cal.Rptr.2d 318, 41 P.3d 128].)
- "[W]hen . . . a liability insurer wrongfully denies coverage or refuses to provide a defense, then the insured is free to negotiate the best possible settlement consistent with his or her interests, including a stipulated judgment accompanied by a covenant not to execute. Such a settlement will raise an evidentiary presumption in favor of the insured (or the insured's assignee) with respect to the existence and amount of the insured's liability. The effect of such presumption is to shift the burden of proof to the insurer to prove that the settlement was unreasonable or the product of fraud or collusion. If the insurer is unable to meet that burden of proof then the stipulated judgment will be binding on the insurer and the policy provision proscribing a direct action against an insurer except upon a judgment against the insured after an 'actual trial' will not bar enforcement of the judgment." (*Pruyn v. Agricultural Insurance Co.* (1995) 36 Cal.App.4th 500, 509 [42 Cal.Rptr.2d 295].)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 15-K, *Judgment Creditor's Action to Enforce Judgment Debtor's Liability Insurance*, ¶¶ 15:1028–15:1077, 15:1123–15:1136 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Claimant's Direct Action for Recovery of Judgment, §§ 27.1–27.7, 27.17–27.27

4 California Insurance Law & Practice, Ch. 41, *Liability Insurance in General*, §§ 41.60–41.63 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance* (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.186, 120.198, 120.206 (Matthew Bender)

2361. Negligent Failure to Obtain Insurance Coverage—Essential Factual Elements

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[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*/it] was harmed by [*name of defendant*]'s negligent failure to obtain insurance requested by [him/her/*nonbinary pronoun*/it]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] requested [*name of defendant*] to obtain [*describe requested insurance*] and [*name of defendant*] promised to obtain that insurance for [him/her/*nonbinary pronoun*/it];**
2. **That [*name of defendant*] was negligent in failing to obtain the promised insurance;**
3. **That [*name of plaintiff*] was harmed; and**
4. **That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For general tort instructions, including the definition of "substantial factor," see the Negligence series (CACI No. 400 et seq.).

Sources and Authority

- "California recognizes the general rule that an agent or broker who intentionally or negligently fails to procure insurance as requested by a client—either an insured or an applicant for insurance—will be liable to the client in tort for the resulting damages." (*AMCO Ins. Co. v. All Solutions Ins. Agency, LLC* (2016) 244 Cal.App.4th 883, 890 [198 Cal.Rptr.3d 687].)
- "A 'failure to deliver the agreed-upon coverage' case is actionable . . . . An insurance agent has an 'obligation to use reasonable care, diligence, and judgment in procuring insurance requested by an insured.' A broker's failure to obtain the type of insurance requested by an insured may constitute actionable negligence and the proximate cause of injury." (*Desai v. Farmers Insurance Exchange* (1996) 47 Cal.App.4th 1110, 1119–1120 [55 Cal.Rptr.2d 276], internal citations omitted.)
- "Absent some notice or warning, an insured should be able to rely on an agent's representations of coverage without independently verifying the accuracy of those representations by examining the relevant policy provisions." (*Clement v.*

Smith (1993) 16 Cal.App.4th 39, 45 [19 Cal.Rptr.2d 676].)

- "[W]hile an insurance agent who promises to procure insurance will indeed be liable for his negligent failure to do so, it does not follow that he can avoid liability for foreseeable harm caused by his silence or inaction merely because he has not expressly promised to assume responsibility." (*Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d 685, 691 [187 Cal.Rptr. 214], internal citations omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 2-A, *Agents and Brokers*, ¶¶ 2:50–2:64.2, 11:246–11:249 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Actions Against Agents and Brokers, §§ 29.7–29.8

5 California Insurance Law & Practice, Ch. 61, *Operating Requirements of Agents and Brokers*, § 61.04[3][a] (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.402 (Matthew Bender)

2362–2399. Reserved for Future Use

VF-2300. Breach of Contractual Duty to Pay a Covered Claim

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] suffer a loss, [all or part of] which was covered under an insurance policy with [*name of defendant*]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of defendant*] notified of the loss [as required by the policy]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **What is the amount of the covered loss that [*name of defendant*] failed to pay [*name of plaintiff*]? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 2300, *Breach of Contractual Duty to Pay a Covered Claim—Essential Factual Elements*.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

VF-2301. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment

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We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] suffer a loss covered under an insurance policy with [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of defendant*] notified of the loss?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] [fail to pay/delay payment of] policy benefits?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s [failure to pay/delay in payment of] policy benefits, unreasonable or without proper cause?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of defendant*]'s [failure to pay/delay in payment of] policy benefits a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2007, April 2008, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2331, *Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If punitive damages are claimed, combine this form with the appropriate verdict form numbering from VF-3900 to VF-3904.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2302. Reserved for Future Use

VF-2303. Bad Faith (First Party)—Breach of Duty to Inform Insured of Rights

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] suffer a loss covered under an insurance policy with [***name of defendant***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] [deny coverage for/refuse to pay] [***name of plaintiff***]'s loss?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] have the [right/obligation] to [***describe right or obligation at issue; e.g., "to request arbitration within 180 days"***] under the policy?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] fail to reasonably inform [***name of plaintiff***] of [his/her/***nonbinary pronoun***] [right/obligation] to [***describe right or obligation***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of defendant***]'s failure to reasonably inform [***name of plaintiff***] a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2333, *Bad Faith (First Party)—Breach of Duty to Inform Insured of Rights—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages,

especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2304. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits

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We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] insured under a policy of liability insurance issued by [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of claimant*] make a claim against [*name of plaintiff*] that was covered by [*name of defendant*]'s insurance policy?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of claimant*] make a reasonable settlement demand to settle [his/her/*nonbinary pronoun*] claim against [*name of plaintiff*] for an amount within policy limits?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of defendant*] fail to accept this settlement demand?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of defendant*]'s failure to accept the settlement demand the result of unreasonable conduct by [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **[Was a judgment entered against [*name of plaintiff*] for a sum of money greater than the policy limits?]**

[*or*]

[Was [*name of defendant*]'s failure to accept the settlement demand a substantial factor in causing harm to [*name of plaintiff*]?]

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Amount of judgment entered against [*name of plaintiff*]

$_____]

[b. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[c. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[d. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[e. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New May 2022; Revised May 2024

Directions for Use

This verdict form is based on CACI No. 2334, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Question 6 should be tailored to the facts of the case as presented in element 6 of CACI No. 2334.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2305–VF-2399. Reserved for Future Use

WRONGFUL TERMINATION

2400. Breach of Employment Contract—Unspecified Term—"At-Will" Presumption

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An employment relationship may be ended by either the employer or the employee, at any time, for any [lawful] reason, or for no reason at all. This is called "at-will employment."

An employment relationship is not "at will" if the employee proves that the parties, by words or conduct, agreed that [*specify the nature of the alleged agreement, e.g., the employee would be discharged only for good cause***].**

New September 2003; Revised June 2006, November 2018

Directions for Use

If the plaintiff has made no claim other than the contract claim, then the word "lawful" may be omitted. If the plaintiff has made a claim for wrongful termination or violation of the Fair Employment and Housing Act, then the word "lawful" should be included in order to avoid confusing the jury.

Sources and Authority

- At-Will Employment. Labor Code section 2922.
- Contract of Employment. Labor Code section 2750.
- "Labor Code section 2922 has been recognized as creating a presumption. The statute creates a presumption of at-will employment which may be overcome 'by evidence that despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a requirement that termination be based only on "good cause." ' " (*Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1488 [28 Cal.Rptr.2d 248], internal citations omitted.)
- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)
- "Because the presumption of at-will employment is premised upon public policy considerations, it is one affecting the burden of proof. Therefore, even if no substantial evidence was presented by defendants that plaintiff's employment was at-will, the presumption of Labor Code section 2922 required the issue to be submitted to the jury." (*Alexander v. Nextel Communications, Inc*. (1997) 52

Cal.App.4th 1376, 1381–1382 [61 Cal.Rptr.2d 293], internal citations omitted.)

- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that . . . the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 244

Chin et al., California Practice Guide: Employment Litigation, Ch.4-A, *Employment Presumed At Will*, ¶¶ 4:2–4:4 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.4-B, *Agreements Limiting At-Will Termination*, ¶ 4:65 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.4–8.14

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, §§ 60.01–60.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.10, 249.11, 249.13, 249.21, 249.43[1], [8] (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Wrongful Termination and Discipline*, §§ 100.20–100.23 (Matthew Bender)

2401. Breach of Employment Contract—Unspecified Term—Actual or Constructive Discharge—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] breached their employment contract [by forcing [***name of plaintiff***] to resign]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**
2. **That [***name of defendant***] promised, by words or conduct, to discharge [***name of plaintiff***] [***specify the nature of the alleged agreement, e.g., only for good cause***];**
3. **That [***name of plaintiff***] substantially performed [his/her/***nonbinary pronoun***] job duties [unless [***name of plaintiff***]'s performance was excused [or prevented]];**
4. **That [***name of defendant***] [constructively] discharged [***name of plaintiff***] [***e.g., without good cause***];**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s breach of contract was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised November 2018

Directions for Use

Element 3 on substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element 3 may be deleted if substantial performance is not a disputed issue.

An employee may be "constructively" discharged if the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person would have had no reasonable alternative except to resign. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [32 Cal.Rptr.2d 223, 876 P.2d 1022].) If constructive rather than actual discharge is alleged, include "by forcing [*name of plaintiff*] to resign" in the introductory paragraph and "constructively" in element 4. Then also give CACI No. 2510, *"Constructive Discharge" Explained.*

Elements 2 and 4 may be modified for adverse employment actions other than discharge, for example demotion. The California Supreme Court has extended the implied contract theory to encompass adverse employment actions that violate the terms of an implied contract. (See *Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 473-474 [46 Cal.Rptr.2d 427, 904 P.2d 834].) See CACI No. 2509, *"Adverse Employment Action" Explained.*

For an instruction on damages, give CACI No. 3903P, *Damages From Employer for Wrongful Discharge (Economic Damage).* See also CACI No. 304, *Oral or Written Contract Terms*, and CACI No. 305, *Implied-in-Fact Contract*.

Sources and Authority

- At-Will Employment. Labor Code section 2922.
- Contractual Conditions Precedent. Civil Code section 1439.
- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented. But where the undisputed facts negate the existence or the breach of the contract claimed, summary judgment is proper." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)
- The employee bears the ultimate burden of proving that he or she was wrongfully terminated. (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917].)
- "The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that . . . the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)
- "In *Foley*, we identified several factors, apart from express terms, that may bear upon 'the existence and content of an . . . [implied-in-fact] agreement' placing limits on the employer's right to discharge an employee. These factors might include ' "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." ' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336–337 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)
- "Standing alone, constructive discharge is neither a tort nor a breach of contract, but a doctrine that transforms what is ostensibly a resignation into a firing. Even after establishing *constructive* discharge, an employee must independently prove

a breach of contract or tort in connection with employment termination in order to obtain damages for *wrongful discharge*." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [32 Cal.Rptr.2d 223, 876 P.2d 1022], original italics, internal citation omitted.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner, supra,* 7 Cal.4th at pp. 1244–1245, internal citation omitted.)
- "In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner, supra,* 7 Cal.4th at p. 1247, internal citation and fns. omitted.)
- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los* Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726].)
- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)
- "Each individual incident need not be sufficient standing alone to force a resignation; rather, the accumulation of discriminatory treatment over time can amount to intolerable working conditions." (*Brome v. California Highway Patrol* (2020) 44 Cal.App.5th 786, 801–802 [258 Cal.Rptr.3d 83].)
- "[T]he standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)
- "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The length of time the plaintiff remained on the job may be *one* relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person. Neither logic nor precedent suggests it should always be dispositive." (*Turner, supra,* 7 Cal.4th at p. 1254, original italics.)
- " 'Good cause' or 'just cause' for termination connotes ' "a fair and honest cause or reason," ' regulated by the good faith of the employer. The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.' Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz, supra,* 24 Cal.4th at p. 351.)
- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch.4-A, *Employment Presumed At Will*, ¶¶ 4:2, 4:8, 4:15 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation Ch.4-B, *Agreements Limiting At-Will Termination*, ¶¶ 4:65, 4:81, 4:105 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.4-C, *"Good Cause" for Termination*, ¶¶ 4:270–4:273 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.4–8.20B

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, §§ 60.05, 60.07 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.10, 249.15, 249.43, 249.90, Ch. 250, *Employment Law: Wage and Hour Disputes,* § 250.66 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.10, 50.11 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.21, 100.22, 100.28, 100.29, 100.31 (Matthew

Bender)

California Civil Practice: Employment Litigation §§ 6:9–6:11 (Thomson Reuters)

2402. Reserved for Future Use

2403. Breach of Employment Contract—Unspecified Term—Implied-in-Fact Promise Not to Discharge Without Good Cause

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An employer promises to [discharge/demote] an employee only for good cause if it is reasonable for an employee to conclude, from the employer's words or conduct, that the employee will be [discharged/demoted] only for good cause.

In deciding whether [*name of defendant***] promised to [discharge/demote] [***name of plaintiff***] only for good cause, you may consider, among other factors, the following:**

(a) [*Name of defendant***]'s personnel policies [and/or] practices;**

(b) [*Name of plaintiff***]'s length of service;**

(c) Any raises, commendations, positive evaluations, and promotions received by [*name of plaintiff***]; [and]**

(d) Whether [*name of defendant***] said or did anything to assure [***name of plaintiff***] of continued employment; [and]**

(e) [*Insert other relevant factor(s).***]**

Length of service, raises, and promotions by themselves are not enough to imply such a promise, although they are factors for you to consider.

New September 2003; Revised April 2009, June 2013, May 2020

Directions for Use

This instruction should be read when an employee is basing the claim of wrongful discharge on an implied covenant not to terminate except for good cause. Only those factors that apply to the facts of the particular case should be read.

In certain cases, it may be necessary to instruct the jury that if it finds there is an at-will provision in an express written agreement, there may not be an implied agreement to the contrary. (See *Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 739 [150 Cal.Rptr.3d 123] [there cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results].)

Sources and Authority

- Express and Implied Contracts. Civil Code sections 1619–1621.
- "Labor Code section 2922 establishes a statutory presumption of at-will employment. However, an employer and an employee are free to depart from the statutory presumption and specify that the employee will be terminated only for good cause, either by an express, or an implied, contractual agreement."

(*Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 380 [84 Cal.Rptr.3d 111], internal citations omitted.)

- "[M]ost cases applying California law . . . have held that an at-will provision in an *express written agreement*, signed by the employee, *cannot* be overcome by proof of an implied contrary understanding." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 340 fn. 10 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics.)
- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented." (*Guz, supra*, 24 Cal.4th at p. 337, internal citations omitted.)
- "The question whether such an implied-in-fact agreement [to termination only for cause] exists is a factual question for the trier of fact unless the undisputed facts can support only one reasonable conclusion." (*Faigin, supra*, 211 Cal.App.4th at p. 739.)
- "In the employment context, factors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement, including 'the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)
- "[A]n employee's *mere* passage of time in the employer's service, even where marked with tangible indicia that the employer approves the employee's work, cannot *alone* form an implied-in-fact contract that the employee is no longer at will. Absent other evidence of the employer's intent, longevity, raises and promotions are their own rewards for the employee's continuing valued service; they do not, *in and of themselves*, additionally constitute a contractual guarantee of future employment security." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 341–342 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics.)
- "We agree that disclaimer language in an employee handbook or policy manual does not necessarily mean an employee is employed at will. But even if a handbook disclaimer is not controlling in every case, neither can such a provision be ignored in determining whether the parties' conduct was intended, and reasonably understood, to create binding limits on an employer's statutory right to terminate the relationship at will. Like any direct expression of employer intent, communicated to employees and intended to apply to them, such language must be taken into account, along with all other pertinent evidence, in ascertaining the terms on which a worker was employed." (*Guz, supra*, 24 Cal.4th at p. 340, internal citations omitted.)
- "Conceptually, there is no rational reason why an employer's policy that its employees will not be demoted except for good cause, like a policy restricting

termination or providing for severance pay, cannot become an implied term of an employment contract. In each of these instances, an employer promises to confer a significant benefit on the employee, and it is a question of fact whether that promise was reasonably understood by the employee to create a contractual obligation." (*Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 464 [46 Cal.Rptr.2d 427, 904 P.2d 834].)

- "[Employer] retained the right to terminate [employee] for any lawful reason. Thus, . . . the fact that [employer] was obligated to pay compensation if it terminated [employee] for reasons other than his misconduct did not convert an otherwise at-will agreement into a for-cause agreement." (*Popescu v. Apple Inc.* (2016) 1 Cal.App.5th 39, 59 [204 Cal.Rptr.3d 302].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 246, 250, 251

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-B, *Agreements Limiting At-Will Termination*, ¶¶ 4:81, 4:105, 4:112 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.6–8.16

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.05[2][a]–[e] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.01, 249.13, 249.15, 249.50 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.21, 100.22, 100.25–100.27, 100.29, 100.34 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:14–6:16 (Thomson Reuters)

2404. Breach of Employment Contract—Unspecified Term—"Good Cause" Defined

Good cause exists when an employer's decision to discharge an employee is made in good faith and based on a fair and honest reason. An employer has substantial but not unlimited discretion regarding personnel decisions[, particularly with respect to an employee in a sensitive or confidential managerial position]. However, good cause does not exist if the employer's reasons for the discharge are trivial, arbitrary, inconsistent with usual practices, or unrelated to business needs or goals, or if the stated reasons conceal the employer's true reasons.

In deciding whether [*name of defendant***] had good cause to discharge [***name of plaintiff***], you must balance [***name of defendant***]'s interest in operating the business efficiently and profitably against the interest of [***name of plaintiff***] in maintaining employment.**

New September 2003; Revised November 2018

Directions for Use

This instruction may not be appropriate in the context of an implied employment contract where the parties have agreed to a particular meaning of "good cause" (e.g., a written employment agreement specifically defining "good cause" for discharge). If so, the instruction should be modified accordingly.

Include the bracketed language in the opening paragraph if the defense alleges that the plaintiff was in a sensitive or confidential managerial position.

When the reason given for the discharge is misconduct, and there is a factual dispute whether the misconduct occurred, then the court should give CACI No. 2405, *Breach of Implied Employment Contract—Unspecified Term—"Good Cause" Defined—Misconduct*, instead of this instruction. (See *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93, 107 [69 Cal.Rptr.2d 900, 948 P.2d 412].)

Sources and Authority

- "Three factual determinations are relevant to the question of employer liability: (1) did the employer act with good faith in making the decision to terminate; (2) did the decision follow an investigation that was appropriate under the circumstances; and (3) did the employer have reasonable grounds for believing the employee had engaged in the misconduct." (*Jameson v. Pacific Gas & Electric Co.* (2017) 16 Cal.App.5th 901, 910 [225 Cal.Rptr.3d 171].)
- " 'Good cause' in the context of implied employment contracts is defined as: 'fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals,

or pretextual.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 872 [172 Cal.Rptr.3d 732], internal citations omitted.)

- "It is the employer's honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue . . . ." (*Jameson*, *supra*, 16 Cal.App.5th at p. 911.)
- "The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. . . . Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 351 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)
- " '*Cotran* did not delineate the earmarks of an appropriate investigation but noted that investigative fairness contemplates listening to both sides and providing employees a fair opportunity to present their position and to correct or contradict relevant statements prejudicial to their case, without the procedural formalities of a trial.' [Citation] [¶] . . . Although the elements of the *Cotran* standard are triable to the jury, 'if the facts are undisputed or admit of only one conclusion, then summary judgment may be entered . . . .' " (*Jameson*, *supra*, 16 Cal.App.5th at p. 910.)
- "[W]here, as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment." (*Pugh v. See's Candies, Inc.* (Pugh I) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917], disapproved on other grounds in *Guz, supra,* 24 Cal.4th at pp. 350–351.)
- "[G]ood cause" in [the context of wrongful termination based on an implied contract] "is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term." (*Pugh, supra,* 116 Cal.App.3d at p. 330.)
- "We have held that appellant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appellant's termination now shifts to the employer. Appellant may attack the employer's offered explanation, either on the ground that it is pretextual (and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. Appellant bears, however, the ultimate burden of proving that he was terminated wrongfully." (*Pugh, supra,* 116 Cal.App.3d at pp. 329–330, internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 219–221, 244

Chin et al., California Practice Guide: Employment Litigation, Ch.4-C, *"Good Cause" for Termination*, ¶¶ 4:270–4:273, 4:300 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.22–8.25

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.09[2] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.21[14][c], 249.63 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.22, 100.27, 100.29, 100.34 (Matthew Bender)

California Civil Practice: Employment Litigation, § 6:19 (Thomson Reuters)

2405. Breach of Implied Employment Contract—Unspecified Term—"Good Cause" Defined—Misconduct

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[*Name of plaintiff***] claims that [***name of defendant***] did not have good cause to [discharge/demote] [him/her/***nonbinary pronoun***] for misconduct. [***Name of defendant***] had good cause to [discharge/demote] [***name of plaintiff***] for misconduct if [***name of defendant***], acting in good faith, conducted an appropriate investigation giving [him/her/***nonbinary pronoun***/it] reasonable grounds to believe that [***name of plaintiff***] engaged in misconduct.**

An appropriate investigation is one that is reasonable under the circumstances and includes notice to the employee of the claimed misconduct and an opportunity for the employee to answer the charge of misconduct before the decision to [discharge/demote] is made. You may find that [*name of defendant***] had good cause to [discharge/demote] [***name of plaintiff***] without deciding if [***name of plaintiff***] actually engaged in misconduct.**

New September 2003

Directions for Use

This instruction should be given when there is a dispute as to whether misconduct, in fact, occurred. (*Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93 [69 Cal.Rptr.2d 900, 948 P.2d 412].)

Sources and Authority

- "The proper inquiry for the jury . . . is not, 'Did the employee *in fact* commit the act leading to dismissal?' It is 'Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?' The jury conducts a factual inquiry in both cases, but the questions are not the same. In the first, the jury decides the ultimate truth of the employee's alleged misconduct. In the second, it focuses on the *employer's response* to allegations of misconduct." (*Cotran, supra,* 17 Cal.4th at p. 107.)
- " 'Good cause' in the context of implied employment contracts is defined as: 'fair and honest' reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.' 'Three factual determinations are relevant to the question of employer liability: (1) did the employer act with good faith in making the decision to terminate; (2) did the decision follow an investigation that was appropriate under the circumstances;

and (3) did the employer have reasonable grounds for believing the employee had engaged in the misconduct.' '*Cotran* did not delineate the earmarks of an appropriate investigation but noted that investigative fairness contemplates listening to both sides and providing employees a fair opportunity to present their position and to correct or contradict relevant statements prejudicial to their case, without the procedural formalities of a trial.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 872–873 [172 Cal.Rptr.3d 732], internal citations omitted.)

- "We have held that appellant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appellant's termination now shifts to the employer. Appellant may attack the employer's offered explanation, either on the ground that it is pretextual and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. Appellant bears, however, the ultimate burden of proving that he was terminated wrongfully." (*Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, 329–330 [171 Cal.Rptr. 917], disapproved on other grounds in *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 350–351 [100 Cal. Rptr. 2d 352, 8 P.3d 1089], internal citation omitted.)
- "[Plaintiff] contends that it was up to a jury to decide whether the [defendant] 'honestly and objectively reasonably' believed that her conduct was egregious enough to be 'gross misconduct' and that the court therefore erred in granting summary adjudication of her fourth cause of action for breach of contract. Although the elements of the *Cotran* standard are triable to the jury, 'if the facts are undisputed or admit of only one conclusion, then summary judgment may be entered . . . .' " (*Serri*, *supra*, 226 Cal.App.4th at p. 873.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 219, 220, 221

Chin et al., California Practice Guide: Employment Litigation, Ch.4-C, *"Good Cause" for Termination*, ¶¶ 4:270–4:271, 4:289 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.22–8.26

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.09[5][b] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.21, 249.43 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.25, 100.29 (Matthew Bender)

California Civil Practice: Employment Litigation, § 6:19 (Thomson Reuters)

2406. Breach of Employment Contract—Unspecified Term—Damages

If you find that [*name of defendant***] [discharged/demoted] [***name of plaintiff***] in breach of an employment contract, then you must decide the amount of damages, if any, that [***name of plaintiff***] has proved [he/she/** *nonbinary pronoun***] is entitled to recover. To make that decision, you must:**

1. **Decide the amount that [***name of plaintiff***] would have earned from [***name of defendant***] up to today, including any benefits and pay increases; [and]**
2. **Add the present cash value of any future wages and benefits that [he/she/***nonbinary pronoun***] would have earned after today for the length of time the employment with [***name of defendant***] was reasonably certain to continue; [and]**
3. **[***Describe any other contract damages that were allegedly caused by defendant's conduct.***]**

In determining the period that [*name of plaintiff***]'s employment was reasonably certain to have continued, you should consider, among other factors, the following:**

(a) [*Name of plaintiff***]'s age, work performance, and intent regarding continuing employment with [***name of defendant***];**

(b) [*Name of defendant***]'s prospects for continuing the operations involving [***name of plaintiff***]; and**

(c) Any other factor that bears on how long [*name of plaintiff***] would have continued to work.**

New September 2003; Revised December 2011

Directions for Use

For an instruction on mitigation, see CACI No. 3963, *Affirmative Defense—Employee's Duty to Mitigate Damages*. This instruction should be given when plaintiff claims loss of employment from a wrongful discharge or demotion or a breach of the covenant of good faith and fair dealing. For instructions on present cash value, see CACI No. 3904A, *Present Cash Value,* and CACI No. 3904B, *Use of Present-Value Tables*.

Sources and Authority

- Damages for Breach of Contract. Civil Code section 3300.
- "The general rule is that the measure of recovery by a wrongfully discharged

employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181–182 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted.)

- "[I]t is our view that in an action for wrongful discharge, and pursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation." (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 [83 Cal.Rptr. 202, 463 P.2d 426].)
- In determining the period that plaintiff's employment was reasonably certain to have continued, the trial court took into consideration plaintiff's " 'physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, [and] the foreseeability of the continued future demand for tax return service to small taxpayers . . . .' " (*Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705 [101 Cal.Rptr. 169].)
- In cases for wrongful demotion, the measure of damages is "the difference in compensation before and after the demotion." (*Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 468 [46 Cal.Rptr.2d 427, 904 P.2d 834].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 284, 285, 286

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-B, *Contract Damages*, ¶¶ 17:81, 17:95, 17:105 (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[3] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.01, 249.17, 249.50 (Matthew Bender)

2407–2419. Reserved for Future Use

2420. Breach of Employment Contract—Specified Term—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] breached an employment contract for a specified term. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment contract that specified a length of time that [***name of plaintiff***] would remain employed;**
2. **That [***name of plaintiff***] substantially performed [his/her/***nonbinary pronoun***] job duties [unless [***name of plaintiff***]'s performance was excused [or prevented]];**
3. **That [***name of defendant***] breached the employment contract by [discharging/demoting] [***name of plaintiff***] before the end of the term of the contract; and**
4. **That [***name of plaintiff***] was harmed by the [discharge/demotion].**

New September 2003

Directions for Use

The element of substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant." (*Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482 [265 P.2d 29], internal citation omitted.) Element 2 may be deleted if substantial performance is not an issue.

See also CACI No. 304, *Oral or Written Contract Terms,* and CACI No. 305, *Implied-in-Fact Contract.*

Sources and Authority

- At-Will Employment. Labor Code section 2922.
- Termination of Employment for Specified Term. Labor Code section 2924.
- Contractual Conditions Precedent. Civil Code section 1439.
- "[L]abor Code section 2924 has traditionally been interpreted to 'inhibit[] the termination of employment for a specified term except in case of a wilful breach of duty, of habitual neglect of, or continued incapacity to perform, a duty.' " (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57 [100 Cal.Rptr.2d 627], internal citations omitted.)

- "Stated simply, the contract compensation for the unexpired period of the contract affords a prima facie measure of damages; the actual measured damage, however, is the contract amount reduced by compensation received during the unexpired term; if, however, such other compensation has not been received, the contract amount may still be reduced or eliminated by a showing that the employee, by the exercise of reasonable diligence and effort, could have procured comparable employment and thus mitigated the damages." (*Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 562 [57 Cal.Rptr. 516].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed at Will*, ¶¶ 4:2, 4:47 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.2–8.20

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.21 (Matthew Bender)

2421. Breach of Employment Contract—Specified Term—Good-Cause Defense (Lab. Code, § 2924)

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] did not breach the employment contract because [he/she/***nonbinary pronoun***/it] [discharged/demoted] [***name of plaintiff***] for good cause. To establish good cause, [***name of defendant***] must prove:**

[that [*name of plaintiff***] willfully breached a job duty] [or]**

[that [*name of plaintiff***] continually neglected [his/her/***nonbinary pronoun***] job duties] [or]**

[that a continued incapacity prevented [*name of plaintiff***] from performing [his/her/***nonbinary pronoun***] job duties.]**

New September 2003; Revised June 2012

Directions for Use

This instruction sets forth the statutory grounds under which an employer may terminate an employment contract for a specified term. (See Lab. Code, § 2924.) It should be given when the employee alleges wrongful discharge in breach of the contract and the employer defends by asserting plaintiff was justifiably discharged.

This instruction may not be appropriate if the parties have agreed to a particular meaning of "good cause" (e.g., a written employment agreement specifically defining "good cause" for discharge). (See *Uecker & Assocs. v. Lei (In re San Jose Med. Mgmt.)* (B.A.P. 9th Cir. 2007) 2007 Bankr. LEXIS 4829.) If so, the instruction should be modified to set forth the contractual grounds for good cause. In the absence of grounds for termination in the contract, the employer is limited to those set forth in the statute. (See *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57 [100 Cal.Rptr.2d 627].)

The third option may not be asserted if the plaintiff has a statutory right to be absent from work (for example, for family or medical leave or to accommodate a disability) throughout the entire period of incapacity.

Sources and Authority

- At-Will Employment. Labor Code section 2922.
- Termination of Employment for Specified Term. Labor Code section 2924.
- "[L]abor Code section 2924 has traditionally been interpreted to 'inhibit[] the termination of employment for a specified term except in case of a wilful breach of duty, of habitual neglect of, or continued incapacity to perform, a duty.' " (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57 [100 Cal.Rptr.2d 627], internal citations omitted.)
- "Unlike a wrongful discharge based on an implied-in-fact contract, an employee

who has a contract for a specified term may not be terminated prior to the term's expiration based on an honest but mistaken belief that the employee breached the contract: Such a right would treat a contract with a specified term no better than an implied contract that has no term; such a right would dilute the enforceability of the contract's specified term because an employee who had properly performed his or her contract could still be terminated before the term's end; and such a right would run afoul of the plain language of Labor Code section 2924, which allows termination of an employment for a specified term only 'in case of any willful breach of duty . . . habitual neglect of . . . duty or continued incapacity to perform it.' Termination of employment for a specified term, before the end of the term, based solely on the mistaken belief of a breach, cannot be reconciled with either the governing statute's text or settled principles of contract law." (*Khajavi, supra*, 84 Cal.App.4th at pp. 38–39.)

- Good cause in the context of wrongful termination based on an implied contract " 'is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term.' " (*Khajavi, supra,* 84 Cal.App.4th at p. 58, internal citations omitted.)
- "An employer is justified in discharging his employee, when the latter fails to perform his duty, even though injury does not result to the employer as a result of the employee's failure to do his duty." (*Bank of America National Trust & Savings Ass'n v. Republic Productions, Inc.* (1941) 44 Cal.App.2d 651, 654 [112 P.2d 972], internal citation omitted.)
- "To terminate an employment without the expiration of its contractual term 'there must be good cause.' The grounds for terminating such an employment are stated in Labor Code section 2924. . . . It is therefore not every deviation of the employee from the standard of performance sought by his employer that will justify a discharge. There must be some 'wilful act or wilful misconduct . . .' when the employee uses his best efforts to serve the interests of his employer." (*Holtzendorff v. Housing Authority of the City of Los Angeles* (1967) 250 Cal.App.2d 596, 610 [58 Cal.Rptr. 886], internal citation omitted.)
- " 'Willful' disobedience of a specific, peremptory instruction of the master, if the instruction be reasonable and consistent with the contract, is a breach of duty—a breach of the contract of service; and, like any other breach of the contract, of itself entitles the master to renounce the contract of employment." (*May v. New York Motion Picture Corp.* (1920) 45 Cal.App. 396, 403 [187 P. 785].)
- "An employment agreement that specifies the length of employment (e.g., two years) limits the employer's right to discharge the employee within that period. Unless the agreement provides otherwise (e.g., by reserving the right to discharge for cause), the employer may terminate employment for a specified term only for [the grounds specified in Labor Code section 2924]." (Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶ 4:47 (The Rutter Group)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶¶ 4:2, 4:47, 4:56, 4:57 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-B, *Agreements Limiting At-Will Termination*, ¶¶ 4:47, 4:56, 4:57 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.22–8.26

4 Wilcox, California Employment Law, Ch. 62, *Avoiding Wrongful Termination and Discipline Claims*, § 62.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.13, 249.21, 249.60–249.63 (Matthew Bender)

2422. Breach of Employment Contract—Specified Term—Damages

If you find that [*name of defendant***] [discharged/demoted] [***name of plaintiff***] in breach of an employment contract for a specified term, then you must decide the damages, if any, that [***name of plaintiff***] has proved [he/she/***nonbinary pronoun***] is entitled to recover. To make that decision, you must:**

1. **Decide the amount that [***name of plaintiff***] would have earned up to today, including any benefits and pay increases; [and]**
2. **Add the present cash value of any future wages and benefits that [he/she/***nonbinary pronoun***] would have earned up to the end of the term of the contract; [and]**
3. **[***Describe any other contract damages that were allegedly caused by defendant's conduct.***]**

[If you find that [*name of plaintiff***] would have exercised [his/her/***nonbinary pronoun***] option to extend the term of the employment contract, then you may consider the total term of [***name of plaintiff***]'s employment contract to be [***specify length of original contract term plus option term***].]**

New September 2003

Directions for Use

Use CACI No. 3963, *Affirmative Defense—Employee's Duty to Mitigate Damages*, if the defendant seeks an offset for wages plaintiff could have earned from similar employment.

Sources and Authority

- Damages for Breach of Contract. Civil Code section 3300.
- "Stated simply, the contract compensation for the unexpired period of the contract affords a prima facie measure of damages; the actual measured damage, however, is the contract amount reduced by compensation received during the unexpired term; if, however, such other compensation has not been received, the contract amount may still be reduced or eliminated by a showing that the employee, by the exercise of reasonable diligence and effort, could have procured comparable employment and thus mitigated the damages." (*Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 562 [57 Cal.Rptr. 516].)
- In appropriate circumstances, the court may authorize the trier of fact to "consider the probability the employee would exercise the option in determining the length of the unexpired term of employment when applying the applicable

measure of damages . . . .” (*Oldenkott v. American Electric, Inc.* (1971) 14 Cal.App.3d 198, 204 [92 Cal.Rptr. 127].)

- “The trial court correctly found that defendants wrongfully terminated the employment contract and that the measure of damages was the difference between the amount Silva would have received under the contract and that amount which Silva actually received from his other employment.” (*Silva v. McCoy* (1968) 259 Cal.App.2d 256, 260 [66 Cal.Rptr. 364].)
- “The plaintiff has the burden of proving his damage. The law is settled that he has the duty of minimizing that damage. While the contract wages are prima facie [evidence of] his damage, his actual damage is the amount of money he was out of pocket by reason of the wrongful discharge.” (*Erler v. Five Points Motors, Inc., supra,* 249 Cal.App.2d at pp. 567–568.)
- “The burden of proof is on the party whose breach caused damage, to establish matters relied on to mitigate damage.” (*Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 654 [160 P.2d 804], internal citations omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, 17-B, *Contract Damages*, ¶¶ 17:81, 17:95, 17:105, 17:495 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, 17-F, *Mitigation of Damages (Avoidable Consequences Doctrine)*, ¶ 17:495 (The Rutter Group)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.21 (Matthew Bender)

2423. Breach of Implied Covenant of Good Faith and Fair Dealing—Employment Contract—Essential Factual Elements

In every employment [*contract/agreement***] there is an implied promise of good faith and fair dealing. This implied promise means that neither the employer nor the employee will do anything to unfairly interfere with the right of the other to receive the benefits of the employment relationship. Good faith means honesty of purpose without any intention to mislead or to take unfair advantage of another. Generally speaking, it means being faithful to one's duty or obligation. However, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract.**

[*Name of plaintiff***] claims that [***name of defendant***] violated the duty implied in their employment [contract/agreement] to act fairly and in good faith. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into an employment relationship;**

[2. That [*name of plaintiff***] substantially performed [his/her/***nonbinary pronoun***] job duties [unless [***name of plaintiff***]'s performance was excused [or prevented]];]**

[3. That all conditions required for [*name of defendant***]'s performance [had occurred/ [or] were excused];]**

4. **That [***name of defendant***] [***specify conduct that the plaintiff claims prevented plaintiff from receiving the benefits under the contract***];**

5. **That by doing so, [***name of defendant***] did not act fairly and in good faith; and**

6. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s conduct.**

New September 2003; Revised November 2019, May 2020

Directions for Use

In every contract, there is an implied promise that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract. (*Comunale v. Traders & General Ins. Co*. (1958) 50 Cal.2d 654, 658 [328 P.2d 198].) Give this instruction if the employee asserts a claim that the employee's termination or other adverse employment action was in breach of this implied covenant. If the existence of a contract is at issue, see instructions on contract formation in the 300 series.

Include element 2 if the employee's substantial performance of the employee's required job duties is at issue. Include element 3 if there are conditions precedent that the employee must fulfill before the employer is required to perform. In element 4, insert an explanation of the employer's conduct that violated the duty to act in good faith.

Do not give this instruction if the alleged breach is only the termination of an at-will contract. (See *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1391 [88 Cal.Rptr.2d 802].)

See also the Sources and Authority to CACI No. 325, *Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements*, for more authorities on the implied covenant outside of employment law.

Sources and Authority

- Contractual Conditions Precedent. Civil Code section 1439.
- "We therefore conclude that the employment relationship is not sufficiently similar to that of insurer and insured to warrant judicial extension of the proposed additional tort remedies in view of the countervailing concerns about economic policy and stability, the traditional separation of tort and contract law, and finally, the numerous protections against improper terminations already afforded employees." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 693 [254 Cal.Rptr. 211, 765 P.2d 373].)
- "A breach of the contract may also constitute a breach of the implied covenant of good faith and fair dealing. But insofar as the employer's acts are directly actionable as a breach of an implied-in-fact contract term, a claim that merely realleges that breach as a violation of the covenant is superfluous. This is because, as we explained at length in *Foley*, the remedy for breach of an employment agreement, including the covenant of good faith and fair dealing implied by law therein, is solely contractual. In the employment context, an implied covenant theory affords no separate measure of recovery, such as tort damages." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 352 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citation omitted.)
- "We do not suggest the covenant of good faith and fair dealing has no function whatever in the interpretation and enforcement of employment contracts. As indicated above, the covenant prevents a party from acting in bad faith to frustrate the contract's actual benefits. Thus, for example, the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned." (*Guz, supra,* 24 Cal.4th at p. 353, fn. 18.)
- "The reason for an employee's dismissal and whether that reason constitutes bad faith are evidentiary questions most properly resolved by the trier of fact." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 26 [267 Cal.Rptr. 618], internal citations omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-D, *Implied Covenant of Good Faith and Fair Dealing*, ¶¶ 4:330, 4:331, 4:340, 4:343, 4:346 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.27–8.28

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, §§ 60.02[2][c], 60.06 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.14 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:21–6:22 (Thomson Reuters)

2424. Affirmative Defense—Breach of the Implied Covenant of Good Faith and Fair Dealing—Good Faith Though Mistaken Belief

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[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] did not breach the duty to act fairly and in good faith because [he/she/***nonbinary pronoun***/it] believed that there was a legitimate and reasonable business purpose for the conduct.**

To succeed, [*name of defendant***] must prove both of the following:**

1. **That [his/her/***nonbinary pronoun***/its] conduct was based on an honest belief that [***insert alleged mistake***]; and**
2. **That, if true, [***insert alleged mistake***] would have been a legitimate and reasonable business purpose for the conduct.**

New September 2003; Revised November 2019, May 2020

Directions for Use

In every contract, there is an implied promise that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract. (*Comunale v. Traders & General Ins. Co*. (1958) 50 Cal.2d 654, 658 [328 P.2d 198].) Give CACI No. 2423, *Breach of Implied Covenant of Good Faith and Fair Dealing—Employment Contract—Essential Factual Elements*, if the employee asserts a claim that the employee's termination or other adverse employment action was in breach of this implied covenant. Give this instruction if the employer asserts the defense that an honest, though mistaken, belief does not constitute a breach.

Sources and Authority

- "[B]ecause the implied covenant of good faith and fair dealing requires the employer to act fairly and in good faith, an employer's honest though mistaken belief that legitimate business reasons provided good cause for discharge, will negate a claim it sought in bad faith to deprive the employee of the benefits of the contract." (*Wilkerson v. Wells Fargo Bank* (1989) 212 Cal.App.3d 1217, 1231 [261 Cal.Rptr. 185], internal citation omitted, disapproved on other grounds in *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93, 96 [69 Cal.Rptr.2d 900, 948 P.2d 412].)
- "The jury was instructed that the neglect or refusal to fulfill a contractual obligation based on an honest, mistaken belief did not constitute a breach of the implied covenant." (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 26 [267 Cal.Rptr. 618].)
- "[*F*]*oley* does not preclude inquiry into an employer's motive for discharging an employee . . . ." (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1521 [273 Cal.Rptr. 296], overruled on other grounds, *Dore v. Arnold Worldwide, Inc.*

(2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56].)

- "[T]he jury was asked to determine in its special verdict whether appellants had a legitimate reason to terminate [plaintiff]'s employment and whether appellants acted in good faith on an honest but mistaken belief that they had a legitimate business reason to terminate [plaintiff]'s employment." (*Seubert, supra,* 223 Cal.App.3d at p. 1521 [upholding jury instruction].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶ 4:5 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.4-C, *"Good Cause" for Termination*, ¶ 4:271 (The Rutter Group)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.30 (Matthew Bender)

2425–2429. Reserved for Future Use

2430. Wrongful Discharge in Violation of Public Policy—Essential Factual Elements

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[*Name of plaintiff***] claims [he/she/***nonbinary pronoun***] was discharged from employment for reasons that violate a public policy. It is a violation of public policy [***specify claim in case, e.g., to discharge someone from employment for refusing to engage in price fixing***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**
2. **That [***name of defendant***] discharged [***name of plaintiff***];**
3. **That [***insert alleged violation of public policy, e.g.,* "**[***name of plaintiff***]***'s refusal to engage in price fixing*"**] was a substantial motivating reason for [***name of plaintiff***]'s discharge;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That the discharge was a substantial factor in causing [***name of plaintiff***] harm.**

New September 2003; Revised June 2013, June 2014, December 2014, November 2018, May 2020

Directions for Use

The judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal.Rptr.2d 874, 824 P.2d 680]; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80 fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Note that there are two causation elements. First, there must be causation between the public policy violation and the discharge (element 3). This instruction uses the term "substantial motivating reason" to express this causation element. "[S]ubstantial motivating reason" has been held to be the appropriate standard for cases alleging termination in violation of public policy. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758]; see *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Element 5 then expresses a second causation requirement; that the plaintiff was harmed as a result of the wrongful discharge.

If plaintiff alleges the plaintiff was forced or coerced to resign, then CACI No. 2431, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy*, or CACI No. 2432, *Constructive Discharge in Violation of*

Public Policy—Plaintiff Required to Endure Intolerable Conditions That Violate Public Policy, should be given instead. See also CACI No. 2510, *"Constructive Discharge" Explained.*

This instruction may be modified for adverse employment actions other than discharge, for example demotion, if done in violation of public policy. (See *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561 [232 Cal.Rptr. 490], disapproved on other grounds in *Gantt, supra,* 1 Cal.4th at p. 1093 [public policy forbids retaliatory action taken by employer against employee who discloses information regarding employer's violation of law to government agency].) See also CACI No. 2509, *"Adverse Employment Action" Explained.*

For an instruction on damages, give CACI No. 3903P, *Damages From Employer for Wrongful Discharge (Economic Damage).*

Sources and Authority

- " '[W]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose.' " (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1138–1139 [69 Cal.Rptr.3d 445], internal citations omitted.)
- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)
- "The elements of a claim for wrongful discharge in violation of public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm." (*Garcia-Brower v. Premier Automotive Imports of CA, LLC* (2020) 55 Cal.App.5th 961, 973 [269 Cal.Rptr.3d 856], internal citation omitted.)
- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889–890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], footnote omitted.)
- "Policies are not 'public' (and thus do not give rise to a common law tort claim) when they are derived from statutes that 'simply regulate conduct between private individuals, or impose requirements whose fulfillment does not implicate fundamental public policy concerns.' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 926 [180 Cal.Rptr.3d 359].)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt*, *supra*, 1 Cal.4th at pp. 1090–1091, internal citations and footnote omitted, overruled on other grounds in *Green, supra,* 19 Cal.4th at p. 80, fn. 6; accord *Stevenson, supra*, 16 Cal.4th at p. 889.)
- "[T]ermination of an employee most clearly violates public policy when it contravenes the provision of a statute forbidding termination for a specified reason . . . ." (*Diego, supra*, 231 Cal.App.4th at p. 926)
- "[Discharge because of employee's] [r]efusal to violate a governmental regulation may also be the basis for a tort cause of action where the administrative regulation enunciates a fundamental public policy and is authorized by statute." (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 708–709 [96 Cal.Rptr.3d 159].)
- "In the context of a tort claim for wrongful discharge, tethering public policy to specific constitutional or statutory provisions serves not only to avoid judicial interference with the legislative domain, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge . . . ." (*Stevenson, supra*, 16 Cal.4th at p. 889.)
- "[A]n employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity." (*Green, supra*, 19 Cal.4th at p. 87, internal citation omitted.)
- "[A]n employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. . . ." (*Tameny, supra*, 27 Cal.3d at p. 178.)
- "[T]here is a 'fundamental public interest in a workplace free from illegal practices . . . .' '[T]he public interest is in a lawful, not criminal, business operation. Attainment of this objective requires that an employee be free to call his or her employer's attention to illegal practices, so that the employer may prevent crimes from being committed by misuse of its products by its employees.' " (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 157 [176 Cal.Rptr.3d 824].)
- "Whether an employer has conducted an adequate investigation before dismissing an employee for an unlawful purpose is generally a question of fact for the jury." (*Garcia-Brower, supra,* 55 Cal.App.5th at p. 974.)
- "An action for wrongful termination in violation of public policy 'can only be asserted against *an employer*. An individual who is not an employer cannot commit the tort of wrongful discharge in violation of public policy; rather, he or she can only be the agent by which *an employer* commits that tort.' " (*Kim v.*

Konad USA Distribution, Inc. (2014) 226 Cal.App.4th 1336, 1351 [172 Cal.Rptr.3d 686], original italics.)

- "Sex discrimination in employment may support a claim of tortious discharge in violation of public policy." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 214 [126 Cal.Rptr.3d 651].)
- "In sum, a wrongful termination against public policy common law tort based on sexual harassment can be brought against an employer of any size." (*Kim*, *supra*, 226 Cal.App.4th at p. 1351.)
- "To establish a claim for wrongful termination in violation of public policy, an employee must prove causation. (See CACI No. 2430 [using phrase 'substantial motivating reason' to express causation].) Claims of whistleblower harassment and retaliatory termination may not succeed where a plaintiff 'cannot demonstrate the required nexus between his reporting of alleged statutory violations and his allegedly adverse treatment by [the employer].' " (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1357 [181 Cal.Rptr.3d 68].)
- "It would be nonsensical to provide a different standard of causation in FEHA cases and common law tort cases based on public policies encompassed by FEHA." (*Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334, 1341 [166 Cal.Rptr.3d 720].)
- "If claims for wrongful termination in violation of public policy must track FEHA, it necessarily follows that jury instructions pertinent to causation and motivation must be the same for both. Accordingly, we conclude the trial court did not err in giving the instructions set forth in the CACI model jury instructions." (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1323 [200 Cal.Rptr.3d 315].)
- "Under California law, if an employer did not violate FEHA, the employee's claim for wrongful termination in violation of public policy necessarily fails." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1169 [217 Cal.Rptr.3d 258].)
- "FEHA's policy prohibiting disability discrimination in employment is sufficiently substantial and fundamental to support a claim for wrongful termination in violation of public policy." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 660 [163 Cal.Rptr.3d 392].)
- "Although the fourth cause of action references FEHA as one source of the public policy at issue, this is not a statutory FEHA cause of action. FEHA does not displace or supplant common law tort claims for wrongful discharge." (*Kim*, *supra*, 226 Cal.App.4th at p. 1349.)
- "[T]o the extent the trial court concluded Labor Code section 132a is the exclusive remedy for work-related injury discrimination, it erred. The California Supreme Court held '[Labor Code] section 132a does not provide an exclusive remedy and does not preclude an employee from pursuing FEHA and common

law wrongful discharge remedies.' " (*Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1381 [196 Cal.Rptr.3d 68].)

- "California's minimum wage law represents a fundamental policy for purposes of a claim for wrongful termination or constructive discharge in violation of public policy." (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 831–832 [166 Cal.Rptr.3d 242].)
- " 'Labor Code section 1102.5, subdivision (b), which prohibits employer retaliation against an employee who reports a reasonably suspected violation of the law to a government or law enforcement agency, reflects the broad public policy interest in encouraging workplace "whistleblowers," who may without fear of retaliation report concerns regarding an employer's illegal conduct. This public policy is the modern day equivalent of the long-established duty of the citizenry to bring to public attention the doings of a lawbreaker. [Citation.] . . .' " (*Ferrick, supra*, 231 Cal.App.4th at p. 1355.)
- "That [defendant]'s decision not to renew her contract for an additional season *might* have been influenced by her complaints about an unsafe working condition . . . does not change our conclusion in light of the principle that a decision not to renew a contract set to expire is not actionable in tort." (*Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682 [145 Cal.Rptr.3d 766], original italics.)
- " ' "[P]ublic policy' as a concept is notoriously resistant to precise definition, and . . . courts should venture into this area, if at all, with great care . . . ." [Citation.] Therefore, *when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action*. Stated another way, the common law cause of action cannot be broader than the constitutional provision or statute on which it depends, and therefore it 'presents no impediment to employers that operate within the bounds of law." [Citation.]' " (*Dutra v. Mercy Medical Center Mt. Shasta* (2012) 209 Cal.App.4th 750, 756 [146 Cal.Rptr.3d 922], original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 255 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-(I)B, *Wrongful Discharge In Violation Of Public Policy (Tameny Claims)*, ¶¶ 5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220, 5:235 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, § 5.45

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.50–249.52 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful*

Termination and Discipline, §§ 100.41–100.61B (Matthew Bender)
California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters)

2431. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was forced to resign rather than commit a violation of public policy. It is a violation of public policy [***specify claim in case, e.g., for an employer to require that an employee engage in price fixing***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**
2. **That [***name of defendant***] required [***name of plaintiff***] to [***specify alleged conduct in violation of public policy, e.g., "engage in price fixing"***];**
3. **That this requirement was so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**
4. **That [***name of plaintiff***] resigned because of this requirement;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That the requirement was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised June 2014, December 2014, May 2020

Directions for Use

This instruction should be given if a plaintiff claims that the plaintiff's constructive termination was wrongful because the defendant required the plaintiff to commit an act in violation of public policy. If the plaintiff alleges the plaintiff was subjected to intolerable working conditions that violate public policy, see CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*.

This instruction must be supplemented with CACI No. 3903P, *Damages From Employer for Wrongful Discharge (Economic Damage).* See also CACI No. 2510, *"Constructive Discharge" Explained*.

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal.Rptr.2d 874, 824 P.2d 680], overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80 fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Sources and Authority

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)
- "[A]n employer's authority over its employees does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer." (*Tameny, supra,* 27 Cal.3d at p. 178.)
- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889–890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], footnote omitted.)
- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090–1091 [4 Cal.Rptr.2d 874, 824 P.2d 680], internal citations and fn. omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046]; accord *Stevenson, supra*, 16 Cal.4th at p. 889.)
- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)
- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244–1245 [32 Cal.Rptr.2d 223, 876 P.2d 1022], internal citation omitted.)
- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to

justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)

- "In order to establish a constructive discharge, an employee must plead and prove . . . that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra*, 7 Cal.4th at p. 1251.)
- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra*, 7 Cal.4th at p. 1246.)
- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra*, 7 Cal.4th at p. 1247, fn. 3.)
- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra*, 7 Cal.4th at p. 1254.)
- "[T]he standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra*, 7 Cal.4th at p. 1248, internal citations omitted.)
- "[U]nder *Turner*, the proper focus is on the working conditions themselves, not on the plaintiff's *subjective* reaction to those conditions." (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1272 [227 Cal.Rptr.3d 695], original italics.)
- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra*, 7 Cal.4th at p. 1254.)
- "[T]here was, as the trial court found, substantial evidence that plaintiff's age and disability were 'substantial motivating reason[s]' for the adverse employment action or actions to which plaintiff was subjected. But the discriminatory motive for plaintiff's working conditions has no bearing on whether the evidence was sufficient to establish constructive discharge." (*Simers*, *supra*, 18 Cal.App.5th at p. 1271.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 235

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-G, Constructive Discharge, ¶¶ 4:405–4:406, 4:409–4:410, 4:421–4:422 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-A, Wrongful Discharge In Violation Of Public Policy (Tameny Claims), ¶¶ 5:45–5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45–5.46

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.31, 100.35–100.38 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters)

2432. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions That Violate Public Policy

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[*Name of plaintiff***] claims that [***name of defendant***] forced [him/her/***nonbinary pronoun***] to resign for reasons that violate public policy. It is a violation of public policy [***specify claim in case, e.g., for an employer to require an employee to work more than forty hours a week for less than minimum wage***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**
2. **That [***name of plaintiff***] was subjected to working conditions that violated public policy, in that [***describe conditions imposed on the employee that constitute the violation, e.g., "[name of plaintiff] was required to work more than forty hours a week for less than minimum wage"***];**
3. **That [***name of defendant***] intentionally created or knowingly permitted these working conditions;**
4. **That these working conditions were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**
5. **That [***name of plaintiff***] resigned because of these working conditions;**
6. **That [***name of plaintiff***] was harmed; and**
7. **That the working conditions were a substantial factor in causing [***name of plaintiff***]'s harm.**

To be intolerable, the adverse working conditions must be unusually aggravated or involve a continuous pattern of mistreatment. Trivial acts are insufficient.

New September 2003; Revised December 2014, June 2015, May 2020

Directions for Use

This instruction should be given if the plaintiff claims that the plaintiff's constructive termination was wrongful because defendant subjected plaintiff to intolerable working conditions in violation of public policy. The instruction must be supplemented with CACI No. 3903P, *Damages From Employer for Wrongful Discharge (Economic Damage).* See also CACI No. 2510, *"Constructive Discharge" Explained.*

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal.Rptr.2d 874, 824 P.2d 680], overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80 fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Whether conditions are so intolerable as to justify the employee's decision to quit rather than endure them is to be judged by an objective reasonable-employee standard. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1247 [32 Cal.Rptr.2d 223, 876 P.2d 1022].) This standard is captured in element 4. The paragraph at the end of the instruction gives the jury additional guidance as to what makes conditions intolerable. (See *id.* at p. 1247.) Note that in some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. (*Id.* at p. 1247, fn. 3.)

Sources and Authority

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)
- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889–890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], footnote omitted.)
- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)
- "Plaintiffs assert, in essence, that they were terminated for refusing to engage in conduct that violated fundamental public policy, to wit, nonconsensual sexual acts. They also assert, in effect, that they were discharged in retaliation for attempting to exercise a fundamental right—the right to be free from sexual assault and harassment. Under either theory, plaintiffs, in short, should have been granted leave to amend to plead a cause of action for wrongful discharge in violation of public policy." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 91 [276 Cal.Rptr. 130, 801 P.2d 373].)
- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment

relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner, supra*, 7 Cal.4th at pp. 1244–1245, internal citation omitted.)

- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)
- "In order to establish a constructive discharge, an employee must plead and prove . . . that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra*, 7 Cal.4th at p. 1251.)
- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra*, 7 Cal.4th at p. 1246.)
- "In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge" (*Turner, supra*, 7 Cal.4th at p. 1247, footnote and internal citation omitted.)
- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra*, 7 Cal.4th at p. 1254.)
- "[T]he standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra*, 7 Cal.4th at p. 1248, internal citations omitted.)
- "[U]nder *Turner*, the proper focus is on the working conditions themselves, not on the plaintiff's *subjective* reaction to those conditions." (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1272 [227 Cal.Rptr.3d 695], original italics.)
- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint

of a reasonable person." (*Turner, supra*, 7 Cal.4th at p. 1254.)

- "[T]here was, as the trial court found, substantial evidence that plaintiff's age and disability were 'substantial motivating reason[s]' for the adverse employment action or actions to which plaintiff was subjected. But the discriminatory motive for plaintiff's working conditions has no bearing on whether the evidence was sufficient to establish constructive discharge." (*Simers*, *supra*, 18 Cal.App.5th at p. 1271.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 235

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-G, Constructive Discharge, ¶¶ 4:405–4:406, 4:409–4:411, 4:421–4:422 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-(I)B, Wrongful Discharge In Violation Of Public Policy (Tameny Claims), ¶¶ 5:4, 5:45–5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45–5.46

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.15, 249.50 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.31, 100.32, 100.36–100.38 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters)

2433–2440 Reserved for Future Use

2441. Discrimination Against Member of Military—Essential Factual Elements (Mil. & Vet. Code, § 394)

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/***nonbinary pronoun***] because of [his/her/***nonbinary pronoun***] [current/past] service in the [United States/California] military. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was an employee of [***name of defendant***];**
2. **That [***name of plaintiff***] [was serving/had served] in the [***specify military branch, e.g., California National Guard***];**
3. **That [***name of defendant***] discharged [***name of plaintiff***];**
4. **That [***name of plaintiff***]'s [[current/past] service in the armed forces/need to report for required military [duty/training]] was a substantial motivating reason for [***name of defendant***]'s decision to discharge [***name of plaintiff***];**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2012; Revised June 2013, June 2014

Directions for Use

Military and Veterans Code section 394 prohibits employment discrimination against members of the military on two grounds. First, discrimination is prohibited based simply on the plaintiff's military membership or service. In other words, an employer, public or private, may not refuse to hire or discharge someone based on the fact that the person serves or has served in the armed forces. (Mil. & Vet. Code, § 394(a), (b).) Second, a military-member employee is protected from discharge or other adverse actions because of a requirement to participate in military duty or training. (Mil. & Vet. Code, § 394(d).) For element 4, choose the appropriate option.

The statute prohibits a refusal to hire based on military status, and also reaches a broad range of adverse employment actions short of actual discharge. (See Mil. & Vet. Code, § 394(a), (b), (d) [prohibiting prejudice, injury, harm].) Elements 1, 3, 4, and 6 may be modified to refer to seeking employment and refusal to hire. Elements 3, 4, and 6 may be modified to allege constructive discharge or adverse acts other than discharge. See CACI No. 2509, *"Adverse Employment Action" Explained*, and CACI No. 2510, *"Constructive Discharge" Explained*, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 4 uses the term "substantial motivating reason" to express both intent and

causation between the the employee's military service and the discharge. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained.*) Whether the FEHA standard applies to cases alleging military service discrimination under section 394 has not been addressed by the courts. However, military and veteran status is now a protected category under the FEHA. (See Gov. Code, § 12940(a).

Sources and Authority

- Discrimination Against Members of the Military. Military and Veterans Code section 394.
- Military and Veteran Status Protected Under Fair Employment and Housing Act. Government Code section 12940(a).
- "[I]ndividual employees may not be held personally liable under section 394 for alleged discriminatory acts that arise out of the performance of regular and necessary personnel management duties." (*Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, 998 [134 Cal. Rptr. 3d 214].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 369, 472

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

2442–2499. Reserved for Future Use

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] and [***name of defendant***] enter into an employment relationship?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] promise, by words or conduct, not to [discharge/demote] [***name of plaintiff***] except for good cause?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] substantially perform [his/her/***nonbinary pronoun***] job duties?**

   _____ Yes _____ No

   If your answer to question 3 is yes, skip question 4 and answer question 5. If you answered no, answer question 4.

4. **Was [***name of plaintiff***]'s performance excused or prevented?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] [discharge/demote] [***name of plaintiff***] without good cause?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [***name of plaintiff***] harmed by the [discharge/demotion]?**

   _____ Yes _____ No

   If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have

the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss: $_____]

[b. Future economic loss: $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on CACI No. 2401, *Breach of Employment Contract—Unspecified Term—Essential Factual Elements.*

Questions 3 and 4 should be deleted if substantial performance is not at issue.

The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

VF-2401. Breach of Employment Contract—Unspecified Term—Constructive Discharge

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We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] and [*name of defendant*] enter into an employment relationship?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] promise, by words or conduct, not to [discharge/demote] [*name of plaintiff*] except for good cause?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of plaintiff*] substantially perform [his/her/*nonbinary pronoun*] job duties?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, skip question 4 and answer question 5. If you answered no, answer question 4.

4. **Was [*name of plaintiff*]'s performance excused or prevented?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [*name of defendant*] intentionally create or knowingly permit working conditions to exist that were so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Did [*name of plaintiff*] resign because of the intolerable conditions?**

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of plaintiff*] harmed by the loss of employment?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss: $_____]

[b. Future economic loss: $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of each case.

This verdict form is based on CACI No. 2401, *Breach of Employment Contract—Unspecified Term—Actual or Constructive Discharge—Essential Factual Elements.*

Questions 3 and 4 should be deleted if substantial performance is not at issue.

The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

VF-2402. Breach of Employment Contract—Specified Term

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] and [*name of defendant*] enter into an employment contract that specified a length of time for which [*name of plaintiff*] would remain employed?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] substantially perform [his/her/*nonbinary pronoun*] job duties?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, skip question 3 and answer question 4. If you answered no, answer question 3.

3. **Was [*name of plaintiff*]'s performance excused or prevented?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of defendant*] breach the employment contract by [discharging/demoting] [*name of plaintiff*] before the end of the term of the contract?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of plaintiff*] harmed by the [discharge/demotion]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss: $_____]

   [b. Future economic loss: $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of each case.

This verdict form is based on CACI No. 2420, *Breach of Employment Contract—Specified Term—Essential Factual Elements*.

Questions 2 and 3 should be deleted if substantial performance is not at issue.

The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

VF-2403. Breach of Employment Contract—Specified Term—Good-Cause Defense

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We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] and [*name of defendant*] enter into an employment contract that specified a length of time for which [*name of plaintiff*] would remain employed?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] substantially perform [his/her/*nonbinary pronoun*] job duties?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, skip question 3 and answer question 4. If you answered no, answer question 3.

3. **Was [*name of plaintiff*]'s performance excused or prevented?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of defendant*] [discharge/demote] [*name of plaintiff*] before the end of the term of the contract?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [*name of defendant*] have good cause to [discharge/demote] [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [*name of plaintiff*] harmed by the [discharge/demotion]?**

   _____ **Yes** _____ **No**

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss: $_____]

[b. Future economic loss: $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of each case.

This verdict form is based on CACI No. 2420, *Breach of Employment Contract—Specified Term—Essential Factual Elements*, and CACI No. 2421, *Breach of Employment Contract—Specified Term—Good-Cause Defense*.

Questions 2 and 3 should be deleted if substantial performance is not at issue.

The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

VF-2404. Employment—Breach of the Implied Covenant of Good Faith and Fair Dealing

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We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] and [*name of defendant*] enter into an employment relationship?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] substantially perform [his/her/*nonbinary pronoun*] job duties?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, skip question 3 and answer question 4. If you answered no, answer question 3.

3. **Was [*name of plaintiff*]'s performance excused or prevented?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of defendant*] [*specify conduct that plaintiff claims prevented plaintiff from receiving the benefits under the contract*]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [*name of defendant*] fail to act fairly and in good faith?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [*name of plaintiff*] harmed by [*name of defendant*]'s failure to act fairly and in good faith?**

   _____ **Yes** _____ **No**

   If your answer to question 6 is yes, then answer question 7. If you

answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss: $_____]

[b. Future economic loss: $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 2423, *Breach of the Implied Covenant of Good Faith and Fair Dealing—Employment Contract—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Questions 2 and 3 should be deleted if substantial performance is not at issue.

The breakdown of damages in question 7 is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2405. Breach of the Implied Covenant of Good Faith and Fair Dealing—Affirmative Defense—Good Faith Mistaken Belief

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] and [***name of defendant***] enter into an employment agreement?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of plaintiff***] substantially perform [his/her/***nonbinary pronoun***] job duties?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, skip question 3 and answer question 4. If you answered no, answer question 3.

3. **Was [***name of plaintiff***]'s performance excused or prevented?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] [***specify conduct that plaintiff claims prevented plaintiff from receiving the benefits under the contract***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of defendant***]'s conduct based on an honest belief that [***insert alleged mistake***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, skip question 6 and answer question 7.

6. **If true, would [***insert alleged mistake***] have been a legitimate and reasonable business purpose for the conduct?**

   _____ **Yes** _____ **No**

   If your answer to question 6 is no, then answer question 7. If you

answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of defendant*] fail to act fairly and in good faith?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [*name of plaintiff*] harmed by [*name of defendant*]'s failure to act in good faith?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s damages?

[a. Past economic loss: $_____]

[b. Future economic loss: $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 2423, *Breach of the Implied Covenant of Good Faith and Fair Dealing—Employment Contract—Essential Factual Elements*, and CACI No. 2424, *Affirmative Defense—Breach of the Implied Covenant of Good Faith and Fair Dealing—Good Faith Though Mistaken Belief.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Questions 2 and 3 should be deleted if substantial performance is not at issue.

The breakdown of damages in question 9 is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2406. Wrongful Discharge in Violation of Public Policy

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] employed by [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of plaintiff*] discharged?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of plaintiff*]'s [*insert alleged activity protected by public policy, e.g., "refusal to engage in price fixing"*] a substantial motivating reason for [*name of defendant*]'s decision to discharge [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did the discharge cause [*name of plaintiff*] harm?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2430, *Wrongful Discharge in Violation of Public Policy—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2407. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy

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We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] employed by [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] require [*name of plaintiff*] to [*specify alleged conduct in violation of public policy, e.g., "engage in price fixing"*] as a condition of employment?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was this requirement so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of plaintiff*] resign because of this requirement?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was the requirement a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2431, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual

forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2408. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy

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We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] employed by [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of plaintiff*] subjected to working conditions that violated public policy, in that [*describe conditions imposed on the employee that constitute the violation, e.g., "plaintiff was treated intolerably in retaliation for filing a workers' compensation claim"*]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] intentionally create or knowingly permit these working conditions?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Were these working conditions so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [*name of plaintiff*] resign because of these working conditions?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Were the working conditions a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy.*

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2409–VF-2499. Reserved for Future Use

FAIR EMPLOYMENT AND HOUSING ACT

2500. Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/***nonbinary pronoun***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**
2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/ applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**
3. **[That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];]**

   [or]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**
4. **That [***name of plaintiff***]'s [***protected status—for example, race, gender, or age***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

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*New September 2003; Revised April 2009, June 2011, June 2012, June 2013, May 2020, May 2024**

Directions for Use

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected status. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group. For disparate impact claims, see CACI No. 2502, *Disparate Impact—Essential Factual Elements*.

If the defendant's status as employer is in dispute, the court may need to instruct the

jury on the statutory definition of "employer" under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(b)–(h), (j), (k).)

Read the first option for element 3 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 4 if either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus and the adverse action (see element 4), and there must be a causal link between the adverse action and the damage (see element 6). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Element 4 requires that discrimination based on a protected classification be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Modify element 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Perception and Association. Government Code section 12926(o).
- "Race." Government Code section 12926(w).
- "Protective Hairstyles." Government Code section 12926(x).
- "Reproductive Health Decisionmaking." Government Code section 12926(y).
- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[] 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our

conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)

- "[C]onceptually the theory of '[disparate] treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)
- "California has adopted the three-stage burden-shifting test for discrimination claims set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed. 2d 668]. 'This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.' " (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 307 [115 Cal.Rptr.3d 453], internal citations omitted.)
- "The *McDonnell Douglas* framework was designed as 'an analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the factfinding process.' " (*Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 737 [233 Cal.Rptr.3d 242].)
- "At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff's prima facie burden is 'not onerous', he must at least show ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion . . . .' . . . ." . . .' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)
- "If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though 'rebuttable,' is 'legally mandatory.' Thus, in a trial, '[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.' [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason. [¶] If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then

have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." (*Guz*, *supra*, 24 Cal.4th at pp. 355–356, internal citations omitted.)

- "The trial court decides the first two stages of the *McDonnell Douglas* test as questions of law. If the plaintiff and defendant satisfy their respective burdens, the presumption of discrimination disappears and the question whether the defendant unlawfully discriminated against the plaintiff is submitted to the jury to decide whether it believes the defendant's or the plaintiff's explanation." (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 965 [181 Cal.Rptr.3d 553].)
- "We conclude that where a plaintiff establishes a prima facie case of discrimination based on a failure to interview her for open positions, the employer must do more than produce evidence that the hiring authorities did not know why she was not interviewed. Nor is it enough for the employer, in a writ petition or on appeal, to cobble together after-the-fact *possible* nondiscriminatory reasons. While the stage-two burden of production is not onerous, the employer must clearly state the *actual* nondiscriminatory reason for the challenged conduct." (*Dept. of Corrections & Rehabilitation v. State Personnel Bd.* (2022) 74 Cal.App.5th 908, 930 [290 Cal.Rptr.3d 70], original italics.)
- "To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to determine if a plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [¶] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action." (*Jones v. Department of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200], internal citations omitted.)
- "Although '[t]he specific elements of a prima facie case may vary depending on the particular facts,' the plaintiff in a failure-to-hire case '[g]enerally . . . must provide evidence that (1) he [or she] was a member of a protected class, (2) he [or she] was qualified for the position he [or she] sought . . . , (3) he [or she] suffered an adverse employment action, such as . . . denial of an available job, and (4) some other circumstance suggests discriminatory motive,' such as that the position remained open and the employer continued to solicit applications for

it." (*Abed, supra,* 23 Cal.App.5th at p. 736.)

- "Although we recognize that in most cases, a plaintiff who did not apply for a position will be unable to prove a claim of discriminatory failure to hire, a job application is not an *element* of the claim." (*Abed, supra,* 23 Cal.App.5th at p. 740, original italics.)
- "Employers who lie about the existence of open positions are not immune from liability under the FEHA simply because they are effective in keeping protected persons from applying." (*Abed, supra,* 23 Cal.App.5th at p. 741.)
- "[Defendant] still could shift the burden to [plaintiff] by presenting admissible evidence showing a legitimate, nondiscriminatory reason for terminating her. 'It is the employer's honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.' . . . '[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. . . . While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, "legitimate" reasons . . . in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding *of discrimination*. . . .' " (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 170–171 [125 Cal.Rptr.3d 1], original italics, internal citations omitted.)
- "[W]e hold that a residency program's claim that it terminated a resident for academic reasons is not entitled to deference. . . . [T]he jury should be instructed to evaluate, without deference, whether the program terminated the resident for a genuine academic reason or because of an impermissible reason such as retaliation or the resident's gender." (*Khoiny v. Dignity Health* (2022) 76 Cal.App.5th 390, 404 [291 Cal.Rptr.3d 496].)
- "The burden therefore shifted to [plaintiff] to present evidence showing the [defendant] engaged in intentional discrimination. To meet her burden, [plaintiff] had to present evidence showing (1) the [defendant]'s stated reason for not renewing her contract was untrue or pretextual; (2) the [defendant] acted with a discriminatory animus in not renewing her contract; or (3) a combination of the two." (*Swanson, supra*, 232 Cal.App.4th at p. 966.)
- "Evidence that an employer's proffered reasons were pretextual does not necessarily establish that the employer intentionally discriminated: ' " '[I]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.' " ' However, evidence of pretext is important: ' "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." ' " (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 350–351 [223 Cal.Rptr.3d 173], internal citations omitted.)
- "While a complainant need not prove that [discriminatory] animus was the sole

motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon, supra*, 192 Cal.App.3d at p. 1319.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris*, *supra*, 56 Cal.4th at p. 232, original italics.)
- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris*, *supra*, 56 Cal.4th at p. 229.)
- "In cases involving a comparison of the plaintiff's qualifications and those of the successful candidate, we must assume that a reasonable juror who might disagree with the employer's decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone. In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. [Citation.] But this does not mean that a reasonable juror would in every case defer to the employer's assessment. If that were so, no job discrimination case could ever go to trial. If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture." (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 674–675 [111 Cal.Rptr.3d 896], original italics.)
- "While not all cases hold that 'the disparity in candidates' qualifications "must be so apparent as to jump off the page and slap us in the face to support a finding of pretext" ' the precedents do consistently require that the disparity be substantial to support an inference of discrimination." (*Reeves*, *supra*, 186 Cal.App.4th at p. 675, internal citation omitted.)
- "In no way did the Court of Appeal in *Reeves* overturn the long-standing rule that comparator evidence is relevant and admissible where the plaintiff and the comparator are similarly situated in all relevant respects and the comparator is treated more favorably. Rather, it held that in a job hiring case, and in the context of a summary judgment motion, a plaintiff's weak comparator evidence

'alone' is insufficient to show pretext." (*Gupta v. Trustees of California State University* (2019) 40 Cal.App.5th 510, 521 [253 Cal.Rptr.3d 277].)

- "[Defendant] contends that a trial court must assess the relative strength and nature of the evidence presented on summary judgment in determining if the plaintiff has 'created only a weak issue of fact.' However, [defendant] overlooks that a review of all of the evidence is essential to that assessment. The stray remarks doctrine, as advocated by [defendant], goes further. It allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by 'nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.' [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, 'the task of disambiguating ambiguous utterances is for trial, not for summary judgment.' Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury. The stray remarks doctrine allows the trial court to remove this role from the jury." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted; see Gov. Code, § 12923(c) [Legislature affirms the decision in *Reid v. Google, Inc.* in its rejection of the "stray remarks doctrine"].)
- "[D]iscriminatory remarks can be relevant in determining whether intentional discrimination occurred: 'Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered . . . .' " (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1190–1191 [220 Cal.Rptr.3d 42].)
- "Discrimination on the basis of an employee's foreign accent is a sufficient basis for finding national origin discrimination." (*Galvan v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 549, 562 [250 Cal.Rptr.3d 16].)
- "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz, supra*, 24 Cal.4th at p. 354.)
- "We have held 'that, in a civil action under the FEHA, all relief generally available in noncontractual actions . . . may be obtained.' This includes injunctive relief." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)
- "The FEHA does not itself authorize punitive damages. It is, however, settled that California's punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA . . . ." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1025,

1029

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.44–2.82

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:2, 2:20 (Thomson Reuters)

2501. Affirmative Defense—Bona fide Occupational Qualification

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[*Name of defendant***] claims that [his/her/***nonbinary pronoun***/its] decision [to discharge/[***other adverse employment action***]] [***name of plaintiff***] was lawful because [he/she/***nonbinary pronoun***/it] was entitled to consider [***protected status—for example, race, gender, or age***] as a job requirement. To succeed, [***name of defendant***] must prove all of the following:**

1. **That the job requirement was reasonably necessary for the operation of [***name of defendant***]'s business;**
2. **That [***name of defendant***] had a reasonable basis for believing that substantially all [***members of protected group***] are unable to safely and efficiently perform that job;**
3. **That it was impossible or highly impractical to consider whether each [applicant/employee] was able to safely and efficiently perform the job; and**
4. **That it was impossible or highly impractical for [***name of defendant***] to rearrange job responsibilities to avoid using [***protected status***] as a job requirement.**

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*New September 2003; Revised May 2024**

Directions for Use

An employer may assert the bona fide occupational qualification (BFOQ) defense where the employer has a practice that on its face excludes an entire group of individuals because of their protected status. Modifications will be necessary if the BFOQ defense is raised in a case involving allegations of failure to accommodate an employee who is pregnant, recovering from childbirth, or having related medical conditions. (Gov. Code, § 12945(a).)

Sources and Authority

- Bona fide Occupational Qualification. Government Code section 12940(a)(1).
- Bona fide Occupational Qualification for Pregnancy, Childbirth and Related Conditions. Government Code section 12945(a).
- Bona fide Occupational Qualification. Cal. Code Regs., tit. 2, § 11010(a).
- Bona fide Occupational Qualification Under Federal Law. 42 U.S.C. § 2000e-2(e)(1).
- The BFOQ defense is a narrow exception to the general prohibition on discrimination. (*Bohemian Club v. Fair Employment & Housing Com.* (1986) 187 Cal.App.3d 1, 19 [231 Cal.Rptr. 769]; *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v.*

Johnson Controls, Inc. (1991) 499 U.S. 187, 201 [111 S.Ct. 1196, 113 L.Ed.2d 158].)

- " '[I]n order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.' " (*Bohemian Club*, *supra*, 187 Cal.App.3d at p. 19, quoting *Weeks v. Southern Bell Telephone & Telegraph Co.* (5th Cir. 1969) 408 F.2d 228, 235.)
- "First, the employer must demonstrate that the occupational qualification is 'reasonably necessary to the normal operation of [the] particular business.' Secondly, the employer must show that the categorical exclusion based on [the] protected class characteristic is justified, i.e., that 'all or substantially all' of the persons with the subject class characteristic fail to satisfy the occupational qualification." (*Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517, 540 [267 Cal.Rptr. 158], quoting *Weeks*, *supra*, 408 F.2d at p. 235.)
- "Even if an employer can demonstrate that certain jobs require members of one sex, the employer must also 'bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities . . .' in order to reduce the BFOQ necessity." (*Johnson Controls, Inc.*, *supra*, 218 Cal.App.3d at p. 541; see *Hardin v. Stynchcomb* (11th Cir. 1982) 691 F.2d 1364, 1370–1371.)
- "Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical' to deal with the older employees on an individualized basis." (*Western Airlines, Inc. v. Criswell* (1985) 472 U.S. 400, 414–415 [105 S.Ct. 2743, 86 L.Ed.2d 321], internal citation and footnote omitted.)
- "The Fair Employment and Housing Commission has interpreted the BFOQ defense in a manner incorporating all of the federal requirements necessary for its establishment. . . . [¶] The standards of the Commission are . . . in harmony with federal law regarding the availability of a BFOQ defense." (*Bohemian Club*, *supra*, 187 Cal.App.3d at p. 19.)
- "By modifying 'qualification' with 'occupational,' Congress narrowed the term to qualifications that affect an employee's ability to do the job." (*International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW*, *supra*, 499 U.S. at p. 201.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1025, 1034

Chin et al., California Practice Guide: Employment Litigation, Ch.9-C, *California Fair Employment and Housing Act (FEHA)*, ¶¶ 9:2380, 9:2382, 9:2400, 9:2430 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual

Harassment, §§ 2.91–2.94

2 Wilcox, California Employment Law, Ch. 41, *Civil Actions Under Equal Employment Opportunity Laws*, §§ 41.94[3], 41.108 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.54[4] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:84 (Thomson Reuters)

2502. Disparate Impact—Essential Factual Elements (Gov. Code, § 12940(a))

[*Name of plaintiff***] claims that [***name of defendant***] had [an employment practice/a selection policy] that wrongfully discriminated against [him/her/***nonbinary pronoun***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**
2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***other covered relationship to defendant***]];**
3. **That [***name of defendant***] had [an employment practice of [***describe practice***]/a selection policy of [***describe policy***]] that had a disproportionate adverse effect on [***describe protected group—for example, persons over the age of 40***];**
4. **That [***name of plaintiff***] is [***protected status***];**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s [employment practice/selection policy] was a substantial factor in causing [***name of plaintiff***]'s harm.**

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*New September 2003; Revised June 2011, May 2024**

Directions for Use

This instruction is intended for disparate impact employment discrimination claims. Disparate impact occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group and cannot be justified by business necessity. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1405 [194 Cal.Rptr.3d 689].)

If the defendant's status as employer is in dispute, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(b)–(h), (j), (k).)

The court should consider instructing the jury on the meaning of "adverse impact," tailored to the facts of the case and the applicable law.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Disparate Impact May Prove Age Discrimination. Government Code section 12941.1.
- Justification for Disparate Impact. Cal. Code Regs., tit. 2, §§ 11010(b), 11017(a), (e).
- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)
- "Prohibited discrimination may . . . be found on a theory of disparate impact, i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)
- "A 'disparate impact' plaintiff . . . may prevail without proving intentional discrimination . . . [However,] a disparate impact plaintiff 'must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue.' " (*Ibarbia v. Regents of the University of California* (1987) 191 Cal.App.3d 1318, 1329–1330 [237 Cal.Rptr. 92], quoting *Lowe v. City of Monrovia* (9th Cir. 1985) 775 F.2d 998, 1004.)
- " 'To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination . . . Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716], quoting *Connecticut v. Teal* (1982) 457 U.S. 440, 446–447 [102 S.Ct. 2525, 73 L.Ed.2d 130], internal citation omitted.)
- "It is well settled that valid statistical evidence is required to prove disparate

impact discrimination, that is, that a facially neutral policy has caused a protected group to suffer adverse effects. ' "Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. . . . [S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation." ' " (*Jumaane, supra*, 241 Cal.App.4th at p. 1405.)

- Under federal title VII, a plaintiff may establish an unlawful employment practice based on disparate impact in one of two ways: (1) the plaintiff demonstrates that a defendant uses a particular employment practice that causes a disparate impact on the basis of a protected status, and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff demonstrates that there is an alternative employment practice with less adverse impact, and the defendant "refuses to adopt such alternative employment practice." (42 U.S.C. § 2000e-2(k)(1)(A).)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶ 4:25 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:530, 7:531, 7:535 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.65

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.21 (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[4] (Matthew Bender)

California Civil Practice: Employment Litigation, § 2:23 (Thomson Reuters)

2503. Affirmative Defense—Business Necessity/Job Relatedness

[*Name of defendant*] claims that the [employment practice/selection policy] is lawful because it is necessary to [his/her/*nonbinary pronoun*/its] business. To succeed, [*name of defendant*] must prove both of the following:

1. **That the purpose of the [employment practice/selection policy] is to operate the business safely and efficiently; and**
2. **That the [employment practice/selection policy] substantially accomplishes this business purpose.**

New September 2003

Directions for Use

The defense of business necessity is available for disparate impact claims but may not be used as a defense against a claim of intentional discrimination.

CACI No. 2504, *Disparate Impact—Rebuttal to Business Necessity/Job Relatedness Defense*, must be given if defendant asserts the defense of business necessity to a disparate impact employment discrimination claim.

Sources and Authority

- Justification of Disparate Impact. Cal. Code Regs., tit. 2, §§ 11010(b), 11017(a), (e).
- "In order to meet its burden the [employer] must demonstrate a business necessity for use of the [discriminatory employment practice] . . . . 'The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 989–990 [236 Cal.Rptr. 716], quoting *Robinson v. Lorillard Corp.* (4th Cir. 1971) 444 F.2d 791, 798.)
- The federal Civil Rights Act of 1991 states that one of its purposes is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424], and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) [109 S.Ct. 2115, 104 L.Ed.2d 733]." (Civil Rights Act of 1991, Pub.L. No. 102-166, § 3(2) (Nov. 21, 1991) 105 Stat. 1071, 1071.)
- Federal title VII provides that while business necessity is a defense to a claim of

disparate impact discrimination, "[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination." (42 U.S.C. § 2000e-2(k)(2).)

- "The touchstone is business necessity. If an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited . . . Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." (*Griggs, supra,* 401 U.S. at pp. 431–432.)
- "[T]he employer may defend its policy or practice by proving that it is 'job related for the position in question and consistent with business necessity.' Though the key terms have been used since *Griggs,* their meaning remains unclear." (1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Adverse Impact, p. 106, footnotes omitted.)
- "[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet . . . ." (*Wards Cove Packing Co., Inc., supra,* 490 U.S. at p. 659.) [Note: This portion of *Wards Cove* may have been superseded by the Civil Rights Act of 1991.]

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-E, *Defamation*, ¶¶ 7:571, 7:581, 7:915 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-L, *Invasion of Privacy*, ¶ 7:915 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.90

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.21[4], 41.95[1] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[2][c] (Matthew Bender)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed.) Adverse Impact, pp. 106–110; *id.* (2000 supp.) at pp. 62–64

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.23[4][d], 115.54[5], 115.102–115.103 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:25 (Thomson Reuters)

2504. Disparate Impact—Rebuttal to Business Necessity/Job Relatedness Defense

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If [*name of defendant*] proves that the [employment practice/ selection policy] is necessary to [his/her/*nonbinary pronoun*/its] business, then the [employment practice/selection policy] is lawful unless [*name of plaintiff*] proves both of the following:

1. **That there was an alternative [employment practice/ selection policy] that would have accomplished the business purpose equally well; and**
2. **That the alternative [employment practice/selection policy] would have had less adverse impact on [*describe members of protected group—for example, "persons over the age of 40"*].**

New September 2003

Directions for Use

Federal title VII requires a plaintiff to demonstrate that the employer refused to adopt the alternative employment practice (see 42 U.S.C. § 2000e-2(K)(1)(A)(ii)). There are no published court opinions determining if a similar requirement exists under California law.

This instruction must be given if defendant asserts the defense of business necessity to a disparate impact employment discrimination claim. (See CACI No. 2503, *Affirmative Defense—Business Necessity/Job Relatedness*.)

Sources and Authority

- Justification for Disparate Impact. Cal. Code Regs., tit. 2, § 11010(b).
- Disparate Impact Under Federal Law. 42 U.S.C. § 2000e-2(k)(1)(A).
- " 'The test [of the business necessity defense] is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential [discriminatory] impact.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 989–990 [236 Cal.Rptr. 716].)
- "[T]he standards established by the FEHC for evaluating a facially neutral selection criterion which has a discriminatory impact on a protected group are identical to federal standards under Title VII." (*City and County of San*

Francisco, supra, 191 Cal.App.3d at p. 986.)

- "If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " (*Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425 [95 S.Ct. 2362, 45 L.Ed.2d 280], internal citation omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch.5(I)-E, *Defamation*, ¶¶ 7:581, 7:590, 7:591, 7:915 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-L, *Invasion of Privacy*, ¶ 7:915 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.21[2] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[2][d] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2][c] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:26 (Thomson Reuters)

2505. Retaliation—Essential Factual Elements (Gov. Code, § 12940(h))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her/***nonbinary pronoun***] for [***describe activity protected by the FEHA***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***describe protected activity***];**
2. **[That [***name of defendant***] [discharged/demoted/[***specify other adverse employment action***]] [***name of plaintiff***];]**

   [or]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**
3. **That [***name of plaintiff***]'s [***describe protected activity***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/demote/[***specify other adverse employment action***]]**

   [*name of plaintiff***]/conduct];**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s decision to [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***] was a substantial factor in causing [him/her/***nonbinary pronoun***] harm.**

[[*Name of plaintiff***] does not have to prove [discrimination/harassment] in order to be protected from retaliation. If [he/she/***nonbinary pronoun***] [reasonably believed that [***name of defendant***]'s conduct was unlawful/requested a [disability/religious] accommodation], [he/she/***nonbinary pronoun***] may prevail on a retaliation claim even if [he/she/***nonbinary pronoun***] does not present, or prevail on, a separate claim for [discrimination/harassment/[***other***]].]**

New September 2003; Revised August 2007, April 2008, October 2008, April 2009, June 2010, June 2012, December 2012, June 2013, June 2014, June 2016, December 2016

Directions for Use

In elements 1 and 3, describe the protected activity in question. Government Code section 12940(h) provides that it is unlawful to retaliate against a person "because the person has opposed any practices forbidden under [Government Code sections

12900 through 12966] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA]." It is also unlawful to retaliate or otherwise discriminate against a person for requesting an accommodation for religious practice or disability, regardless of whether the request was granted. (Gov. Code, § 12940(*l*)(4) [religious practice], (m)(2) [disability].)

Read the first option for element 2 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if whether there was an adverse employment action is a question of fact for the jury. For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Give both the first and second options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423–424 [69 Cal.Rptr.3d 1].) Also select "conduct" in element 3 if the second option or both the first and second options are included for element 2.

Retaliation in violation of the FEHA may be established by constructive discharge; that is, that the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the employee's position would have had no reasonable alternative other than to resign. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].) If constructive discharge is alleged, give the third option for element 2 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Also select "conduct" in element 3 if the third option is included for element 2.

Element 3 requires that the protected activity be a substantial motivating reason for the retaliatory acts. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; *Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Note that there are two causation elements. There must be a causal link between the retaliatory animus and the adverse action (see element 3), and there must be a causal link between the adverse action and damages (see element 5). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

This instruction has been criticized in dictum because it is alleged that there is no element requiring retaliatory intent. (See *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1229–1231 [136 Cal.Rptr.3d 472].) The court urged the Judicial Council to redraft the instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA.

The jury in the case was instructed per element 3 "that Richard Joaquin's reporting that he had been sexually harassed was a motivating reason for the City of Los

Angeles' decision to terminate Richard Joaquin's employment or deny Richard Joaquin promotion to the rank of sergeant." The committee believes that the instruction as given is correct for the intent element in a retaliation case. (Cf. *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 127–132 [199 Cal.Rptr.3d 462] [for disability discrimination, "substantial motivating reason" is only language required to express intent].) However, in cases such as *Joaquin* that involve allegations of a prohibited motivating reason (based on a report of sexual harassment) and a permitted motivating reason (based on a good faith belief that the report was falsified), the instruction may need to be modified to make it clear that plaintiff must prove that defendant acted based on the *prohibited* motivating reason and not the *permitted* motivating reason.

Sources and Authority

- Retaliation Prohibited Under Fair Employment and Housing Act. Government Code section 12940(h).
- Retaliation for Requesting Reasonable Accommodation for Religious Practice and Disability Prohibited. Government Code section 12940(*l*)(4), (m)(2).
- "Person" Defined Under Fair Employment and Housing Act. Government Code section 12925(d).
- Prohibited Retaliation. Title 2 California Code of Regulations section 11021.
- "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz, supra*, 36 Cal.4th at p. 1042, internal citations omitted.)
- "Actions for retaliation are 'inherently fact-driven'; it is the jury, not the court, that is charged with determining the facts." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 299 [156 Cal.Rptr.3d 851].)
- "It is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision." (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492 [102 Cal.Rptr.3d 431].)
- "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as

well as the workplace context of the claim." (*Yanowitz, supra*, 36 Cal.4th at p. 1052.)

- "Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute." (*Yanowitz, supra*, 36 Cal.4th at pp. 1055–1056, internal citations omitted.)
- "[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination." (*Miller v. Department of Corr.* (2005) 36 Cal.4th 446, 473–474 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- "Clearly, section 12940, subdivision (h) encompasses a broad range of protected activity. An employee need not use specific legal terms or buzzwords in opposing discrimination. Nor is it necessary for an employee to file a formal charge. The protected activity element may be established by evidence that the plaintiff threatened to file a discrimination charge, by a showing that the plaintiff mistakenly, but reasonably and sincerely believed he was opposing discrimination, or by evidence an employer believed the plaintiff was a potential witness in another employee's FEHA action." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 652 [163 Cal.Rptr.3d 392], internal citations and footnote omitted.)
- " 'Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination.' '[C]omplaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct.' [¶] But employees need not explicitly and directly inform their employer that they believe the employer's conduct was discriminatory or otherwise forbidden by FEHA." (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1046 [207 Cal.Rptr.3d 120], internal citation omitted.)
- "The relevant question . . . is not whether a formal accusation of discrimination is made but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner." (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1193 [220 Cal.Rptr.3d 42].)
- "Notifying one's employer of one's medical status, even if such medical status

constitutes a 'disability' under FEHA, does not fall within the protected activity identified in subdivision (h) of section 12940—i.e., it does not constitute engaging in opposition to any practices forbidden under FEHA or the filing of a complaint, testifying, or assisting in any proceeding under FEHA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 247 [206 Cal.Rptr.3d 841].)

- "[Plaintiff]'s advocacy for the disabled community and opposition to elimination of programs that might benefit that community do not fall within the definition of protected activity. [Plaintiff] has not shown the [defendant]'s actions amounted to discrimination against disabled citizens, but even if they could be so construed, discrimination by an employer against members of the general public is not a prohibited *employment* practice under the FEHA." (*Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368, 383 [209 Cal.Rptr.3d 809], original italics.)
- "Moreover, [defendant]'s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm." (*Wysinger, supra*, 157 Cal.App.4th at p. 424, internal citations omitted.)
- "A long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not causally connected. But if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection." (*Wysinger, supra*, 157 Cal.App.4th at p. 421, internal citation omitted.)
- "Both direct and circumstantial evidence can be used to show an employer's intent to retaliate. 'Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive.' Circumstantial evidence typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers." (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153 [119 Cal.Rptr.2d 131], internal citations omitted.)
- "The retaliatory motive is 'proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' 'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision." ' " (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)
- "[A]n employer generally can be held liable for the retaliatory actions of its

supervisors." (*Wysinger, supra*, 157 Cal.App.4th at p. 420.)

- "Plaintiff, although a partner, is a person whom section 12940, subdivision (h) protects from retaliation for opposing the partnership-employer's harassment against those employees." (*Fitzsimons v. California Emergency Physicians Medical Group* (2012) 205 Cal.App.4th 1423, 1429 [141 Cal.Rptr.3d 265].)
- "[A]n employer may be found to have engaged in an adverse employment action, and thus liable for retaliation under section 12940(h), 'by permitting . . . fellow employees to punish [him] for invoking [his] rights.' We therefore hold that an employer may be held liable for coworker retaliatory conduct if the employer knew or should have known of coworker retaliatory conduct and either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 213 [126 Cal.Rptr.3d 651], internal citation omitted.)
- "[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation." (*Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232].)
- " 'The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints . . . .' Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone 'an absurd result' that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer." (*Steele, supra*, 162 Cal.App.4th at p. 1255, internal citations omitted.)
- " 'The plaintiff's burden is to prove, by competent evidence, that the employer's proffered justification is mere pretext; i.e., that the presumptively valid reason for the employer's action was in fact a coverup. . . . In responding to the employer's showing of a legitimate reason for the complained-of action, the plaintiff cannot " 'simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee ' "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," . . . and hence infer "that the employer did not act for the [asserted] non-discriminatory reasons." ' " ' " (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1409 [194 Cal.Rptr.3d 689].)
- "The showing of pretext, while it may indicate retaliatory intent or animus, is not the sole means of rebutting the employer's evidence of nonretaliatory intent. ' "While 'pretext' is certainly a relevant issue in a case of this kind, making it a central or necessary issue is not sound. The central issue is and should remain whether the evidence as a whole supports a reasoned inference that the

challenged action was the product of discriminatory or retaliatory animus. The employer's mere articulation of a legitimate reason for the action cannot answer this question; it can only dispel the *presumption* of improper motive that would otherwise *entitle* the employee to a judgment in his favor." ' " (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 94 [221 Cal.Rptr.3d 668], original italics.)

- "Government Code section 12940, subdivision (h), does not shield an employee against termination or lesser discipline for either lying or withholding information during an employer's internal investigation of a discrimination claim. In other words, public policy does not protect deceptive activity during an internal investigation. Such conduct is a legitimate reason to terminate an at-will employee." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1528 [152 Cal.Rptr.3d 154], footnotes omitted.)
- "Although appellant does not argue she was constructively discharged, such a claim is not necessary to find unlawful retaliation." (*McCoy, supra*, 216 Cal.App.4th at p. 301.)
- "The phrase 'because of' [in Gov. Code, § 12940(a)] is ambiguous as to the type or level of intent (i.e., motivation) and the connection between that motivation and the decision to treat the disabled person differently. This ambiguity is closely related to [defendant]'s argument that it is liable only if motivated by discriminatory animus. [¶] The statutory ambiguity in the phrase 'because of" was resolved by our Supreme Court about six months after the first jury trial [in *Harris, supra*, 56 Cal.4th at p. 203]." (*Wallace, supra*, 245 Cal.App.4th at p. 127.)
- " '[W]hile discrimination may be carried out by means of speech, such as a written notice of termination, and an illicit animus may be evidenced by speech, neither circumstance transforms a discrimination suit to one arising from speech. What gives rise to liability is not that the defendant spoke, but that the defendant denied the plaintiff a benefit, or subjected the plaintiff to a burden, on account of a discriminatory or retaliatory consideration.' " (*Laker v. Board of Trustees of California State University* (2019) 32 Cal.App.5th 745, 772 [244 Cal.Rptr.3d 238].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1028, 1052–1054

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:121–7:205 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.83–2.88

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.131 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment*

Discrimination, §§ 115.37, 115.94 (Matthew Bender)
California Civil Practice: Employment Litigation, §§ 2:74–2:75 (Thomson Reuters)

2506. Limitation on Remedies—After-Acquired Evidence

[*Name of defendant***] claims that after [he/she/***nonbinary pronoun***/it] [discharged/refused to hire] [***name of plaintiff***], [he/she/***nonbinary pronoun***/it] discovered that [***name of plaintiff***] [***describe misconduct, e.g., had provided a false Social Security number***]. [***Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] would have [discharged/refused to hire] [***name of plaintiff***] anyway if [he/she/***nonbinary pronoun***/it] had known that [***name of plaintiff***] [***describe misconduct***]. You must decide whether [***name of defendant***] has proved all of the following:**

1. **That [***name of plaintiff***] [***describe misconduct***];**
2. **That [***name of plaintiff***]'s misconduct was sufficiently severe that [***name of defendant***] would have [discharged/refused to hire] [him/her/***nonbinary pronoun***] because of that misconduct alone had [***name of defendant***] known of it; and**
3. **That [***name of defendant***] would have [discharged/refused to hire] [***name of plaintiff***] for [his/her/***nonbinary pronoun***] misconduct as a matter of settled company policy.**

[If you find that [*name of defendant***] has proved that [***name of plaintiff***] [***describe misconduct***] and that had [***name of defendant***] known of the misconduct earlier, [he/she/***nonbinary pronoun***/it] would have [discharged/refused to hire] [***name of plaintiff***] as required by the elements above, then [***name of plaintiff***] may recover damages only for any time before the date on which [***name of defendant***] discovered the misconduct. [[***Name of defendant***] must prove the date of discovery if it is contested.]]**

New September 2003; Revised June 2016, December 2016, May 2019

Directions for Use

The doctrine of after-acquired evidence refers to an employer's discovery, after an allegedly wrongful termination of employment or refusal to hire, of information that would have justified a lawful termination or refusal to hire. (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 428 [173 Cal.Rptr.3d 689, 327 P.3d 797].)

There is some uncertainty as to whether or not it is an equitable doctrine. (Compare *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1173 [104 Cal.Rptr.2d 95] [doctrine is the basis for an *equitable defense* related to the traditional defense of "unclean hands," italics added] with *Salas, supra,* 59 Cal.4th at p. 428 [omitting "equitable"].) If it is an equitable doctrine, then the fact-finding in the elements of the instruction would be only advisory to the court, or the elements could be found by the court itself as the trier of fact. (See *Thompson, supra,* 86 Cal.App.4th at p. 1173; see also *Hoopes v. Dolan* (2008) 168 Cal.App.4th

146, 156 [85 Cal.Rptr.3d 337] [jury's factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder].)

After-acquired evidence is not a complete defense to liability, but may foreclose otherwise available remedies. (*Salas, supra,* 59 Cal.4th at pp. 430–431.) Give the optional last paragraph if the court decides to allow the jury to award damages or to make a finding on damages. Add the last sentence of the paragraph if the date on which the defendant discovered the after-acquired evidence is contested.

After-acquired evidence cases must be distinguished from mixed motive cases in which the employer at the time of the employment action has two or more motives, at least one of which is unlawful. (See *Salas supra,* 59 Cal.4th at p. 430; CACI No. 2512, *Limitation on Remedies—Same Decision*.)

Sources and Authority

- "In general, the after-acquired-evidence doctrine shields an employer from liability or limits available relief where, after a termination, the employer learns for the first time about employee wrongdoing that would have led to the discharge in any event. Employee wrongdoing in after-acquired-evidence cases generally falls into one of two categories: (1) misrepresentations on a resume or job application; or (2) posthire, on-the-job misconduct." (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 632 [41 Cal.Rptr.2d 329].)
- "The after-acquired-evidence doctrine serves as a complete or partial defense to an employee's claim of wrongful discharge . . . To invoke this doctrine, '. . . the employer must establish "that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it" . . . [T]he employer . . . must show that such a firing would have taken place as a matter of "settled" company policy.' " (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 842, 845–846 [77 Cal.Rptr.2d 12], internal citations omitted.)
- "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." (*McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 362–363 [115 S.Ct. 879, 130 L.Ed.2d 852].)
- "Courts must tread carefully in applying the after-acquired-evidence doctrine to discrimination claims . . . . Where, as here, the discriminatory conduct was pervasive during the term of employment, therefore, it would not be sound public policy to bar recovery for injuries suffered while employed. In applying the after-acquired-evidence doctrine, the equities between employer and employee can be balanced by barring all portions of the employment discrimination claim tied to the employee's discharge." (*Murillo*, *supra*, 65 Cal.App.4th at pp. 849–850.)
- "As the Supreme Court recognized in *McKennon*, the use of after-acquired

evidence must 'take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing.' We appreciate that the facts in *McKennon* . . . presented a situation where balancing the equities should permit a finding of employer liability—to reinforce the importance of antidiscrimination laws—while limiting an employee's damages—to take account of an employer's business prerogatives. However, the equities compel a different result where an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications. In such a situation, the employee should have no recourse for an alleged wrongful termination of employment." (*Camp*, *supra*, 35 Cal.App.4th at pp. 637–638, internal citation omitted.)

- "We decline to adopt a blanket rule that material falsification of an employment application is a complete defense to a claim that the employer, while still unaware of the falsification, terminated the employment in violation of the employee's legal rights." (*Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614, 617 [29 Cal.Rptr.2d 642].)
- "The doctrine [of after-acquired evidence] is the basis for an equitable defense related to the traditional defense of 'unclean hands' . . . [¶] In the present case, there were conflicts in the evidence concerning respondent's actions, her motivations, and the possible consequences of her actions within appellant's disciplinary system. The trial court submitted those factual questions to the jury for resolution and then used the resulting special verdict as the basis for concluding appellant was not entitled to equitable reduction of the damages award." (*Thompson, supra,* 86 Cal.App.4th at p. 1173.)
- "By definition, after-acquired evidence is not known to the employer at the time of the allegedly unlawful termination or refusal to hire. In after-acquired evidence cases, the employer's alleged wrongful act in violation of the FEHA's strong public policy precedes the employer's discovery of information that would have justified the employer's decision. To allow such after-acquired evidence to be a complete defense would eviscerate the public policies embodied in the FEHA by allowing an employer to engage in invidious employment discrimination with total impunity." (*Salas, supra*, 59 Cal.4th at p. 430.)
- "In after-acquired evidence cases, therefore, both the employee's rights and the employer's prerogatives deserve recognition. The relative equities will vary from case to case, depending on the nature and consequences of any wrongdoing on either side, a circumstance that counsels against rigidity in fashioning appropriate remedies in those actions where an employer relies on after-acquired evidence to defeat an employee's FEHA claims." (*Salas, supra*, 59 Cal.4th at p. 430.)
- "Generally, the employee's remedies should not afford compensation for loss of employment during the period after the employer's discovery of the evidence relating to the employee's wrongdoing. When the employer shows that information acquired after the employee's claim has been made would have led to a lawful discharge or other employment action, remedies such as

reinstatement, promotion, and pay for periods after the employer learned of such information would be 'inequitable and pointless,' as they grant remedial relief for a period during which the plaintiff employee was no longer in the defendant's employment and had no right to such employment." (*Salas, supra*, 59 Cal.4th at pp. 430–431.)

- The remedial relief generally should compensate the employee for loss of employment from the date of wrongful discharge or refusal to hire to the date on which the employer acquired information of the employee's wrongdoing or ineligibility for employment. Fashioning remedies based on the relative equities of the parties prevents the employer from violating California's FEHA with impunity while also preventing an employee or job applicant from obtaining lost wages compensation for a period during which the employee or applicant would not in any event have been employed by the employer. In an appropriate case, it would also prevent an employee from recovering any lost wages when the employee's wrongdoing is particularly egregious." (*Salas, supra*, 59 Cal.4th at p. 431, footnote omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 223

Chin et al., California Practice Guide: Employment Litigation Ch. 7-A, *Title VII and the California Fair Employment and Housing Act*, ¶¶ 7:930–7:932 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation Ch. 16-H, *Other Defenses—After-Acquired Evidence of Employee Misconduct*, ¶¶ 16:615–16:616, 16:625, 16:635–16:637, 16:647 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.107

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.92 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.54[2] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:88 (Thomson Reuters)

2507. "Substantial Motivating Reason" Explained

A "substantial motivating reason" is a reason that actually contributed to the [*specify adverse employment action*]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [*adverse employment action*].

New December 2007; Revised June 2013

Directions for Use

Read this instruction with CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, CACI No. 2505, *Retaliation—Essential Factual Elements*, CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements*, CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements*, or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements*.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Causation Under Federal Law. Title 42 United States Code section 2000e-2(m).
- "Substantial Motivating Factor" Explained. Title 2 California Code of Regulations section 11009(c).
- "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)
- "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1319 [237 Cal.Rptr. 884].)
- "The employee need not show 'he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies. . . .' In other words, 'while a complainant need not prove that racial animus was the sole motivation behind the challenged action, he must prove by a preponderance of the evidence that there was a "causal connection" between the employee's protected status and the adverse employment decision.' " (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 665 [8 Cal.Rptr.2d 151], citing *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 282, fn. 10 [96 S.Ct. 2574, 49 L.Ed.2d 493, 502] and *Mixon, supra*, 192 Cal.App.3d at p. 1319.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49], original italics.)
- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris*, *supra*, 56 Cal.4th at p. 229.)
- "Although [plaintiff] contends that a jury in an employment discrimination case would not draw any meaningful distinction between 'a motivating reason' and 'a substantial motivating reason' in deciding whether there was unlawful discrimination, the Supreme Court reached a contrary conclusion in *Harris* [*supra*]. The court specifically concluded that '[r]equiring the plaintiff to show that discrimination was a substantial motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision.' " (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:485–7:508 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.61–2.65, 2.87

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.11[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:20–2:21, 2:75 (Thomson Reuters)

2508. Failure to File Timely Administrative Complaint—Plaintiff Alleges Continuing Violation (Gov. Code, § 12960(e))

[*Name of defendant*] contends that [*name of plaintiff*]'s lawsuit may not proceed because [*name of plaintiff*] did not timely file a complaint with the California Civil Rights Department (CRD). A complaint is timely if it was filed within three years of the date on which [*name of defendant*]'s alleged unlawful practice occurred.

[*Name of plaintiff*] filed a complaint with the CRD on [*date*]. [*Name of plaintiff*] may recover for acts of alleged [*specify the unlawful practice, e.g., harassment*] that occurred before [*insert date three years before the CRD complaint was filed*], only if [he/she/*nonbinary pronoun*] proves all of the following:

1. **That [*name of defendant*]'s [*e.g., harassment*] that occurred before [*insert date three years before the CRD complaint was filed*] was similar or related to the conduct that occurred on or after that date;**
2. **That the conduct was reasonably frequent; and**
3. **That the conduct had not yet become permanent before that date.**

"Permanent" in this context means that the conduct has stopped, [*name of plaintiff*] has resigned, or [*name of defendant*]'s statements and actions would make it clear to a reasonable employee that any further efforts to resolve the issue internally would be futile.

New June 2010; Revised December 2011, June 2015, May 2019, May 2020, May 2023

Directions for Use

Give this instruction if the plaintiff relies on the continuing violation doctrine in order to avoid the bar of the limitation period of three years within which to file an administrative complaint. (See Gov. Code, § 12960(e).) Although the continuing violation doctrine is labeled an equitable exception, it may involve triable issues of fact. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 723–724 [85 Cal.Rptr.3d 705].)

If the case involves multiple claims of FEHA violations, replace "lawsuit" in the opening sentence with reference to the particular claim or claims to which the continuing violation rule may apply.

In the second paragraph, insert the date on which the administrative complaint was filed and the dates on which both sides allege that the complaint requirement was triggered. The verdict form should ask the jury to specify the date that it finds that the requirement accrued. If there are multiple claims with different continuing

violation dates, repeat this paragraph for each claim.

The plaintiff has the burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with the CRD. (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1345 [172 Cal.Rptr.3d 686].) (Use "Department of Fair Employment and Housing" or "DFEH" as appropriate if the case was filed before the agency's name change.) This burden of proof extends to any excuse or justification for the failure to timely file, such as the continuing violation exception. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402 [194 Cal.Rptr.3d 689].)

Sources and Authority

- Administrative Complaint for FEHA Violation. Government Code section 12960.
- "At a jury trial, the facts are presented and the jury must decide whether there was a continuing course of unlawful conduct based on the law as stated in CACI No. 2508." (*Jumaane, supra*, 241 Cal.App.4th at p. 1401.)
- "Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be filed with the Department 'after the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,' with an exception for delayed discovery not relevant here." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 [105 Cal.Rptr.2d 652], original italics, internal citations omitted.)
- "[I]t is 'plaintiff's burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with [CRD, formerly known as DFEH] and obtaining a right-to-sue letter.' " (*Kim, supra,* 226 Cal.App.4th at p. 1345.)
- "[W]hen defendant has asserted the statute of limitation defense, plaintiff has the burden of proof to show his or her claims are timely under the continuing violation doctrine." (*Jumaane, supra*, 241 Cal.App.4th at p. 1402.)
- "Under the continuing violation doctrine, a plaintiff may recover for unlawful acts occurring outside the limitations period if they continued into that period. The continuing violation doctrine requires proof that (1) the defendant's actions inside and outside the limitations period are sufficiently similar in kind; (2) those actions occurred with sufficient frequency; and (3) those actions have not acquired a degree of permanence." (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 850–851 [234 Cal.Rptr.3d 712], internal citations omitted.)

- " '[P]ermanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. [¶] Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823–824 [111 Cal.Rptr.2d 87, 29 P.3d 175], internal citations omitted.)
- "[T]he *Richards* court interpreted section 12960 to mean that when a continuing pattern of wrongful conduct occurs partly in the statutory period and partly outside the statutory period, the limitations period begins to accrue once an employee is on notice of the violation of his or her rights and on notice that 'litigation, not informal conciliation, is the only alternative for the vindication of his or her rights.' " (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1412 [159 Cal.Rptr.3d 749].)
- "A continuing violation may be established by demonstrating 'a company wide policy or practice' or 'a series of related acts against a single individual.' 'The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements. "[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions." ' The plaintiff must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." . . . The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.' " (*Morgan, supra*, 88

Cal.App.4th at p. 64, internal citations omitted.)

- "[A] continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [the plaintiff] was being discriminated against at the time the earlier events occurred." (*Morgan, supra*, 88 Cal.App.4th at p. 65.)
- "The Supreme Court has extended the continuing violation doctrine to retaliation claims. And the doctrine also applies to racial harassment claims. Indeed, as we observed in *Morgan v. Regents of University of California, supra*, 88 Cal.App.4th 52, 65: 'Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework.' " (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 270 [100 Cal.Rptr.3d 296], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1068

3 Witkin, California Procedure (6th ed. 2021) Actions, § 238

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:561.1, 7:975 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 16-A, *Failure To Exhaust Administrative Remedies*, ¶ 16:85 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.51[1] (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.59 (Matthew Bender)

2509. "Adverse Employment Action" Explained

[*Name of plaintiff*] must prove that [he/she/*nonbinary pronoun*] was subjected to an adverse employment action.

Adverse employment actions are not limited to ultimate actions such as termination or demotion. There is an adverse employment action if [*name of defendant*] has taken an action or engaged in a course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of [*name of plaintiff*]'s employment. An adverse employment action includes conduct that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion. However, minor or trivial actions or conduct that is not reasonably likely to do more than anger or upset an employee cannot constitute an adverse employment action.

New June 2012

Directions for Use

Give this instruction with CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, CACI No. 2505, *Retaliation*, CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements*, CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements,* or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements,* if there is an issue as to whether the employee was the victim of an adverse employment action.

For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute discrimination or retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Or the case may involve acts that, considered alone, would not appear to be adverse, but could be adverse under the particular circumstances of the case. (See *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1389–1390 [37 Cal.Rptr.3d 113] [lateral transfer can be adverse employment action even if wages, benefits, and duties remain the same].)

Sources and Authority

- "Appropriately viewed, [section 12940(a)] protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting

the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Yanowitz, supra,* 36 Cal.4th at pp. 1053–1054, footnotes omitted.)

- "[T]he determination of what type of adverse treatment properly should be considered discrimination in the terms, conditions, or privileges of employment is not, by its nature, susceptible to a mathematically precise test, and the significance of particular types of adverse actions must be evaluated by taking into account the legitimate interests of both the employer and the employee. Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of sections 12940(a) and 12940(h)." (*Yanowitz, supra*, 36 Cal.4th at pp. 1054–1055.)
- "An ' "adverse employment action," ' . . . , requires a 'substantial adverse change in the terms and conditions of the plaintiff's employment'. " (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1063 [119 Cal.Rptr.3d 878, internal citations omitted.)
- "Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute." (*Yanowitz, supra*, 36 Cal.4th at pp. 1055–1056, internal citations omitted.)
- "Moreover, [defendant]'s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm." (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424 [69 Cal.Rptr.3d 1], internal citations omitted.)
- "The employment action must be both detrimental and substantial . . . [¶]. We must analyze [plaintiff's] complaints of adverse employment actions to determine if they result in a material change in the terms of her employment, impair her employment in some cognizable manner, or show some other employment injury . . . . [W]e do not find that [plaintiff's] complaint alleges the necessary material changes in the terms of her employment to cause employment injury. Most of

the actions upon which she relies were one time events . . . . The other allegations . . . are not accompanied by facts which evidence both a substantial and detrimental effect on her employment." (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511–512 [91 Cal.Rptr.2d 770], internal citations omitted.)

- "The 'materiality' test of adverse employment action . . . looks to 'the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career,' and the test 'must be interpreted liberally . . . with a reasonable appreciation of the realities of the workplace . . . .' " (*Patten, supra*, 134 Cal.App.4th at p. 1389.)
- "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 366–367 [225 Cal.Rptr.3d 321].)
- "[A] mere oral or written criticism of an employee . . . does not meet the definition of an adverse employment action under [the] FEHA." (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 92 [221 Cal.Rptr.3d 668].)
- "Mere ostracism in the workplace is insufficient to establish an adverse employment decision. However, ' "[W]orkplace harassment, if sufficiently severe or pervasive, may in and of itself constitute an adverse employment action sufficient to satisfy the second prong of the prima facie case for . . . retaliation cases." [Citation].' " (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 212 [126 Cal.Rptr.3d 651], internal citations omitted.)
- "Not every change in the conditions of employment, however, constitutes an adverse employment action. ' "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." . . .' '[W]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.' " (*Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357 [58 Cal.Rptr.3d 444].)
- "[R]efusing to allow a former employee to rescind a voluntary discharge—that is, a resignation free of employer coercion or misconduct—is not an adverse employment action." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1161 [217 Cal.Rptr.3d 258].)
- "[T]he reduction of [plaintiff]'s hours alone could constitute a material and adverse employment action by the [defendant]." (*Light*, *supra*, 14 Cal.App.5th at p. 93.)

- "[A] job reassignment may be an adverse employment action when it entails materially adverse consequences." (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1279 [227 Cal.Rptr.3d 695].)
- "[T]he denial of previously promised training and the failure to promote may constitute adverse employment actions." (*Light*, *supra*, 14 Cal.App.5th at p. 93.)
- "The trial court correctly found that the act of placing plaintiff on administrative leave [involuntarily] was an adverse employment action." (*Whitehall*, *supra*, 17 Cal.App.5th at p. 367.)
- "[Plaintiff] has presented no authority, and we are aware of none, holding that a single threat of an adverse employment action, never carried out, could itself constitute an adverse employment action under the standard articulated in *Yanowitz* and its progeny." (*Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 879 [235 Cal.Rptr.3d 161].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1052–1055

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:203, 7:731, 7:785 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.12 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

2510. "Constructive Discharge" Explained

[*Name of plaintiff***] must prove that [he/she/***nonbinary pronoun***] was constructively discharged. To establish constructive discharge, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] [through [***name of defendant***]'s officers, directors, managing agents, or supervisory employees] intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign; and**
2. **That [***name of plaintiff***] resigned because of these working conditions.**

In order to be sufficiently intolerable, adverse working conditions must be unusually aggravated or amount to a continuous pattern. In general, single, trivial, or isolated acts of misconduct are insufficient to support a constructive discharge claim. But in some circumstances, a single intolerable incident may constitute a constructive discharge.

New June 2012; Revised May 2019, May 2020

Directions for Use

Give this instruction with CACI No. 2401, *Breach of Employment Contract—Unspecified Term—Actual or Constructive Discharge—Essential Factual Elements*, CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, CACI No. 2505, *Retaliation*, CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements*, CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements*, or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements*, if the employee alleges that because of the employer's actions, the employee had no reasonable alternative other than to leave the employment. Constructive discharge can constitute the adverse employment action required to establish a FEHA violation for discrimination or retaliation. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].)

Sources and Authority

- "[C]onstructive discharge occurs only when an employer terminates employment by forcing the employee to resign. A constructive discharge is equivalent to a dismissal, although it is accomplished indirectly. Constructive discharge occurs only when the employer coerces the employee's resignation, either by creating working conditions that are intolerable under an objective standard, or by failing to remedy objectively intolerable working conditions that actually are known to

the employer. We have said 'a constructive discharge is legally regarded as a firing rather than a resignation.' " (*Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731, 737 [63 Cal.Rptr.2d 636, 936 P.2d 1246], internal citations omitted.)

- "Actual discharge carries significant legal consequences for employers, including possible liability for wrongful discharge. In an attempt to avoid liability, an employer may refrain from actually firing an employee, preferring instead to engage in conduct causing him or her to quit. The doctrine of constructive discharge addresses such employer-attempted 'end runs' around wrongful discharge and other claims requiring employer-initiated terminations of employment." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244 [32 Cal.Rptr.2d 223, 876 P.2d 1022].)
- "Standing alone, constructive discharge is neither a tort nor a breach of contract, but a doctrine that transforms what is ostensibly a resignation into a firing." (*Turner, supra*, 7 Cal.4th at p. 1251.)
- "In order to amount to constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner, supra*, 7 Cal.4th at p. 1247, internal citation and footnotes omitted.)
- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra*, 7 Cal.4th at p. 1247, fn. 3.)
- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)
- "[T]he standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra*, 7 Cal.4th at p. 1248, internal citations omitted.)
- "[U]nder *Turner*, the proper focus is on the working conditions themselves, not on the plaintiff's *subjective* reaction to those conditions." (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1272 [227 Cal.Rptr.3d 695], original italics.)
- "The length of time the plaintiff remained on the job may be *one* relevant factor in determining the intolerability of employment conditions from the standpoint

of a reasonable person." (*Turner*, *supra*, 7 Cal.4th at p. 1254, original italics.)

- "[T]here was, as the trial court found, substantial evidence that plaintiff's age and disability were 'substantial motivating reason[s]' for the adverse employment action or actions to which plaintiff was subjected. But the discriminatory motive for plaintiff's working conditions has no bearing on whether the evidence was sufficient to establish constructive discharge." (*Simers*, *supra*, 18 Cal.App.5th at p. 1271.)
- "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner, supra*, 7 Cal.4th at p. 1251.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 238

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-G, *Constructive Discharge*, ¶ 4:405 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.34 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.31 et seq. (Matthew Bender)

2511. Adverse Action Made by Decision Maker Without Animus (Cat's Paw)

In this case, the decision to [discharge/[*other adverse employment action***]] [***name of plaintiff***] was made by [***name of decision maker***]. Even if [***name of decision maker***] did not hold any [discriminatory/retaliatory] intent [or was unaware of [***name of plaintiff***]'s conduct on which the claim of retaliation is based], [***name of defendant***] may still be liable for [discrimination/retaliation] if [***name of decision maker***] followed a recommendation from or relied on facts provided by another person who had [discriminatory/retaliatory] intent.**

To succeed, [*name of plaintiff***] must prove both of the following:**

1. **That [***name of plaintiff***]'s [***specify protected activity or attribute***] was a substantial motivating reason for [***name of other person***]'s [***specify acts on which decision maker relied***]; and**
2. **That [***name of other person***]'s [***specify acts on which decision maker relied***] was a substantial motivating reason for [***name of decision maker***]'s decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***].**

New December 2012; Revised June 2013, May 2020, November 2020

Directions for Use

Give this instruction if the "cat's paw" rule is a factor in the case. Under the cat's paw rule, the person who actually took the adverse employment action against the employee was not acting out of any improper animus. The decision maker, however, acted on information provided by another person who was acting out of discriminatory or retaliatory animus with the objective of causing the adverse employment action. The decision maker is referred to as the "cat's paw" of the person with the animus. (See *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 100 [16 Cal.Rptr.3d 717]; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1536 [152 Cal.Rptr.3d 154] [accepting the legal premise that an employer may be held liable on the basis of a non-supervisor's discriminatory motivation].) The cases have not yet defined the scope of the cat's paw rule when the decision maker relies on the acts of a nonsupervisory coworker or other person involved in the employment decision.

The purpose of this instruction is to make it clear to the jury that they are not to evaluate the motives or knowledge of the decision maker, but rather to decide whether the acts of another person with animus actually caused the adverse action. Give the optional language in the second sentence of the first paragraph in a retaliation case in which the decision maker was not aware of the plaintiff's conduct

that allegedly led to the retaliation (defense of ignorance). (See *Reeves, supra,* 121 Cal.App.4th at pp. 106–108.)

Element 1 requires that the protected activity or attribute be a substantial motivating reason for the retaliatory acts. Element 2 requires that the other person's improper motive be a substantial motivating reason for the decision maker's action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

In both elements 1 and 2, all of the other person's specific acts need not be listed in all cases. Depending on the facts, doing so may be too cumbersome and impractical. If the specific acts are listed, the list should include all acts on which plaintiff claims the decision maker relied, not just the acts admitted to have been relied on by the decision maker.

Sources and Authority

- "This case presents the question whether an employer may be liable for retaliatory discharge when the supervisor who initiates disciplinary proceedings acts with retaliatory animus, but the cause for discipline is separately investigated and the ultimate decision to discharge the plaintiff is made by a manager with no knowledge that the worker has engaged in protected activities. We hold that so long as the supervisor's retaliatory motive was an actuating . . . cause of the dismissal, the employer may be liable for retaliatory discharge. Here the evidence raised triable issues as to the existence and effect of retaliatory motive on the part of the supervisor, and as to whether the manager and the intermediate investigator acted as tools or 'cat's paws' for the supervisor, that is, instrumentalities by which his retaliatory animus was carried into effect to plaintiff's injury." (*Reeves, supra*, 121 Cal.App.4th at p. 100.)
- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause." (*Harris*, *supra*, 56 Cal.4th at p. 229.)
- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris*, *supra*, 56 Cal.4th at p. 232, original italics.)
- "This concept—which for convenience we will call the 'defense of ignorance'—poses few analytical challenges so long as the 'employer' is conceived as a single entity receiving and responding to stimuli as a unitary,

indivisible organism. But this is often an inaccurate picture in a world where a majority of workers are employed by large economic enterprises with layered and compartmentalized management structures. In such enterprises, decisions significantly affecting personnel are rarely if ever the responsibility of a single actor. As a result, unexamined assertions about the knowledge, ignorance, or motives of 'the employer' may be fraught with ambiguities, untested assumptions, and begged questions." (*Reeves, supra*, 121 Cal.App.4th at p. 108.)

- "[S]howing that a significant participant in an employment decision exhibited discriminatory animus is enough to raise an inference that the employment decision itself was discriminatory, even absent evidence that others in the process harbored such animus." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 551 [87 Cal.Rptr.3d 99]).
- "[W]e accept Employee's implicit legal premise that Employer could be liable for [the outside investigator's] discriminatory motivation if the male executives who actually terminated Employee were merely the cat's paws of a biased female investigator." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1536 [152 Cal.Rptr.3d 154].)
- "Certainly a defendant does not conclusively negate the element of causation by showing only that some responsible actors, but not all, were ignorant of the occasion for retaliation." (*Reeves, supra*, 121 Cal.App.4th at p. 108.)
- "Here a rational fact finder could conclude that an incident of minor and excusable disregard for a supervisor's stated preferences was amplified into a 'solid case' of 'workplace violence,' and that this metamorphosis was brought about in necessary part by a supervisor's desire to rid himself of a worker who created trouble by complaining of matters the supervisor preferred to ignore. Since those complaints were protected activities under FEHA, a finder of fact must be permitted to decide whether these inferences should in fact be drawn." (*Reeves, supra*, 121 Cal.App.4th at p. 121.)
- "Our emphasis on the conduct of *supervisors* is not inadvertent. An employer can generally be held liable for the discriminatory or retaliatory actions of supervisors. The outcome is less clear where the only actor possessing the requisite animus is a nonsupervisory coworker." (*Reeves, supra*, 121 Cal.App.4th at p. 109 fn. 9, original italics, internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1025, 1026, 1052, 1053

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶ 7:806.5 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.131 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][a] (Matthew Bender)

2512. Limitation on Remedies—Same Decision

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was [discharged/[***other adverse employment action***]] because of [his/her/***nonbinary pronoun***] [***protected status or action, e.g., race, gender, or age***], which is an unlawful [discriminatory/retaliatory] reason. [***Name of defendant***] claims that [***name of plaintiff***] [was discharged/[***other adverse employment action***]] because of [***specify reason, e.g., plaintiff's poor job performance***], which is a lawful reason.**

If you find that [discrimination/retaliation] was a substantial motivating reason for [*name of plaintiff***]'s [discharge/[***other adverse employment action***]], you must then consider [***name of defendant***]'s stated reason for the [discharge/[***other adverse employment action***]].**

If you find that [*e.g., plaintiff's poor job performance***] was also a substantial motivating reason, then you must determine whether the defendant has proven that [he/she/***nonbinary pronoun***/it] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway at that time based on [***e.g., plaintiff's poor job performance***] even if [he/she/***nonbinary pronoun***/it] had not also been substantially motivated by [discrimination/retaliation].**

In determining whether [*e.g., plaintiff's poor job performance***] was a substantial motivating reason, determine what actually motivated [***name of defendant***], not what [he/she/***nonbinary pronoun***/it] might have been justified in doing.**

If you find that [*name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***] for a [discriminatory/retaliatory] reason, you will be asked to determine the amount of damages that [he/she/***nonbinary pronoun***] is entitled to recover. If, however, you find that [***name of defendant***] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway at that time for [***specify defendant's nondiscriminatory/nonretaliatory reason***], then [***name of plaintiff***] will not be entitled to reinstatement, back pay, or damages.**

New December 2013; Revised June 2015, June 2016

Directions for Use

Give this instruction along with CACI No. 2507, *"Substantial Motivating Reason" Explained*, if the employee has presented sufficient evidence for the jury to find that the employer took adverse action against him or her for a prohibited reason, but the employer has presented sufficient evidence for the jury to find that it had a legitimate reason for the action. In such a "mixed-motive" case, the employer is relieved from an award of damages, but may still be liable for attorney fees and

costs and injunctive relief. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 211 [152 Cal.Rptr.3d 392, 294 P.3d 49].)

Mixed-motive must be distinguished from pretext though both require evaluation of the same evidence, i.e., the employer's purported legitimate reason for the adverse action. In a pretext case, the only actual motive is the discriminatory one and the purported legitimate reasons are fabricated in order to disguise the true motive. (See *City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716].) The employee has the burden of proving pretext. (*Harris, supra,* 56 Cal.4th at pp. 214–215.) If the employee proves discrimination or retaliation and also pretext, the employer is liable for all potential remedies including damages. But if the employee proves discrimination or retaliation but fails to prove pretext, then a mixed-motive case is presented. To avoid an award of damages, the employer then has the burden of proving that it would have made the same decision anyway solely for the legitimate reason, even though it may have also discriminated or retaliated.

Sources and Authority

- "[U]nder the FEHA, when a jury finds that unlawful discrimination was a substantial factor motivating a termination of employment, and when the employer proves it would have made the same decision absent such discrimination, a court may not award damages, backpay, or an order of reinstatement. But the employer does not escape liability. In light of the FEHA's express purpose of not only redressing but also preventing and deterring unlawful discrimination in the workplace, the plaintiff in this circumstance could still be awarded, where appropriate, declaratory relief or injunctive relief to stop discriminatory practices. In addition, the plaintiff may be eligible for reasonable attorney's fees and costs." (*Harris, supra,* 56 Cal.4th at p. 211.)
- "Because employment discrimination litigation does not resemble the kind of cases in which we have applied the clear and convincing standard, we hold that preponderance of the evidence is the standard of proof applicable to an employer's same-decision showing" (*Harris, supra,* 53 Cal.4th at p. 239.)
- "[W]hen we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision*." (*Harris, supra,* 56 Cal.4th at p. 224, original italics.)
- "In light of today's decision, a jury in a mixed-motive case alleging unlawful termination should be instructed that it must find the employer's action was substantially motivated by discrimination before the burden shifts to the employer to make a same-decision showing, and that a same-decision showing precludes an award of reinstatement, backpay, or damages." (*Harris, supra,* 56 Cal.4th at p. 241.)
- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and

even by itself determinative of an employment decision without also being a 'but for' cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

- "[A] plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff." (*Harris, supra,* 56 Cal.4th at pp. 214–215.)
- "In some cases there is no single reason for an employer's adverse action, and a discriminatory motive may have influenced otherwise legitimate reasons for the employment decision. In *Harris v. City of Santa Monica* (*Harris*) the California Supreme Court recognized the traditional *McDonnell Douglas* burden-shifting test was intended for use in cases presenting a single motive for the adverse action, that is, in 'cases that do not involve mixed motives.' As the Court explained, this 'framework . . . presupposes that the employer has a single reason for taking an adverse action against the employee and that the reason is either discriminatory or legitimate. By hinging liability on whether the employer's proffered reason for taking the action is genuine or pretextual, the *McDonnell Douglas* inquiry aims to ferret out the "true" reason for the employer's action. In a mixed-motives case, however, there is no single "true" reason for the employer's action.' " (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1182 [220 Cal.Rptr.3d 42], internal citations omitted.)
- "Following the California Supreme Court's decision in *Harris,* . . . the Judicial Council added CACI No. 2512, to be given when the employer presents evidence of a legitimate reason for the adverse employment action, informing the jurors that even if they find that discrimination was a substantial motivating reason for the adverse action, if the employer establishes that the adverse action nonetheless would have been taken for legitimate reasons, 'then [the plaintiff] will not be entitled to reinstatement, back pay, or damages.' " (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1320–1321 [200 Cal.Rptr.3d 315].)
- " '[Plaintiff] further argues that for equitable reasons, an employer that wishes to make a same-decision showing must concede that it had mixed motives for taking the adverse employment action instead of denying a discriminatory motive altogether. But there is no inconsistency when an employer argues that its motive for discharging an employee was legitimate, while also arguing, contingently, that if the trier of fact finds a mixture of lawful and unlawful motives, then its lawful motive alone would have led to the discharge.' " (*Thornbrough v. Western Placer Unified School Dist.* (2013) 223 Cal.App.4th

169, 199 [167 Cal.Rptr.3d 24] [quoting *Harris, supra*, 56 Cal.App.4th at p. 240].)

- "As a preliminary matter, we reject [defendant]'s claim that the jury could have found no liability on the part of [defendant] had it been properly instructed on the mixed-motive defense at trial. As discussed, the Supreme Court in *Harris* held that the mixed-motive defense is available under the FEHA, but only as a limitation on remedies and not as a complete defense to liability. Consequently, when the plaintiff proves by a preponderance of the evidence that discrimination was a substantial motivating factor in the adverse employment decision, the employer is liable under the FEHA. When the employer proves by a preponderance of the evidence that it would have made the same decision even in the absence of such discrimination, the employer is still liable under the FEHA, but the plaintiff's remedies are then limited to declaratory or injunctive relief, and where appropriate, attorney's fees and costs. As presently drafted, BAJI No. 12.26 does not accurately set forth the parameters of the defense as articulated by the Supreme Court, but rather states that, in a mixed-motive case, 'the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision.' By providing that the mixed-motive defense, if proven, is a complete defense to liability, [defendant]'s requested instruction directly conflicts with the holding in *Harris*. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 481 [161 Cal.Rptr.3d 758], internal citations omitted.)
- "Pretext may . . . be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 272 [100 Cal.Rptr.3d 296].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1037, 1067

7 Witkin, California Procedure (6th ed. 2021), Judgment § 101

3 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.11 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23 (Matthew Bender)

2513. Business Judgment for "At-Will" Employment

In California, employment is presumed to be "at will." This means that an employer may [discharge/[*other adverse action***]] an employee for no reason, or for a good, bad, mistaken, unwise, or even unfair reason, as long as its action is not for a [discriminatory/retaliatory] reason.**

New December 2013; Revised May 2024

Directions for Use

Give this instruction to advise the jury that the employer's adverse action is not illegal just because it is ill-advised. It has been held to be error not to give this instruction. (See *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 20–24 [151 Cal.Rptr.3d 41].)

Sources and Authority

- At-Will Employment. Labor Code section 2922.
- "[A] plaintiff in a discrimination case must show discrimination, not just that the employer's decision was wrong, mistaken, or unwise. . . . ' "The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason. . . . 'While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is . . . whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve.' " ' " (*Veronese, supra,* 212 Cal.App.4th at p. 21, internal citation omitted.)
- "[I]f nondiscriminatory, [defendant]'s true reasons need not necessarily have been wise or correct. While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, 'legitimate' reasons in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics, internal citations omitted.)
- "[U]nder the law [defendant] was entitled to exercise her business judgment, without second guessing. But [the court] refused to tell the jury that. That was error." (*Veronese, supra,* 212 Cal.App.4th at p. 24.)
- "An employment decision based on political concerns, even if otherwise unfair, is not actionable under section 12940 so long as the employee's race or other protected status is not a substantial factor in the decision." (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 355 [223 Cal.Rptr.3d 173].)

- "What constitutes satisfactory performance is of course a question ordinarily vested in the employer's sole discretion. An employer is free to set standards that might appear unreasonable to outside observers, and to discipline employees who fail to meet those standards, so long as the standards are applied evenhandedly. But that does not mean that an employer conclusively establishes the governing standard of competence in an employment discrimination action merely by asserting that the plaintiff's performance was less than satisfactory. Evidence of the employer's policies and practices, including its treatment of other employees, may support a contention, and an eventual finding, that the plaintiff's job performance did in fact satisfy the employer's own norms." (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 742–743 [167 Cal.Rptr.3d 485].)
- "The central issue is and should remain whether the evidence as a whole supports a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus. The employer's mere articulation of a legitimate reason for the action cannot answer this question; it can only dispel the presumption of improper motive that would otherwise entitle the employee to a judgment in his favor." (*Cheal, supra*, 223 Cal.App.4th at p. 755.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 244 et seq.

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1017–1021

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶ 4:25 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392, 7:530, 7:531, 7:535 (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline,* § 60.01 et seq. (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.11 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.23 (Matthew Bender)

2514–2519. Reserved for Future Use

2520. Quid pro quo Sexual Harassment—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her/***nonbinary pronoun***] to sexual harassment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/ applied to [***name of defendant***] for a job/was a person providing services pursuant to a contract with [***name of defendant***]];**
2. **That [***name of alleged harasser***] made unwanted sexual advances to [***name of plaintiff***] or engaged in other unwanted verbal or physical conduct of a sexual nature;**
3. **That terms of employment, job benefits, or favorable working conditions were made contingent, by words or conduct, on [***name of plaintiff***]'s acceptance of [***name of alleged harasser***]'s sexual advances or conduct;**
4. **That at the time of [his/her/***nonbinary pronoun***] conduct, [***name of alleged harasser***] was a supervisor or agent for [***name of defendant***];**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of alleged harasser***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2015

Directions for Use

Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), 12940(j)(1); *Reno v. Baird* (1998) 18 Cal.4th 640, 648 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning]).

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined: Harassment. Government Code section 12940(j)(4)(A).
- "Person Providing Services Under Contract: Harassment. Government Code section 12940(j)(5).
- Sexual Harassment. Cal. Code Regs., tit. 2, § 11034(f)(1).
- "Courts have generally recognized two distinct categories of sexual harassment

claims: quid pro quo and hostile work environment. Quid pro quo harassment occurs when submission to sexual conduct is made a condition of concrete employment benefits." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 607 [262 Cal.Rptr. 842], internal citation omitted.)

- "A cause of action for quid pro quo harassment involves the behavior most commonly regarded as sexual harassment, including, e.g., sexual propositions, unwarranted graphic discussion of sexual acts, and commentary on the employee's body and the sexual uses to which it could be put. To state a cause of action on this theory, it is sufficient to allege that a term of employment was expressly or impliedly conditioned upon acceptance of a supervisor's unwelcome sexual advances." (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414 [26 Cal.Rptr.2d 116], internal citations omitted.)
- "Cases based on threats which are carried out are referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. The terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility . . . [¶] We do not suggest the terms quid pro quo and hostile work environment are irrelevant to Title VII litigation. To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive." (*Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 751, 753–754 [118 S.Ct. 2257, 141 L.Ed.2d 633].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:150, 7:166, 7:168–7:169, 7:194 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment*, ¶¶ 10:18–10:19, 10:22, 10:31 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:50 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual Harassment, §§ 3.31–3.35

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.81[1][a], [6] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment*

Discrimination, § 115.36[5][b] (Matthew Bender)
California Civil Practice: Employment Litigation § 2:55 (Thomson Reuters)

2521A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was subjected to harassment based on [his/her/***nonbinary pronoun***] [***describe protected status, e.g., race, gender, or age***] at [***name of defendant***] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**
2. **That [***name of plaintiff***] was subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***];**
3. **That the harassing conduct was severe or pervasive;**
4. **That a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
5. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [*or***]**

   [That [*name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**
7. **That [***name of plaintiff***] was harmed; and**
8. **That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021, November 2023, May 2024**

Directions for Use

This instruction is for use in a hostile work environment case when the defendant is

an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) Further modification may be necessary if the defendant is a business-entity agent of an employer. (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] ["[A]s long as the harassment occurs in a work-related context, the employer is liable"].)

For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dept. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].) Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to

express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal. 5th at p. 291, internal citations omitted.)
- "To establish a prima facie case of a hostile work environment, [the plaintiff] must show that (1) [plaintiff] is a member of a protected class; (2) [plaintiff] was subjected to unwelcome harassment; (3) the harassment was based on [plaintiff's] protected status; (4) the harassment unreasonably interfered with [plaintiff's] work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment." (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 [250 Cal.Rptr.3d 1].)
- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S.

17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "[A]n employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dept. of Health Servs.*, *supra*, 31 Cal.4th at p. 1042.)
- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that *all* acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is *not* a supervisor. (*State Dept. of Health Services*, *supra*, 31 Cal.4th at p. 1041, original italics.)
- "When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action)." (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.3d 464].)
- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)
- "Under FEHA, an employer is strictly liable for harassment by a supervisor. However, an employer is only strictly liable under FEHA for harassment by a supervisor 'if the supervisor is acting in the capacity of supervisor when the harassment occurs.' 'The employer is *not* strictly liable for a supervisor's acts of harassment resulting from a completely private relationship unconnected with the employment and not occurring at the workplace or during normal working hours.' " (*Atalla v. Rite Aid Corp.* (2023) 89 Cal.App.5th 294, 309 [306 Cal.Rptr.3d 1], internal citations omitted, original italics.)
- "Here, [defendant] was jointly liable with its employees on a respondeat superior or vicarious liability theory on every cause of action in which it was named as a defendant." (*Bihun*, *supra*, 13 Cal.App.4th at p. 1000.)
- "The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18

Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)
- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)
- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)
- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)
- "The stray remarks doctrine . . . allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by 'nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.' [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, 'the task of disambiguating ambiguous utterances is for trial, not for summary

judgment.' Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted.)

- "[I]n reviewing the trial court's grant of [defendant]'s summary judgment motion, the Court of Appeal properly considered evidence of alleged discriminatory comments made by decision makers and coworkers along with all other evidence in the record." (*Reid, supra*, 50 Cal.4th at p. 545.)
- "[M]any employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 286 [100 Cal.Rptr.3d 296].)
- "In contending that the 'subjectively offensive' element was not proven, a defendant 'will assert that a plaintiff consented to the conduct through active participation in it, or was not injured because the plaintiff did not subjectively find it abusive.' [¶] [Evidence Code] Section 1106 limits the evidence the defendant may use to support this assertion. It provides that '[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff . . . .' This general rule is, however, subject to the exception that it 'does not apply to evidence of the plaintiff's sexual conduct with the alleged perpetrator.' The term 'sexual conduct' within the meaning of section 1106 has been broadly construed to include 'all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity,' including 'racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits.' " (*Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 874 [235 Cal.Rptr.3d 161], internal citations omitted.)
- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)
- "Under . . . FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1525 [169 Cal.Rptr.3d 794], original italics.)
- "[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. '[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.' Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment." (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)

- "The plaintiff must show that the harassing conduct took place because of the plaintiff's sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant's bias against women; she need not show that it was because of the defendant's sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)
- "[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239–1240 [166 Cal.Rptr.3d 676].)
- "A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: 'For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct need not be motivated by sexual desire*.' " (*Lewis*, *supra*, 224 Cal.App.4th at p. 1527, fn. 8, original italics.)
- "California courts have held so-called 'me too' evidence, that is, evidence of gender bias against employees other than the plaintiff, may be admissible evidence in discrimination and harassment cases." (*Meeks, supra,* 24 Cal.App.5th at p. 871.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 353, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment*, ¶¶ 10:18–10:19, 10:22, 10:31 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2521B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff***] claims that coworkers at [***name of defendant***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***] and that this harassment created a work environment for [***name of plaintiff***] that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**
2. **That [***name of plaintiff***], although not personally subjected to harassing conduct, personally witnessed harassing conduct that took place in [his/her/***nonbinary pronoun***] immediate work environment;**
3. **That the harassing conduct was severe or pervasive;**
4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
5. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [***e.g., women***];**
6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [*or***]**

   [That [*name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**
7. **That [***name of plaintiff***] was harmed; and**
8. **That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

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*Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019, November 2021, May 2024**

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) Further modification may be necessary if the defendant is a business-entity agent of an employer. (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] ["[A]s long as the harassment occurs in a work-related context, the employer is liable"].)

For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained.*

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- "The plaintiff's work environment is affected not only by conduct directed at

herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)
- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect . . . her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)
- "[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dep't. of Health Servs.*, *supra*, 31 Cal.4th at p. 1041, original italics.)
- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only

when the harasser is not a supervisor. (*State Dept. of Health Servs.*, *supra*, 31 Cal.4th at p. 1041, original italics.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)
- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)
- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 353, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2521C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was subjected to harassment based on sexual favoritism at [*name of defendant*] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences.

To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of defendant*];**
2. **That there was sexual favoritism in the work environment;**
3. **That the sexual favoritism was severe or pervasive;**
4. **That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the conduct to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**
5. **That [*name of plaintiff*] considered the conduct to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**
6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor [engaged in the conduct/created the sexual favoritism];]

   [*or***]**

   [That [*name of defendant*] [or [his/her/*nonbinary pronoun*/its] supervisors or agents] knew or should have known of the sexual favoritism and failed to take immediate and appropriate corrective action;]
7. **That [*name of plaintiff*] was harmed; and**
8. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

*Derived from former CACI No. 2521 December 2007; Revised December 2015, May 2018, July 2019, May 2020, November 2021, May 2024**

Directions for Use

This instruction is for use in a hostile work environment case involving sexual favoritism when the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) Further modification may be necessary if the defendant is a business-entity agent of an employer. (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the facts of the case support it, the instruction should be modified as appropriate for the applicant's circumstances.

For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained.*

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[] 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- "Following the guidance of the EEOC, and also employing standards adopted in

our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct . . . which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)
- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor', by implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dept. of Health Servs.*, *supra*, 31 Cal.4th at pp. 1040–1041, original italics.)
- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Servs.*, *supra*, 31 Cal.4th at p. 1041, original italics.)
- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007)

148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)
- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Correction*s (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 353, 370

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2522A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff***] claims that [***name of individual defendant***] subjected [him/her/***nonbinary pronoun***] to harassment based on [***describe protected status, e.g., race, gender, or age***] at [***name of covered entity***] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of covered entity***];**

[2. That [*name of individual defendant***] was an employee of [***name of covered entity***];]**

3. **That [***name of plaintiff***] was subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***];**

4. **That the harassing conduct was severe or pervasive;**

5. **That a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**

6. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**

7. **That [***name of individual defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

8. **That [***name of plaintiff***] was harmed; and**

9. **That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021, May 2022

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is also an employee of the covered entity. (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is a dispute about the defendant's status as an employee and include optional question 2 on the verdict form. See CACI No. VF-2507A, *Work Environment Harassment—Conduct*

Directed at Plaintiff—Individual Defendant.

The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See Gov. Code, § 12940(j)(1).) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] ["[A]s long as the harassment occurs in a work-related context, the employer is liable"].)

For an employer defendant, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

Modify element 3 if the plaintiff was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If there are both employer and individual supervisor defendants (see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dept. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).

- Employee Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "To establish a prima facie case of a hostile work environment, [the plaintiff] must show that (1) [plaintiff] is a member of a protected class; (2) [plaintiff] was subjected to unwelcome harassment; (3) the harassment was based on [plaintiff's] protected status; (4) the harassment unreasonably interfered with [plaintiff's] work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment." (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 [250 Cal.Rptr.3d 1].)
- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- "Under FEHA, an employee who harasses another employee may be held personally liable." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 [169 Cal.Rptr.3d 794].)
- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 [58 Cal.Rptr.2d 308].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56–2:56.50 (Thomson Reuters)

2522B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff***] claims that coworkers at [***name of covered entity***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***] and that this harassment created a work environment for [***name of plaintiff***] that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of covered entity***];**

[2. That [*name of individual defendant***] was an employee of [***name of covered entity***];]**

3. **That [***name of plaintiff***], although not personally subjected to harassing conduct, personally witnessed harassing conduct that took place in [his/her/***nonbinary pronoun***] immediate work environment;**

4. **That the harassing conduct was severe or pervasive;**

5. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**

6. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [***e.g., women***];**

7. **That [***name of individual defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

8. **That [***name of plaintiff***] was harmed; and**

9. **That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, November 2021, May 2022

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is also an employee of the

covered entity. (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is a dispute about the defendant's status as an employee and include optional question 2 on the verdict form. See CACI No. VF-2507B, *Work Environment Harassment—Conduct Directed at Others—Individual Defendant*.

The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See Gov. Code, § 12940(j)(1).) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] ["[A]s long as the harassment occurs in a work-related context, the employer is liable"].)

For an employer defendant, see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained.*

If there are both employer and individual supervisor defendants (see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Employee Personal Liability for Harassment. Government Code section 12940(j)(3).

- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)
- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by

a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect . . . her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)
- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2522C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was subjected to harassment based on sexual favoritism at [*name of covered entity*] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences.

To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of employer*];**

[2. That [*name of individual defendant*] was an employee of [*name of covered entity*];]

3. **That there was sexual favoritism in the work environment;**
4. **That the sexual favoritism was severe or pervasive;**
5. **That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**
6. **That [*name of plaintiff*] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**
7. **That [*name of individual defendant*] [participated in/assisted/ [or] encouraged] the sexual favoritism;**
8. **That [*name of plaintiff*] was harmed; and**
9. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018, July 2019, May 2020, November 2021, May 2022

Directions for Use

This instruction is for use in a hostile work environment case involving sexual

favoritism when the defendant is also an employee of the covered entity. (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is a dispute about the defendant's status as an employee and include optional question 2 on the verdict form. See CACI No. VF-2507C, *Work Environment Harassment—Sexual Favoritism—Individual Defendant*.

The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (Gov. Code, § 12940(j)(1).) If the facts of the case support it, the instruction should be modified as appropriate to the applicant's circumstances.

For an employer defendant, see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

If there are both employer and individual supervisor defendants (see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Employee Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).

- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct . . . which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)
- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50

Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36[5] (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2523. "Harassing Conduct" Explained

Harassing conduct may include, but is not limited to, [any of the following:]

[a. Verbal harassment, such as obscene language, demeaning comments, slurs, [or] threats [or] [*describe other form of verbal harassment*]**;] [or]**

[b. Physical harassment, such as unwanted touching, assault, or physical interference with normal work or movement;] [or]

[c. Visual harassment, such as offensive posters, objects, cartoons, or drawings;] [or]

[d. Unwanted sexual advances;] [or]

[e. [*Describe other form of harassment if appropriate, e.g., derogatory, unwanted, or offensive photographs, text messages, Internet postings*]**.]**

New September 2003; Revised December 2007, December 2015

Directions for Use

Read this instruction with CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant;* CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant;* CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant;* or CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. Read also CACI No. 2524, *"Severe or Pervasive" Explained*, if appropriate.

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Harassment" Defined. Cal. Code Regs., tit. 2, § 11019(b)(2).
- "Harassment is distinguishable from discrimination under the FEHA. '[D]iscrimination refers to bias in the exercise of official actions on behalf of the employer, and harassment refers to bias that is expressed or communicated through interpersonal relations in the workplace.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 869 [172 Cal.Rptr.3d 732].)
- "[H]arassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of

necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job." (*Reno v. Baird* (1998) 18 Cal.4th 640, 645–646 [76 Cal.Rptr.2d 499, 957 P.2d 1333], internal citations omitted.)

- "No supervisory employee needs to use slurs or derogatory drawings, to physically interfere with freedom of movement, to engage in unwanted sexual advances, etc., in order to carry out the legitimate objectives of personnel management. Every supervisory employee can insulate himself or herself from claims of harassment by refraining from such conduct." (*Serri*, *supra*, 226 Cal.App.4th at p. 869.)
- "We conclude, therefore, that the Legislature intended that commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management. This significant distinction underlies the differential treatment of harassment and discrimination in the FEHA." (*Reno, supra,* 18 Cal.4th at pp. 646–647, internal citation omitted.)
- "[W]e can discern no reason why an employee who is the victim of discrimination based on some official action of the employer cannot also be the victim of harassment by a supervisor for abusive messages that create a hostile working environment, and under the FEHA the employee would have two separate claims of injury." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707 [101 Cal.Rptr.3d 773, 219 P.3d 749].)
- "Here, [plaintiff]'s *discrimination* claim sought compensation for official employment actions that were motivated by improper bias. These discriminatory actions included not only the termination itself but also official employment actions that preceded the termination, such as the progressive disciplinary warnings and the decision to assign [plaintiff] to answer the office telephones during office parties. [Plaintiff]'s *harassment* claim, by contrast, sought compensation for hostile social interactions in the workplace that affected the workplace environment because of the offensive message they conveyed to [plaintiff]. These harassing actions included [supervisor]'s demeaning comments to [plaintiff] about her body odor and arm sores, [supervisor]'s refusal to respond to [plaintiff]'s greetings, [supervisor]'s demeaning facial expressions and gestures

toward [plaintiff], and [supervisor]'s disparate treatment of [plaintiff] in handing out small gifts. None of these events can fairly be characterized as an official employment action. None involved [supervisor]'s exercising the authority that [employer] had delegated to her so as to cause [employer], in its corporate capacity, to take some action with respect to [plaintiff]. Rather, these were events that were unrelated to [supervisor]'s managerial role, engaged in for her own purposes." (*Roby, supra*, 47 Cal.4th at pp. 708–709, original italics, footnote omitted.)

- "[S]ome official employment actions done in furtherance of a supervisor's managerial role can also have a secondary effect of communicating a hostile message. This occurs when the actions establish a widespread pattern of bias. Here, some actions that [supervisor] took with respect to [plaintiff] are best characterized as official employment actions rather than hostile social interactions in the workplace, but they may have contributed to the hostile message that [supervisor] was expressing to [plaintiff] in other, more explicit ways. These would include [supervisor]'s shunning of [plaintiff] during staff meetings, [supervisor]'s belittling of [plaintiff]'s job, and [supervisor]'s reprimands of [plaintiff] in front of [plaintiff]'s coworkers. Moreover, acts of discrimination can provide evidentiary support for a harassment claim by establishing discriminatory animus on the part of the manager responsible for the discrimination, thereby permitting the inference that rude comments or behavior by that same manager were similarly motivated by discriminatory animus." (*Roby, supra*, 47 Cal.4th at p. 709.)
- "[A]busive conduct that is not facially sex specific can be grounds for a hostile environment sexual harassment claim *if it is inflicted because of gender*, i.e., if men and women are treated differently and the conduct is motivated by gender bias." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 130 [129 Cal.Rptr.3d 384], original italics.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:125–10:155 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual and Other Harassment, §§ 3.13, 3.36

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.80[1][a][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2524. "Severe or Pervasive" Explained

"Severe or pervasive" means conduct that alters the conditions of employment and creates a work environment that is hostile, intimidating, offensive, oppressive, or abusive.

In determining whether the conduct was severe or pervasive, you should consider all the circumstances, including any or all of the following:

(a) The nature of the conduct;

(b) How often, and over what period of time, the conduct occurred;

(c) The circumstances under which the conduct occurred;

(d) Whether the conduct was physically threatening or humiliating.

[*Name of plaintiff***] does not have to prove that [his/her/***nonbinary pronoun***] productivity has declined. It is sufficient to prove that a reasonable person who was subjected to the harassing conduct would find that the conduct so altered working conditions as to make it more difficult to do the job.**

[A single incident can be sufficiently severe or pervasive to constitute harassment.]

New September 2003; Revised December 2007, July 2019

Directions for Use

Read this instruction with any of the Work Environment Harassment instructions (CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, and 2522C). Read also CACI No. 2523, *"Harassing Conduct" Explained*. Give the last optional sentence if a single incident forms the basis of the claim. (See Gov. Code, § 12923(b) [single incident of harassing conduct can be sufficient to create a triable issue regarding the existence of a hostile work environment].)

In determining what constitutes "sufficiently pervasive" harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial. (See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610 [262 Cal.Rptr. 842].) Whether this limitation remains in light of Government Code section 12923 is not clear.

Sources and Authority

- "We have agreed with the United States Supreme Court that, to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. The

working environment must be evaluated in light of the totality of the circumstances: '[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' . . . [¶] 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)
- "Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances. The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance . . . and that she was actually offended . . . . The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609–610 [262 Cal.Rptr. 842], internal citation omitted.)
- "The United States Supreme Court . . . has clarified that conduct need not seriously affect an employee's psychological well-being to be actionable as abusive work environment harassment. So long as the environment reasonably would be perceived, and is perceived, as hostile or abusive, there is no need for

it also to be psychologically injurious." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 412 [27 Cal.Rptr.2d 457], internal citations omitted.)

- "As the Supreme Court recently reiterated, in order to be actionable, '. . . a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' The work environment must be viewed from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' This determination requires judges and juries to exercise '[c]ommon sense, and an appropriate sensitivity to social context' in order to evaluate whether a reasonable person in the plaintiff's position would find the conduct severely hostile or abusive." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518–519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- "The requirement that the conduct be sufficiently severe or pervasive to create a working environment a reasonable person would find hostile or abusive is a crucial limitation that prevents sexual harassment law from being expanded into a 'general civility code.' " (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1377 [62 Cal.Rptr.3d 200], internal citations omitted.)
- "[T]he jury only needed to find the harassing conduct to be either severe or pervasive . . . ." (*Caldera v. Department of Corrections & Rehabilitation* (2018) 25 Cal.App.5th 31, 40 [235 Cal.Rptr.3d 262].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin, et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:160–10:249 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.17, 3.36–3.41

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation, § 2:56 (Thomson Reuters)

2525. Harassment—"Supervisor" Defined (Gov. Code, § 12926(t))

[*Name of alleged harasser***] was a supervisor of [***name of defendant***] if [he/she/***nonbinary pronoun***] had any of the following:**

a. The authority to hire, transfer, promote, assign, reward, discipline, [or] discharge [or] [*insert other employment action***] other employees [or effectively to recommend any of these actions];**

b. The responsibility to act on other employees' grievances [or effectively to recommend action on grievances]; or

c. The responsibility to direct other employees' daily work activities.

[*Name of alleged harasser***]'s exercise of this authority or responsibility must not be merely routine or clerical, but must require the use of independent judgment.**

New September 2003; Revised June 2006, December 2015, December 2022

Directions for Use

The FEHA's definition of "supervisor" refers to the "authority" for factor (a) and the "responsibility" for factors (b) and (c). The difference, if any, between "authority" and "responsibility" as used in the statute is not clear. The FEHA's definition of "supervisor" also expressly refers to authority and responsibility over "other employees." (Gov. Code, § 12926(t).) The statute further requires that "the exercise of that *authority* is not of a merely routine or clerical nature, but requires the use of independent judgment." (See Gov. Code, § 12926(t), italics added.) However, at least one court has found the independent-judgment requirement to be applicable to the *responsibility* for factor (c). (See *Chapman v. Enos* (2004) 116 Cal.App.4th 920, 930–931 [10 Cal.Rptr.3d 852], italics added.) Therefore, the last sentence of the instruction refers to "authority or responsibility."

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Supervisor" Defined. Government Code section 12926(t).
- "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment 'by an employee

other than an agent or supervisor' by implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040–1041 [6 Cal.Rptr. 3d 441, 79 P.3d 556], internal citations omitted.)

- "Unlike discrimination in hiring, the ultimate responsibility for which rests with the employer, sexual or other harassment perpetrated by a supervisor with the power to hire, fire and control the victimized employee's working conditions is a particularly personal form of the type of discrimination which the Legislature sought to proscribe when it enacted the FEHA." (*Matthews v. Superior Court* (1995) 34 Cal.App.4th 598, 605–606 [40 Cal.Rptr.2d 350].)
- "This section has been interpreted to mean that the employer is strictly liable for the harassing actions of its supervisors and agents, but that the employer is only liable for harassment by a coworker if the employer knew or should have known of the conduct and failed to take immediate corrective action. Thus, characterizing the employment status of the harasser is very significant." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1046 [58 Cal.Rptr.2d 122], internal citations omitted.)
- "The case and statutory authority set forth three clear rules. First, . . . a supervisor who personally engages in sexually harassing conduct is personally liable under the FEHA. Second, . . . if the supervisor participates in the sexual harassment or substantially assists or encourages continued harassment, the supervisor is personally liable under the FEHA as an aider and abettor of the harasser. Third, under the FEHA, the employer is vicariously and strictly liable for sexual harassment by a supervisor." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1327 [58 Cal.Rptr.2d 308].)
- "[W]hile an employer's liability under the [FEHA] for an act of sexual harassment committed by a supervisor or agent is broader than the liability created by the common law principle of respondeat superior, respondeat superior principles are nonetheless relevant in determining liability when, as here, the sexual harassment occurred away from the workplace and not during work hours." (*Doe*, *supra*, 50 Cal.App.4th at pp. 1048–1049.)
- "The FEHA does not define 'agent.' Therefore, it is appropriate to consider general principles of agency law. An agent is one who represents a principal in dealings with third persons. An agent is a person authorized by the principal to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal. A supervising employee is an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1328, internal citations omitted.)
- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)
- "[W]hile full accountability and responsibility are certainly indicia of supervisory

power, they are not *required* elements of . . . the FEHA definition of supervisor. Indeed, many supervisors with responsibility to direct others using their independent judgment, and whose supervision of employees is not merely routine or clerical, would not meet these additional criteria though they would otherwise be within the ambit of the FEHA supervisor definition." (*Chapman, supra*, 116 Cal.App.4th at p. 930, footnote omitted.)

- "Defendants take the position that the court's modified instruction is, nonetheless, accurate because the phrase 'responsibility to direct' is the functional equivalent of being 'fully accountable and responsible for the performance and work product of the employees. . . .' In this, they rely on the dictionary definition of 'responsible' as 'marked by accountability.' But as it relates to the issue before us, this definition is unhelpful for two reasons. First, one can be accountable for one's own actions without being accountable for those of others. Second, the argument appears to ignore the plain language of the statute which *itself* defines the circumstances under which the exercise of the responsibility to direct will be considered supervisory, i.e., 'if . . . [it] is not of a merely routine or clerical nature, but requires the use of independent judgment.' " (*Chapman, supra*, 116 Cal.App.4th at pp. 930–931.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment*, ¶ 10:17 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-D, *Employer Liability For Workplace Harassment*, ¶¶ 10:308, 10:310, 10:315–10:317, 10:321, 10:322 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-E, *Harasser's Individual Liability*, ¶ 10:499 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual and Other Harassment, § 4.21

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.80 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.20, 115.36, 115.54 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56.50 (Thomson Reuters)

2526. Affirmative Defense—Avoidable Consequences Doctrine (Sexual Harassment by a Supervisor)

If [*name of plaintiff***] proves that [***name of supervisor***] sexually harassed [him/her/***nonbinary pronoun***], [***name of employer defendant***] is responsible for [***name of plaintiff***]'s harm caused by the harassment. However, [***name of employer defendant***] claims that [***name of plaintiff***] could have avoided some or all of the harm with reasonable effort. To succeed, [***name of employer defendant***] must prove all of the following:**

1. **That [***name of employer defendant***] took reasonable steps to prevent and correct workplace sexual harassment;**
2. **That [***name of plaintiff***] unreasonably failed to use the preventive and corrective measures for sexual harassment that [***name of employer defendant***] provided; and**
3. **That the reasonable use of [***name of employer defendant***]'s procedures would have prevented some or all of [***name of plaintiff***]'s harm.**

You should consider the reasonableness of [*name of plaintiff***]'s actions in light of the circumstances facing [him/her/***nonbinary pronoun***] at the time, including [his/her/***nonbinary pronoun***] ability to report the conduct without facing undue risk, expense, or humiliation.**

If you decide that [*name of employer defendant***] has proved this claim, you should not include in your award of damages the amount of damages that [***name of plaintiff***] could have reasonably avoided.**

New April 2004; Revised December 2011, December 2015, May 2020

Directions for Use

Give this instruction if the employer asserts the affirmative defense of "avoidable consequences." The essence of the defense is that the employee could have avoided part or most of the harm had the employee taken advantage of procedures that the employer had in place to address sexual harassment in the workplace. The avoidable-consequences doctrine is a defense only to damages, not to liability. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1045 [6 Cal.Rptr.3d 441, 79 P.3d 556].) For other instructions that may also be given on failure to mitigate damages generally, see CACI No. 3963, *Affirmative Defense—Employee's Duty to Mitigate Damages,* and CACI No. 3930, *Mitigation of Damages (Personal Injury).*

Whether this defense may apply to claims other than for supervisor sexual harassment has not been clearly addressed by the courts. It has been allowed against a claim for age discrimination in a constructive discharge case. (See *Rosenfeld v.*

Abraham Joshua Heschel Day School, Inc. (2014) 226 Cal.App.4th 886, 900–901 [172 Cal.Rptr.3d 465].)

Sources and Authority

- "[W]e conclude that under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor. But strict liability is not absolute liability in the sense that it precludes all defenses. Even under a strict liability standard, a plaintiff's own conduct may limit the amount of damages recoverable or bar recovery entirely." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1042, internal citations omitted.)
- "We emphasize that the defense affects damages, not liability. An employer that has exercised reasonable care nonetheless remains strictly liable for harm a sexually harassed employee could not have avoided through reasonable care. The avoidable consequences doctrine is part of the law of damages; thus, it affects only the remedy available. If the employer establishes that the employee, by taking reasonable steps to utilize employer-provided complaint procedures, could have caused the harassing conduct to cease, the employer will nonetheless remain liable for any compensable harm the employee suffered before the time at which the harassment would have ceased, and the employer avoids liability only for the harm the employee incurred thereafter." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1045, internal citation omitted.)
- "Under the avoidable consequences doctrine as recognized in California, a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure. The reasonableness of the injured party's efforts must be judged in light of the situation existing at the time and not with the benefit of hindsight. 'The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law.' The defendant bears the burden of pleading and proving a defense based on the avoidable consequences doctrine." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1043, internal citations omitted.)
- "Although courts explaining the avoidable consequences doctrine have sometimes written that a party has a 'duty' to mitigate damages, commentators have criticized the use of the term 'duty' in this context, arguing that it is more accurate to state simply that a plaintiff may not recover damages that the plaintiff could easily have avoided." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1043, internal citations omitted.)
- "We hold . . . that in a FEHA action against an employer for hostile environment sexual harassment by a supervisor, an employer may plead and prove a defense based on the avoidable consequences doctrine. In this particular context, the defense has three elements: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would

have prevented at least some of the harm that the employee suffered." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1044.)

- "This defense will allow the employer to escape liability for those damages, and only those damages, that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1044, internal citations omitted.)
- "If the employer establishes that the employee, by taking reasonable steps to utilize employer-provided complaint procedures, could have caused the harassing conduct to cease, the employer will nonetheless remain liable for any compensable harm the employee suffered before the time at which the harassment would have ceased, and the employer avoids liability only for the harm the employee incurred thereafter." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1045, internal citations omitted.)
- "We stress also that the holding we adopt does not demand or expect that employees victimized by a supervisor's sexual harassment must always report such conduct immediately to the employer through internal grievance mechanisms. The employer may lack an adequate antiharassment policy or adequate procedures to enforce it, the employer may not have communicated the policy or procedures to the victimized employee, or the employee may reasonably fear reprisal by the harassing supervisor or other employees. Moreover, in some cases an employee's natural feelings of embarrassment, humiliation, and shame may provide a sufficient excuse for delay in reporting acts of sexual harassment by a supervisor." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1045.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1798

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-D, *Employer Liability For Workplace Harassment*, ¶¶ 10:360, 10:361, 10:365–10:367, 10:371, 10:375 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.81[7][c], 41.92A (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.36[2][a], 115.54[3] (Matthew Bender)

2527. Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(k))

[*Name of plaintiff***] claims that [***name of defendant***] failed to take all reasonable steps to prevent [harassment/discrimination/retaliation] [based on [***describe protected status—e.g., race, gender, or age***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/ applied to [***name of defendant***] for a job/was a person providing services under a contract with [***name of defendant***]];**
2. **That [***name of plaintiff***] was subjected to [harassment/discrimination/retaliation] in the course of employment;**
3. **That [***name of defendant***] failed to take all reasonable steps to prevent the [harassment/discrimination/retaliation];**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s failure to take all reasonable steps to prevent [harassment/discrimination/retaliation] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2006; Revised April 2007, June 2013, December 2015

Directions for Use

Give this instruction after the appropriate instructions in this series on the underlying claim for discrimination, retaliation, or harassment if the employee also claims that the employer failed to prevent the conduct. (See Gov. Code, § 12940(k).) Read the bracketed language in the opening paragraph beginning with "based on" if the claim is for failure to prevent harassment or discrimination.

For guidance for a further instruction on what constitutes "reasonable steps," see section 11019(b)(4) of Title 2 of the California Code of Regulations.

Sources and Authority

- Prevention of Discrimination and Harassment. Government Code section 12940(k).
- "The employer's duty to prevent harassment and discrimination is affirmative and mandatory." (*Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035 [127 Cal.Rptr.2d 285].)
- "Once an employer is informed of the sexual harassment, the employer must take adequate remedial measures. The measures need to include immediate

corrective action that is reasonably calculated to (1) end the current harassment and (2) to deter future harassment. [Citation.] The employer's obligation to take prompt corrective action requires (1) that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified and (2) that permanent remedial steps be implemented by the employer to prevent future harassment . . . ." (*M.F. v. Pacific Pearl Hotel Management LLC* (2017) 16 Cal.App.5th 693, 701 [224 Cal.Rptr.3d 542].)

- "This section creates a tort that is made actionable by statute. ' " '[T]he word "tort" means a civil wrong, other than a breach of contract, for which the law will provide a remedy in the form of an action for damages.' 'It is well settled the Legislature possesses a broad authority . . . to establish . . . tort causes of action.' Examples of statutory torts are plentiful in California law." ' Section 12960 et seq. provides procedures for the prevention and elimination of unlawful employment practices. In particular, section 12965, subdivision (a) authorizes the Department of Fair Employment and Housing (DFEH) to bring an accusation of an unlawful employment practice if conciliation efforts are unsuccessful, and section 12965, subdivision (b) creates a private right of action for damages for a complainant whose complaint is not pursued by the DFEH." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286 [73 Cal.Rptr.2d 596], internal citations omitted.)
- "With these rules in mind, we examine the section 12940 claim and finding with regard to whether the usual elements of a tort, enforceable by private plaintiffs, have been established: Defendants' legal duty of care toward plaintiffs, breach of duty (a negligent act or omission), legal causation, and damages to the plaintiff." (*Trujillo, supra*, 63 Cal.App.4th at pp. 286–287, internal citation omitted.)
- "[W]hether an employer sufficiently complied with its mandate to 'take immediate and appropriate corrective action' is a question of fact." (*M.F.*, *supra*, 16 Cal.App.5th at p. 703, internal citation omitted.)
- "[C]ourts have required a finding of actual discrimination or harassment under FEHA before a plaintiff may prevail under section 12940, subdivision (k)." (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1314 [184 Cal.Rptr.3d 774].)
- "Also, there is a significant question of how there could be legal causation of any damages (either compensatory or punitive) from such a statutory violation, where the only jury finding was the failure to prevent actionable harassment or discrimination, which, however, did not occur." (*Trujillo, supra*, 63 Cal.App.4th at p. 289.)
- "[T]he 'Directions for Use' to CACI No. 2527 (2015), . . . states that the failure to prevent instruction should be given 'after the appropriate instructions in this series on the underlying claim for . . . harassment if the employee also claims that the employer failed to prevent the conduct.' An instruction on the elements of an underlying sexual harassment claim would be unnecessary if the failure to take reasonable steps necessary to prevent a claim for harassment could be based

on harassing conduct that was not actionable harassment." (*Dickson, supra*, 234 Cal.App.4th at p. 1317.)

- "In accordance with . . . the fundamental public policy of eliminating discrimination in the workplace under the FEHA, we conclude that retaliation is a form of discrimination actionable under [Gov. Code] section 12940, subdivision (k)." (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1240 [51 Cal.Rptr.3d 206], disapproved on other grounds in *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158 [72 Cal.Rptr.3d 624, 177 P.3d 232].)
- "[Defendant] suggests that a separate element in CACI No. 2527 requiring [plaintiff] to prove that the failure to prevent discrimination or retaliation was 'a substantial factor in causing her harm' is equivalent to the disputed element in the other CACI instructions requiring [plaintiff] to prove that her pregnancy-related leave was 'a motivating reason' for her discharge. However, the 'substantial factor in causing harm' element in CACI No. 2527 does not concern the causal relationship between the adverse employment action and the plaintiff's protected status or activity. Rather, it concerns the causal relationship between the discriminatory or retaliatory conduct, if proven, and the plaintiff's injury." (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 480 [161 Cal.Rptr.3d 758].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1025, 1026

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment and Housing Act*, ¶¶ 7:670–7:672 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.02[6], 41.80[1], 41.81[7] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g] (Matthew Bender)

2528. Failure to Prevent Harassment by Nonemployee (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [***name of defendant***] failed to take reasonable steps to prevent harassment based on [his/her/***nonbinary pronoun***] [***describe protected status, e.g., race, gender, or age***] by a nonemployee. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/ applied to [***name of defendant***] for a job/was an unpaid [intern/ volunteer] for [***name of defendant***]/was a person providing services under a contract with [***name of defendant***]];**
2. **That while in the course of employment, [***name of plaintiff***] was subjected to harassment based on [his/her/***nonbinary pronoun***] [***e.g., race***] by [***name***], who was not an employee of [***name of defendant***];**
3. **That [***name of defendant***] knew or should have known that the nonemployee's conduct placed employees at risk of harassment;**
4. **That [***name of defendant***] failed to take immediate and appropriate [preventive/corrective] action;**
5. **That the ability to take [preventive/corrective] action was within the control of [***name of defendant***];**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of defendant***]'s failure to take immediate and appropriate steps to [prevent/put an end to] the harassment was a substantial factor in causing [***name of plaintiff***]'s harm.**

New November 2018; Revised January 2019

Directions for Use

Give this instruction on a claim against the employer for failure to prevent harassment by a nonemployee. The FEHA protects not only employees, but also applicants, unpaid interns or volunteers, and persons providing services under a contract (element 1). (Gov. Code, § 12940(j)(1).) Modify references to employment in elements 2 and 3 as necessary if the plaintiff's status is other than an employee. Note that unlike claims for failure to prevent acts of a co-employee (see Gov. Code, § 12940(k)), only harassment is covered. (Gov. Code, § 12940(j)(1).) If there is such a thing as discrimination or retaliation by a nonemployee, there is no employer duty to prevent it under the FEHA.

The employer's duty is to "take immediate and appropriate corrective action." (Gov. Code § 12940(j)(1).) In contrast, for the employer's failure to prevent acts of an employee, the duty is to "take *all* reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code, § 12940(k).)

Whether the employer must prevent or later correct the harassing situation would seem to depend on the facts of the case. If the issue is to stop harassment from recurring after becoming aware of it, the employer's duty would be to "correct" the problem. If the issue is to address a developing problem before the harassment occurs, the duty would be to "prevent" it. Choose the appropriate words in elements 4, 5, and 7 depending on the facts.

Sources and Authority

- Prevention of Harassment by a Nonemployee. Government Code section 12940(j)(1).
- Prevention of Discrimination and Harassment. Government Code section 12940(k).
- "The FEHA provides: 'An employer may . . . be responsible for the acts of nonemployees, with respect to sexual harassment of employees . . . , where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered.' . . . ' A plaintiff cannot state a claim for failure to prevent harassment unless the plaintiff first states a claim for harassment." (*M.F. v. Pacific Pearl Hotel Management LLC* (2017) 16 Cal.App.5th 693, 700-701 [224 Cal.Rptr.3d 542].)
- "Once an employer is informed of the sexual harassment, the employer must take adequate remedial measures. The measures need to include immediate corrective action that is reasonably calculated to (1) end the current harassment and (2) to deter future harassment. [Citation.] The employer's obligation to take prompt corrective action requires (1) that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified and (2) that permanent remedial steps be implemented by the employer to prevent future harassment . . . ." (*M.F., supra,* 16 Cal.App.5th at p. 701.)
- "[T]he language of section 12940, subdivision (j)(1), does not limit its application to a particular fact pattern. Rather, the language of the statute provides for liability whenever an employer (1) knows or should know of sexual harassment by a nonemployee and (2) fails to take immediate and appropriate remedial action (3) within its control. (*M.F., supra,* 16 Cal.App.5th at p. 702.)
- "[W]hether an employer sufficiently complied with its mandate to 'take immediate and appropriate corrective action' is a question of fact." (*M.F., supra,* 16 Cal.App.5th at p. 703, internal citation omitted.)
- "The more egregious the abuse and the more serious the threat of which the

employer has notice, the more the employer will be required under a standard of reasonable care to take steps for the protection of likely future victims." (*M.F., supra,* 16 Cal.App.5th at p. 701.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1019, 1028, 1035

2529–2539. Reserved for Future Use

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/***nonbinary pronoun***] based on [his/her/***nonbinary pronoun***] [history of [a]] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**
2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/ applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**
3. **That [***name of defendant***] knew that [***name of plaintiff***] had [a history of having] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**
4. **That [***name of plaintiff***] was able to perform the essential job duties of [his/her/***nonbinary pronoun***] [current position/the position for which [he/she/***nonbinary pronoun***] applied], either with or without reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., condition***];**
5. **[That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];]**

   [or]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**
6. **That [***name of plaintiff***]'s [history of [a]] [***e.g., physical condition***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[*Name of plaintiff***] does not need to prove that [***name of defendant***] held any ill will or animosity toward [him/her/***nonbinary pronoun***] personally because [he/she/***nonbinary pronoun***] was [perceived to be] disabled. [On the other hand, if you find that [***name of defendant***] did hold ill will or**

animosity toward [*name of plaintiff***] because [he/she/***nonbinary pronoun***] was [perceived to be] disabled, you may consider this fact, along with all the other evidence, in determining whether [***name of plaintiff***]'s [history of [a]] [***e.g., physical condition***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct].]**

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*New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012, June 2013, December 2014, December 2016, May 2019, May 2020, May 2024**

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

In the introductory paragraph and in elements 3 and 6, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(b)–(h), (j), (k).)

This instruction is for use by both an employee and a job applicant. Select the appropriate options in elements 2, 5, and 6 depending on the plaintiff's status.

Modify elements 3 and 6 if the plaintiff was not actually disabled or had a history of disability, but alleges discrimination because the plaintiff was perceived to be disabled. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) This can be done with language in element 3 that the employer "treated [*name of plaintiff*] as if [he/she/*nonbinary pronoun*] . . ." and with language in element 6 "That [*name of employer*]'s belief that . . . ."

If the plaintiff alleges discrimination on the basis of the plaintiff's association with someone who was or was perceived to be disabled, give CACI No. 2547, *Disability-Based Associational Discrimination—Essential Factual Elements.* (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655–660 [163 Cal.Rptr.3d 392] [claim for "disability based associational discrimination" adequately pled].)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i))

is alleged, omit "that limited [*insert major life activity*]" in element 3. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

Regarding element 4, it is now settled that the ability to perform the essential duties of the job, with or without reasonable accommodation, is an element of the plaintiff's burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P.3d 118].)

Read the first option for element 5 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 6 if either the second or third option is included for element 5.

Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Give the optional sentence in the last paragraph if there is evidence that the defendant harbored personal animus against the plaintiff because of the plaintiff's disability.

If the existence of a qualifying disability is disputed, consider giving special instructions defining "medical condition," "mental disability," and "physical disability." (See Gov. Code, § 12926(i), (j), (m) [defining "medical condition," "mental disability," and "physical disability"]; see also Cal. Code Regs., tit. 2, § 11065.)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Inability to Perform Essential Job Duties. Government Code section 12940(a)(1).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Perception of Disability and Association With Person Who Has or Is Perceived to Have Disability Protected. Government Code section 12926(o).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate

circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)

- "[T]he plaintiff initially has the burden to establish a prima facie case of discrimination. The plaintiff can meet this burden by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. To establish a prima facie case, a plaintiff must show ' " ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion . . . ." ' " . . .' The prima facie burden is light; the evidence necessary to sustain the burden is minimal. As noted above, while the elements of a plaintiff's prima facie case can vary considerably, generally an employee need only offer sufficient circumstantial evidence to give rise to a reasonable *inference* of discrimination." (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310 [115 Cal.Rptr.3d 453], original italics, internal citations omitted.)
- "The distinction between cases involving *direct evidence* of the employer's motive for the adverse employment action and cases where there is only *circumstantial evidence* of the employer's discriminatory motive is critical to the outcome of this appeal. There is a vast body of case law that addresses proving discriminatory intent in cases where there was no direct evidence that the adverse employment action taken by the employer was motivated by race, religion, national origin, age or sex. In such cases, proof of discriminatory motive is governed by the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]." (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 123 [199 Cal.Rptr.3d 462], original italics, footnote and internal citations omitted.)
- "The three-stage framework and the many principles adopted to guide its application do not apply in discrimination cases where, like here, the plaintiff presents direct evidence of the employer's motivation for the adverse employment action. In many types of discrimination cases, courts state that direct evidence of intentional discrimination is rare, but disability discrimination cases often involve direct evidence of the role of the employee's actual or perceived *disability* in the employer's decision to implement an adverse

employment action. Instead of litigating the employer's reasons for the action, the parties' disputes in disability cases focus on whether the employee was able to perform essential job functions, whether there were reasonable accommodations that would have allowed the employee to perform those functions, and whether a reasonable accommodation would have imposed an undue hardship on the employer. To summarize, courts and practitioners should not automatically apply principles related to the *McDonnell Douglas* test to disability discrimination cases. Rather, they should examine the critical threshold issue and determine whether there is direct evidence that the motive for the employer's conduct was related to the employee's physical or mental condition." (*Wallace, supra*, 245 Cal.App.4th at p. 123, original italics, footnote and internal citations omitted; cf. *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 234 fn. 3 [206 Cal.Rptr.3d 841] [case did not present so-called "typical" disability discrimination case, as described in *Wallace*, in that the parties disputed the employer's reasons for terminating plaintiff's employment].)

- "If the employee meets this [prima facie] burden, it is then incumbent on the employer to show that it had a legitimate, nondiscriminatory reason for its employment decision. When this showing is made, the burden shifts back to the employee to produce substantial evidence that employer's given reason was either 'untrue or pretextual,' or that the employer acted with discriminatory animus, in order to raise an inference of discrimination." (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 744 [151 Cal.Rptr.3d 292], internal citations omitted.)
- "Although the same statutory language that prohibits disability discrimination also prohibits discrimination based on race, age, sex, and other factors, we conclude that disability discrimination claims are fundamentally different from the discrimination claims based on the other factors listed in section 12940, subdivision (a). These differences arise because (1) additional statutory provisions apply to disability discrimination claims, (2) the Legislature made separate findings and declarations about protections given to disabled persons, and (3) discrimination cases involving race, religion, national origin, age and sex, often involve pretexts for the adverse employment action—an issue about motivation that appears less frequently in disability discrimination cases." (*Wallace, supra*, 245 Cal.App.4th at p. 122.)
- "[Defendant] argues that, because [it] hired plaintiffs as recruit officers, they must show they were able to perform the essential functions of a police recruit in order to be qualified individuals entitled to protection under FEHA. [Defendant] argues that plaintiffs cannot satisfy their burden of proof under FEHA because they failed to show that they could perform those essential functions. [¶] Plaintiffs do not directly respond to [defendant]'s argument. Instead, they contend that the relevant question is whether they could perform the essential functions of the positions to which they sought reassignment. Plaintiffs' argument improperly conflates the legal standards for their claim under section 12940, subdivision (a), for discrimination, and their claim under section

12940, subdivision (m), for failure to make reasonable accommodation, including reassignment. In connection with a discrimination claim under section 12940, subdivision (a), the court considers whether a plaintiff could perform the essential functions of the job held—or for job applicants, the job desired—with or without reasonable accommodation." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 716–717 [214 Cal.Rptr.3d 113].)

- "Summary adjudication of the section 12940(a) claim . . . turns on . . . whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the 'qualified individual with a disability' requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here. To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]'s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion." (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190], original italics, internal citations omitted.)
- "To establish a prima facie case of mental disability discrimination under FEHA, a plaintiff must show the following elements: (1) She suffers from a mental disability; (2) she is otherwise qualified to do the job with or without reasonable accommodation; and (3) she was subjected to an adverse employment action because of the disability." (*Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78, 84 [187 Cal.Rptr.3d 745].)
- "At most, [plaintiff] alleges only that he anticipated becoming disabled for some time after the organ donation. This is insufficient. [Plaintiff] cannot pursue a cause of action for discrimination under FEHA on the basis of his 'actual' physical disability in the absence of factual allegations that he was in fact, physically disabled." (*Rope, supra*, 220 Cal.App.4th at p. 659.)
- "[Defendant] asserts the statute's 'regarded as' protection is limited to persons who are denied or who lose jobs based on an employer's reliance on the 'myths, fears or stereotypes' frequently associated with disabilities. . . . However, the statutory language does not expressly restrict FEHA's protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer's failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the 'regarded as' definition casts a broader net and

protects *any* individual 'regarded' or 'treated' by an employer 'as having, or having had, any physical condition that makes achievement of a major life activity difficult' or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer's 'mistaken' perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA's protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], original italics, internal citations omitted.)

- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)
- "We say on this record that [defendant] took action against [plaintiff] based on concerns or fear about his possible future disability. The relevant FEHA definition of an individual regarded as disabled applies only to those who suffer certain specified physical disabilities or those who have a condition with 'no present disabling effect' but which 'may become a physical disability . . . .' According to the pleadings, [defendant] fired [plaintiff] to avoid accommodating him because of his association with his physically disabled sister. That is not a basis for liability under the 'regarded as' disabled standard." (*Rope, supra*, 220 Cal.App.4th at p. 659, internal citations omitted.)
- " '[A]n employer "knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. The employer need only know the underlying facts, not the legal significance of those facts." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 592 [210 Cal.Rptr.3d 59].)
- " 'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made. . . . While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations . . . ." . . .' " (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.3d 338].)
- "[W]e interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not

discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 166 [125 Cal.Rptr.3d 1], internal citations omitted.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra*, 56 Cal.4th at p. 232, original italics.)
- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause." (*Harris, supra*, 56 Cal.4th at p. 229.)
- "We note that the court in *Harris* discussed the employer's motivation and the link between the employer's consideration of the plaintiff's physical condition and the adverse employment action without using the terms 'animus,' 'animosity,' or 'ill will.' The absence of a discussion of these terms necessarily implies an employer can violate section 12940, subdivision (a) by taking an adverse employment action against an employee "because of" the employee's physical disability even if the employer harbored no animosity or ill will against the employee or the class of persons with that disability." (*Wallace, supra*, 245 Cal.App.4th at p. 128.)
- "Based on *Harris*, we conclude that an employer has treated an employee differently 'because of' a disability when the disability is a substantial motivating reason for the employer's decision to subject the [employee] to an adverse employment action. This conclusion resolves how the jury should have been instructed on [defendant]'s motivation or intent in connection with the disability discrimination claim." (*Wallace, supra*, 245 Cal.App.4th at p. 128.)
- "We conclude that where, as here, an employee is found to be able to safely perform the essential duties of the job, a plaintiff alleging disability discrimination can establish the requisite employer intent to discriminate by proving (1) the employer knew that plaintiff had a physical condition that limited a major life activity, or perceived him to have such a condition, and (2) the plaintiff's actual or perceived physical condition was a substantial motivating reason for the defendant's decision to subject the plaintiff to an adverse employment action. . . . [T]his conclusion is based on (1) the interpretation of section 12940's term 'because of' adopted in *Harris*; (2) our discussion of the meaning of the statutory phrase 'to discriminate against'; and (3) the guidance provided by the current versions of CACI Nos. 2540 and 2507. [¶] Therefore,

the jury instruction that [plaintiff] was required to prove that [defendant] 'regarded or treated [him] as having a disability in order to discriminate' was erroneous." (*Wallace, supra*, 245 Cal.App.4th at p. 129.)

- "The word 'animus' is ambiguous because it can be interpreted narrowly to mean 'ill will' or 'animosity' or can be interpreted broadly to mean 'intention.' In this case, it appears [defendant] uses 'animus' to mean something more than the intent described by the substantial-motivating-reason test adopted in *Harris*." (*Wallace, supra*, 245 Cal.App.4th at p. 130, fn. 14, internal citation omitted.)
- " '[W]eight may qualify as a protected "handicap" or "disability" within the meaning of the FEHA if medical evidence demonstrates that it results from a physiological condition affecting one or more of the basic bodily systems and limits a major life activity.' . . . '[A]n individual who asserts a violation of the FEHA on the basis of his or her weight must adduce evidence of a physiological, systemic basis for the condition.' " (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 928 [227 Cal.Rptr.3d 286].)
- "Being unable to work during pregnancy is a disability for the purposes of section 12940." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1340 [153 Cal.Rptr.3d 367].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1045–1051

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2160–9:2241 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.78–2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.11, 41.32[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22[8], 115.23[2] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:46 (Thomson Reuters)

2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, § 12940(m))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her/***nonbinary pronoun***] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**
2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/ applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**
3. **That [[***name of plaintiff***] had/[***name of defendant***] treated [***name of plaintiff***] as if [he/she/***nonbinary pronoun***] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**
4. **That [***name of defendant***] knew of [***name of plaintiff***]'s [***e.g., physical condition***] [that limited [***insert major life activity***]];]**
5. **That [***name of plaintiff***] was able to perform the essential duties of [[his/her/***nonbinary pronoun***] current position or a vacant alternative position to which [he/she/***nonbinary pronoun***] could have been reassigned/the position for which [he/she/***nonbinary pronoun***] applied] with reasonable accommodation for [his/her/ ***nonbinary pronoun***] [***e.g., physical condition***];**
6. **That [***name of defendant***] failed to provide reasonable accommodation for [***name of plaintiff***]'s [***e.g., physical condition***];**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s failure to provide reasonable accommodation was a substantial factor in causing [***name of plaintiff***]'s harm.**

[In determining whether [*name of plaintiff***]'s [***e.g., physical condition***] limits [***insert major life activity***], you must consider the [***e.g., physical condition***] [in its unmedicated state/without assistive devices/[***describe mitigating measures***]].]**

*New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010, December 2011, June 2012, June 2013, May 2019, May 2023, May 2024**

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(b)–(h), (j), (k).)

This instruction is for use by both an employee and a job applicant. Select the appropriate options in elements 2 and 5 depending on the plaintiff's status.

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in elements 3 and 4 and do not include the last paragraph. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

In a case of perceived disability, include "[*name of defendant*] treated [*name of plaintiff*] as if [he/she/*nonbinary pronoun*] had" in element 3, and delete optional element 4. (See Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) In a case of actual disability, include "**[***name of plaintiff*] had" in element 3, and give element 4.

If the existence of a qualifying disability is disputed, consider giving special instructions defining "medical condition," "mental disability," and "physical disability." (See Gov. Code, § 12926(i), (j), (m) [defining "medical condition," "mental disability," and "physical disability"]; see also Cal. Code Regs., tit. 2, § 11065.)

The California Supreme Court has held that under Government Code section 12940(a), the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with or without reasonable accommodation. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal.Rptr.3d 390, 165 P.3d 118].) While the court left open the question of whether the same rule should apply to cases under Government Code section 12940(m) (see *id.* at p. 265), appellate courts have subsequently placed the burden on the employee to prove that he or she would be able to perform the job duties with reasonable accommodation (see element 5). (See *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766 [123 Cal.Rptr.3d 562]; *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973–979 [83 Cal.Rptr.3d 190].)

There may still be an unresolved issue if the employee claims that the employer failed to provide the employee with other suitable job positions that the employee might be able to perform with reasonable accommodation. The rule has been that

the employer has an affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to any other employees or has a policy of offering such assistance or benefit to any other employees. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142]; see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 745 [151 Cal.Rptr.3d 292]; *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487].) In contrast, other courts have said that it is the employee's burden to prove that a reasonable accommodation could have been made, i.e., that the employee was qualified for a position in light of the potential accommodation. (See *Nadaf-Rahrov, supra*, 166 Cal.App.4th at p. 978; see also *Cuiellette, supra*, 194 Cal.App.4th at p. 767 [plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought].) The question of whether the employee has to present evidence of other suitable job descriptions and prove that a vacancy existed for a position that the employee could do with reasonable accommodation may not be fully resolved.

No element has been included that requires the plaintiff to specifically request reasonable accommodation. Unlike Government Code section 12940(n) on the interactive process (see CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*), section 12940(m) does not specifically require that the employee request reasonable accommodation; it requires only that the employer know of the disability. (See *Prilliman, supra*, 53 Cal.App.4th at pp. 950–951.)

Sources and Authority

- Reasonable Accommodation Required. Government Code section 12940(m).
- "Reasonable Accommodation" Explained. Government Code section 12926(p).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "Under FEHA, an employer is required 'to make reasonable accommodation for the known physical or mental disability of an applicant or employee.' Relatedly, the employer is required 'to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability . . . .' " (*Lin v. Kaiser Foundation Hospitals* (2023) 88 Cal.App.5th 712, 728 [304 Cal.Rptr.3d 820], internal citations omitted.)
- "There are three elements to a failure to accommodate action: '(1) the plaintiff

has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability. [Citation.]' " (*Hernandez v. Rancho Santiago Cmty. College Dist.* (2018) 22 Cal.App.5th 1187, 1193–1194 [232 Cal.Rptr.3d 349].)

- "Under the FEHA, 'reasonable accommodation' means 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.' " (*Cuiellette, supra*, 194 Cal.App.4th at p. 766.)
- "Reasonable accommodations include '[j]ob restructuring, part-time or modified work schedules, *reassignment to a vacant position*, . . . and other similar accommodations for individuals with disabilities.' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 968 [181 Cal.Rptr.3d 553], original italics.)
- "The examples of reasonable accommodations in the relevant statutes and regulations include reallocating nonessential functions or modifying how or when an employee performs an essential function, but not eliminating essential functions altogether. FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 375 [184 Cal.Rptr.3d 9].)
- "A term of leave from work can be a reasonable accommodation under FEHA, and, therefore, a request for leave can be considered to be a request for accommodation under FEHA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 243 [206 Cal.Rptr.3d 841], internal citation omitted.)
- "Failure to accommodate claims are not subject to the *McDonnell Douglas* burden-shifting framework." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 926 [227 Cal.Rptr.3d 286].)
- "The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well. First, . . . an employee's ability to perform the essential functions of a job is a prerequisite to liability under section 12940(m). Second, the Legislature modeled section 12940(m) on the federal reasonable accommodation requirement (adopting almost verbatim the federal statutory definition of 'reasonable accommodation' by way of example). Had the Legislature intended the employer to bear the burden of proving ability to

perform the essential functions of the job, contrary to the federal allocation of the burden of proof, . . . it could have expressly provided for that result, but it did not. Finally, general evidentiary principles support allocating the burden of proof on this issue to the plaintiff." (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at pp. 977–978, internal citations omitted.)

- " 'If the employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. [Citation.] A reassignment, however, is not required if "there is no vacant position for which the employee is qualified." [Citations.] "The responsibility to reassign a disabled employee who cannot otherwise be accommodated does 'not require creating a new job, moving another employee, promoting the disabled employee or violating another employee's rights . . . .' " [Citations.] "What is required is the 'duty to reassign a disabled employee if an already funded, vacant position at the same level exists.' [Citations.]" [Citations.]' " (*Furtado, supra*, 212 Cal.App.4th at p. 745.)
- "[A]n employee's probationary status does not, in and of itself, deprive an employee of the protections of FEHA, including a reasonable reassignment. The statute does not distinguish between the types of reasonable accommodations an employer may have to provide to employees on probation or in training and those an employer may have to provide to other employees. We decline to read into FEHA a limitation on an employee's eligibility for reassignment based on an employee's training or probationary status. Instead, the trier of fact should consider whether an employee is on probation or in training in determining whether a particular reassignment is comparable in pay and status to the employee's original position." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 724 [214 Cal.Rptr.3d 113], internal citations omitted.)
- "[A] disabled employee seeking reassignment to a vacant position 'is entitled to preferential consideration.' " (*Swanson, supra*, 232 Cal.App.4th at p. 970.)
- " 'Generally, " '[t]he employee bears the burden of giving the employer notice of the disability.' " ' An employer, in other words, has no affirmative duty to investigate whether an employee's illness might qualify as a disability. ' " '[T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge.' " ' " (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1167 [217 Cal.Rptr.3d 258], internal citations omitted.)
- " '[A]n employer "knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation." ' . . . [¶] 'While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the *only* reasonable interpretation of the known facts. "Vague

or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the [FEHA].' " (*Featherstone, supra,* 10 Cal.App.5th at p. 1167, internal citations omitted.)

- "In other words, so long as the employer is aware of the employee's condition, there is no requirement that the employer be aware that the condition is considered a disability under the FEHA. By the same token, it is insufficient to tell the employer merely that one is disabled or requires an accommodation." (*Cornell*, *supra*, 18 Cal.App.5th at p. 938, internal citation omitted.)
- " ' " 'This notice then triggers the employer's burden to take "positive steps" to accommodate the employee's limitations. . . . [¶] . . . The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or her] disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the [employee's] capabilities and available positions.' " ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 598 [210 Cal.Rptr.3d 59].)
- "Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an 'undue hardship.' " (*Prilliman*, *supra*, 53 Cal.App.4th at p. 947.)
- " 'Ordinarily the reasonableness of an accommodation is an issue for the jury.' " (*Prilliman*, *supra*, 53 Cal.App.4th at p. 954, internal citation omitted.)
- "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti, supra*, 97 Cal.App.4th at p. 362.)
- "[A]n employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations . . . ." (*Atkins, supra,* 8 Cal.App.5th at p. 721.)
- "The question whether plaintiffs could perform the essential functions of a position to which they sought reassignment is relevant to a claim for failure to accommodate under section 12940, subdivision (m) . . . ." (*Atkins, supra*, 8 Cal.App.5th at p. 717.)
- "On these issues, which are novel to California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA's statutorily defined 'disabilities,' including those 'regarded as' disabled, and must engage in an informal, interactive process to determine any effective accommodations." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874].)
- "While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Moore, supra*, 248 Cal.App.4th at p. 242.)
- "[A] pretextual termination of a perceived-as-disabled employee's employment in

lieu of providing reasonable accommodation or engaging in the interactive process does not provide an employer a reprieve from claims for failure to accommodate and failure to engage in the interactive process." (*Moore, supra*, 248 Cal.App.4th at p. 244.)

- "Appellant also stated a viable claim under section 12940, subdivision (m), which mandates that an employer provide reasonable accommodations for the known physical disability of an employee. She alleged that she was unable to work during her pregnancy, that she was denied reasonable accommodations for her pregnancy-related disability and terminated, and that the requested accommodations would not have imposed an undue hardship on [defendant]. A finite leave of greater than four months may be a reasonable accommodation for a known disability under the FEHA." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1341 [153 Cal.Rptr.3d 367].)
- "To the extent [plaintiff] claims the [defendant] had a duty to await a vacant position to arise, he is incorrect. A finite leave of absence may be a reasonable accommodation to allow an employee time to recover, but FEHA does not require the employer to provide an indefinite leave of absence to await possible future vacancies." (*Nealy, supra*, 234 Cal.App.4th at pp. 377–378.)
- "While 'a finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform . . . her duties,' a finite leave is not a reasonable accommodation when the leave leads directly to termination of employment because the employee's performance could not be evaluated while she was on the leave." (*Hernandez, supra,* 22 Cal.App.5th at p. 1194.)

Secondary Sources

10 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 977, 1048

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2250–9:2285, 9:2345–9:2347 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.20, 115.35 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:50 (Thomson Reuters)

2542. Disability Discrimination—"Reasonable Accommodation" Explained

A reasonable accommodation is a reasonable change to the workplace that [*choose one or more of the following***]**

[gives a qualified applicant with a disability an equal opportunity in the job application process;]

[allows an employee with a disability to perform the essential duties of the job;] [or]

[allows an employee with a disability to enjoy the same benefits and privileges of employment that are available to employees without disabilities.]

Reasonable accommodations may include the following:

a. Making the workplace readily accessible to and usable by employees with disabilities;

b. Changing job responsibilities or work schedules;

c. Reassigning the employee to a vacant position;

d. Modifying or providing equipment or devices;

e. Modifying tests or training materials;

f. Providing qualified interpreters or readers; or

g. Providing other similar accommodations for an individual with a disability.

If more than one accommodation is reasonable, an employer makes a reasonable accommodation if it selects one of those accommodations in good faith.

New September 2003; Revised April 2009, June 2012

Directions for Use

Give this instruction to explain "reasonable accommodation" as used in CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*. For discussion regarding the burden of proof on reasonable accommodation, see the Directions for Use to CACI No. 2541.

Sources and Authority

- Employer Obligation to Make Reasonable Accommodation. Government Code section 12940(m).
- "Reasonable Accommodation" Defined. Government Code section 12926(p).

- "Reasonable Accommodation" Defined. Cal. Code Regs., tit. 2, § 11068(a).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 362 [118 Cal.Rptr.2d 443].)
- "[A]n employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees." (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142].)
- "The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well." (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 977–978 [83 Cal.Rptr.3d 190], internal citations omitted.)
- "Under the FEHA . . . an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations or if there is no vacant position for which the employee is qualified." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶ 7:213 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2091, 9:2093–9:2095, 9:2197, 9:2252, 9:2265, 9:2366 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[3][a], [b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment*

Discrimination, § 115.35 (Matthew Bender)
California Civil Practice: Employment Litigation § 2:50 (Thomson Reuters)

2543. Disability Discrimination—"Essential Job Duties" Explained (Gov. Code, §§ 12926(f), 12940(a)(1))

In deciding whether a job duty is essential, you may consider, among other factors, the following:

a. Whether the reason the job exists is to perform that duty;

b. Whether there is a limited number of employees available who can perform that duty;

c. Whether the job duty is highly specialized so that the person currently holding the position was hired for the person's expertise or ability to perform the particular duty.

Evidence of whether a particular duty is essential includes, but is not limited to, the following:

a. [*Name of defendant***]'s judgment as to which functions are essential;**

b. Written job descriptions prepared before advertising or interviewing applicants for the job;

c. The amount of time spent on the job performing the duty;

d. The consequences of not requiring the person currently holding the position to perform the duty;

e. The terms of a collective bargaining agreement;

f. The work experiences of past persons holding the job;

g. The current work experience of persons holding similar jobs;

h. Reference to the importance of the job in prior performance reviews.

"Essential job duties" do not include the marginal duties of the position. "Marginal duties" are those that, if not performed would not eliminate the need for the job, or those that could be readily performed by another employee, or those that could be performed in another way.

New September 2003; Revoked June 2013; Restored and Revised December 2013; Revised May 2020

Directions for Use

Give this instruction with CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements,* or CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements,* or both,

if it is necessary to explain what is an "essential job duty." (See Gov. Code, §§ 12926(f), 12940(a)(1); see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 743–744 [151 Cal.Rptr.3d 292].) While the employee has the burden to prove that the employee can perform essential job duties, with or without reasonable accommodation, it is unresolved which party has the burden of proving that a job duty is essential. (See *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 972–973 [150 Cal.Rptr.3d 385].)

Sources and Authority

- Ability to Perform Essential Duties. Government Code section 12940(a)(1).
- "Essential Functions" Defined. Government Code section 12926(f).
- Evidence of Essential Functions. 2 California Code of Regulations section 11065(e)(2).
- Marginal Functions. 2 California Code of Regulations section 11065(e)(3).
- " ' "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position.' ' "Marginal functions" of an employment position are those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way.' 'A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following: [¶] (A) . . . [T]he reason the position exists is to perform that function. [¶] (B) . . . [T]he limited number of employees available among whom the performance of that job function can be distributed. [¶] [And] (C) . . . the incumbent in the position is hired for his or her expertise or ability to perform the particular [highly specialized] function.' " (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 373 [184 Cal.Rptr.3d 9], internal citations omitted.)
- "Evidence of 'essential functions' may include the employer's judgment, written job descriptions, the amount of time spent on the job performing the function, the consequences of not requiring employees to perform the function, the terms of a collective bargaining agreement, the work experiences of past incumbents in the job, and the current work experience of incumbents in similar jobs." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 717–718 [214 Cal.Rptr.3d 113].)
- "The trial court's essential functions finding is also supported by the evidence presented by defendant corresponding to the seven categories of evidence listed in [Government Code] section 12926(f)(2). 'Usually no one listed factor will be dispositive . . . .' " (*Lui, supra,* 211 Cal.App.4th at p. 977.)
- "The question whether plaintiffs could perform the essential functions of a position to which they sought reassignment is relevant to a claim for failure to accommodate under section 12940, subdivision (m), and to a claim for failure to engage in the interactive process under section 12940, subdivision (n)." (*Atkins, supra,* 8 Cal.App.5th at p. 717.)

- "The identification of essential job functions is a 'highly fact-specific inquiry.' " (*Lui, supra,* 211 Cal.App.4th at p. 971.)
- "It is clear that plaintiff bore the burden of proving 'that he or she is a qualified individual under the FEHA (i.e., that he or she can perform the essential functions of the job with or without reasonable accommodation).' It is less clear whether that burden included the burden of proving what the essential functions of the position are, rather than just plaintiff's ability to perform the essential functions. Under the ADA, a number of federal decisions have held that '[a]lthough the plaintiff bears the ultimate burden of persuading the fact finder that he can perform the job's essential functions, . . . "an employer who disputes the plaintiff's claim that he can perform the essential functions must put forth evidence establishing those functions." [Citation.]' . . . Arguably, plaintiff's burden of proving he is a qualified individual includes the burden of proving which duties are essential functions of the positions he seeks. Ultimately, we need not and do not decide in the present case which party bore the burden of proof on the issue at trial . . . ." (*Lui, supra,* 211 Cal.App.4th at pp. 972–973, internal citations omitted.)
- "[R]equiring employers to eliminate an essential function of a job to accommodate a disabled employee 'would be at odds with the definition of the employee's prima facie case' under FEHA. The employee's burden includes 'showing he or she can perform the essential functions of the job with accommodation, not that an essential function can be eliminated altogether to suit his or her restrictions.' " (*Atkins, supra,* 8 Cal.App.5th at p. 720.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1045–1049

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment and Housing Act (FEHA)*, ¶¶ 9:2247, 9:2247.1, 9:2247.2, 9:2402–9:2402.1 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.97[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.54, 115.104 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:86 (Thomson Reuters)

2544. Disability Discrimination—Affirmative Defense—Health or Safety Risk

[*Name of defendant***] claims that [his/her/***nonbinary pronoun***/its] conduct was not discriminatory because, even with reasonable accommodations, [***name of plaintiff***] was unable to perform at least one essential job duty without endangering [[his/her/***nonbinary pronoun***] health or safety/ [or] [the health or safety of others]. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [***describe job duty***] was an essential job duty;**
2. **That there was no reasonable accommodation that would have allowed [***name of plaintiff***] to perform this job duty without endangering [[his/her/***nonbinary pronoun***] health or safety/ [or] [the health or safety of others]; and**
3. **That [***name of plaintiff***]'s performance of this job duty would present an immediate and substantial degree of risk to [[him/her/** ***nonbinary pronoun***]**/ [or] others].**

[However, it is not a defense to assert that [*name of plaintiff***] has a disability with a future risk, as long as the disability does not presently interfere with [his/her/***nonbinary pronoun***] ability to perform the job in a manner that will not endanger [him/her/***nonbinary pronoun***]/ [or] others].]**

In determining whether [*name of defendant***] has proved this defense, factors that you may consider include the following:**

a. **The duration of the risk;**
b. **The nature and severity of the potential harm;**
c. **The likelihood that the potential harm would have occurred;**
d. **How imminent the potential harm was; [and]**
e. **Relevant information regarding [***name of plaintiff***]'s past work history[;/and]**

[f. [*Specify other relevant factors***].]**

Your consideration of these factors should be based on a reasonable medical judgment that relies on the most current medical knowledge or on the best available objective evidence.

New September 2003; Revised May 2019, November 2019

Directions for Use

This instruction is based on the Fair Employment and Housing Council regulation

addressing the defense of health or safety risk. (See Cal. Code Regs., tit. 2, § 11067.) Give CACI No. 2543, *Disability Discrimination—"Essential Job Duties" Explained*, to instruct on when a job duty is essential.

If more than one essential job duty is alleged to involve a health or safety risk, pluralize the elements accordingly.

Give the optional paragraph following the elements if there is concern about a future risk. (See Cal. Code Regs., tit. 2, § 11067(d).)

The list of factors to be considered is not exclusive. (See Cal. Code Regs., tit. 2, § 11067(e).) Additional factors may be added according to the facts and circumstances of the case.

Sources and Authority

- Risk to Health or Safety. Government Code section 12940(a)(1).
- Risk to Health or Safety. Cal. Code Regs., tit. 2, § 11067(b)–(e).
- "FEHA's 'danger to self' defense has a narrow scope; an employer must offer more than mere conclusions or speculation in order to prevail on the defense . . . . As one court said, '[t]he defense requires that the employee face an "imminent and substantial degree of risk" in performing the essential functions of the job.' An employer may not terminate an employee for harm that is merely potential . . . . In addition, in cases in which the employer is able to establish the 'danger to self' defense, it must also show that there are 'no "available reasonable means of accommodation which could, without undue hardship to [the employer], have allowed [the plaintiff] to perform the essential job functions . . . without danger to himself." ' " (*Wittkopf v. County of Los Angeles* (2001) 90 Cal.App.4th 1205, 1218–1219 [109 Cal.Rptr.2d 543], internal citations omitted.)
- "An employer may refuse to hire persons whose physical handicap prevents them from performing their duties in a manner which does not endanger their health. Unlike the BFOQ defense, this exception must be tailored to the individual characteristics of each applicant . . . in relation to specific, legitimate job requirements . . . . [Defendant's] evidence, at best, shows a possibility [plaintiff] might endanger his health sometime in the future. In the light of the strong policy for providing equal employment opportunity, such conjecture will not justify a refusal to employ a handicapped person." (*Sterling Transit Co. v. Fair Employment Practice Com.* (1981) 121 Cal.App.3d 791, 798–799 [175 Cal.Rptr. 548], internal citations and footnote omitted.)
- "FEHA does not expressly address whether the act protects an employee whose disability causes him or her to make threats against coworkers. FEHA, however, does authorize an employer to terminate or refuse to hire an employee who poses an actual threat of harm to others due to a disability . . . ." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 169 [125 Cal.Rptr.3d 1] [idle threats against coworkers do not disqualify employee from job, but rather may provide legitimate, nondiscriminatory reason for discharging employee].)

- "The employer has the burden of proving the defense of the threat to the health and safety of other workers by a preponderance of the evidence." (*Raytheon Co. v. Fair Employment & Housing Com.* (1989) 212 Cal.App.3d 1242, 1252 [261 Cal.Rptr. 197].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1045–1048

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act* (FEHA), ¶¶ 9:2297, 2297.1, 9:2402, 9:2402.1 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.111

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.97[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.54, 115.104 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:86 (Thomson Reuters)

2545. Disability Discrimination—Affirmative Defense—Undue Hardship

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[*Name of defendant***] claims that accommodating [***name of plaintiff***]'s disability would create an undue hardship to the operation of [his/her/** *nonbinary pronoun***its] business. To succeed on this defense, [***name of defendant***] must prove that [an] accommodation[s] would create an undue hardship because it would be significantly difficult or expensive, in light of the following factors:**

a. The nature and cost of the accommodation[s];

b. [*Name of defendant***]'s ability to pay for the accommodation[s];**

c. The type of operations conducted at the facility;

d. The impact on the operations of the facility;

e. The number of [*name of defendant***]'s employees and the relationship of the employees' duties to one another;**

f. The number, type, and location of [*name of defendant***]'s facilities; and**

g. The administrative and financial relationship of the facilities to one another.

New September 2003; Revised November 2019, May 2020

Directions for Use

The issue of whether undue hardship is a true affirmative defense or whether the defendant only has the burden of coming forward with the evidence of hardship as a way of negating the element of plaintiff's case concerning the reasonableness of an accommodation appears to be unclear. (See *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 733 [214 Cal.Rptr.3d 113].)

For an instruction in the religious creed context, see CACI No. 2561, *Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship*.

Sources and Authority

- Employer Duty to Provide Reasonable Accommodation. Government Code section 12940(m).
- "Undue Hardship" Defined. Government Code section 12926(u).
- " 'Undue hardship' means 'an action requiring significant difficulty or expense, when considered in light of the following factors: [¶] (1) The nature and cost of the accommodation needed. [¶] (2) The overall financial resources of the

facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility. [¶] (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities. [¶] (4) The type of operations, including the composition, structure, and functions of the workforce of the entity. [¶] (5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.' (§ 12926, subd. (u).) ' "Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis" ' and 'is a multi-faceted, fact-intensive inquiry.' " (*Atkins, supra*, 8 Cal.App.5th at p. 733.)

- "[U]nder California law and the instructions provided to the jury, an employer must do more than simply assert that it had economic reasons to reject a plaintiff's proposed reassignment to demonstrate undue hardship. An employer must show *why* and *how* asserted economic reasons would affect its ability to provide a particular accommodation." (*Atkins, supra,* 8 Cal.App.5th at p. 734, original italics, internal citation omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2250, 9:2345, 9:2366, 9:2367 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[4][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.35, 115.54, 115.100 (Matthew Bender)

2546. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

[*Name of plaintiff***] contends that [***name of defendant***] failed to engage in a good-faith interactive process with [him/her/***nonbinary pronoun***] to determine whether it would be possible to implement effective reasonable accommodations so that [***name of plaintiff***] [***insert job requirements requiring accommodation***]. In order to establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**
2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/ applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**
3. **That [***name of plaintiff***] had [a] [***select term to describe basis of limitations, e.g., physical condition***] that was known to [***name of defendant***];**
4. **That [***name of plaintiff***] requested that [***name of defendant***] make reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., physical condition***] so that [he/she/***nonbinary pronoun***] would be able to perform the essential job requirements;**
5. **That [***name of plaintiff***] was willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she/***nonbinary pronoun***] would be able to perform the essential job requirements;**
6. **That [***name of defendant***] failed to participate in a timely good-faith interactive process with [***name of plaintiff***] to determine whether reasonable accommodation could be made;**
7. **[That [***name of defendant***] could have made a reasonable accommodation when the interactive process should have taken place;]**
8. **That [***name of plaintiff***] was harmed; and**
9. **That [***name of defendant***]'s failure to engage in a good-faith interactive process was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2007; Revised April 2009, December 2009, May 2022

Directions for Use

In elements 3 and 4, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Modify elements 3 and 4, as necessary, if the employer perceives the employee to have a disability. (See *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61, fn. 21 [43 Cal.Rptr.3d 874].)

In element 4, specify the position at issue and the reason why some reasonable accommodation was needed. In element 5, you may add the specific accommodation requested, though the focus of this cause of action is on the failure to discuss, not the failure to provide.

For an instruction on a cause of action for failure to make reasonable accommodation, see CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*. For an instruction defining "reasonable accommodation," see CACI No. 2542, *Disability Discrimination—"Reasonable Accommodation" Explained*.

Bracketed element 7 reflects that there is a split of authority as to whether the employee must also prove that a reasonable accommodation was available. (Compare *Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 87 [273 Cal.Rptr.3d 312] ["the availability of a reasonable accommodation is an essential element of an interactive process claim"] and *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute] with *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837] [if the employer's failure to participate in good faith causes a breakdown in the interactive process, liability follows]; see *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018–1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict].) See also verdict form CACI No. VF-2513, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*.

Sources and Authority

- Good-Faith Interactive Process. Government Code section 12940(n).
- Federal Interpretive Guidance Incorporated. Government Code section 12926.1(e).
- Interactive Process. The Interpretive Guidance on title I of the Americans With

Disabilities Act, title 29 Code of Federal Regulations Part 1630 Appendix.

- An employee may file a civil action based on the employer's failure to engage in the interactive process. (*Claudio, supra*, 134 Cal.App.4th at p. 243.)
- "Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith." (*Gelfo, supra*, 140 Cal.App.4th at p. 54, internal citations omitted.)
- "While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 242 [206 Cal.Rptr.3d 841].)
- "FEHA requires an informal process with the employee to attempt to identify reasonable accommodations, not necessarily ritualized discussions." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 379 [184 Cal.Rptr.3d 9].)
- "The point of the interactive process is to find reasonable accommodation for a disabled employee, or an employee regarded as disabled by the employer, in order to *avoid* the employee's termination. Therefore, a pretextual termination of a perceived-as-disabled employee's employment in lieu of providing reasonable accommodation or engaging in the interactive process does not provide an employer a reprieve from claims for failure to accommodate and failure to engage in the interactive process." (*Moore, supra*, 248 Cal.App.4th at pp. 243–244, original italics.)
- "FEHA's reference to a 'known' disability is read to mean a disability of which the employer has become aware, whether because it is obvious, the employee has brought it to the employer's attention, it is based on the employer's own perception—mistaken or not—of the existence of a disabling condition or, perhaps as here, the employer has come upon information indicating the presence of a disability." (*Gelfo, supra*, 140 Cal.App.4th at p. 61, fn. 21.)
- "Typically, the employee must initiate the process 'unless the disability and resulting limitations are obvious.' " (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1169 [217 Cal.Rptr.3d 258].)
- "Contrary to [employer's] contention (which the trial court accepted), it is not necessarily sufficient for an employer merely to grant the employee each accommodation she requests. ' "[T]he employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation *or* where the employer is aware that the initial accommodation is failing and further accommodation is needed." ' Put differently, while an employer need not read an employee's mind or provide accommodations of which it is unaware, when an

employer *is* aware of a further reasonable accommodation that is needed, the employer has a duty to consider that accommodation even if the employee does not explicitly request it." (*Lin v. Kaiser Foundation Hospitals* (2023) 88 Cal.App.5th 712, 728 [304 Cal.Rptr.3d 820], internal citation omitted, original italics.)

- "Once initiated, the employer has a continuous obligation to engage in the interactive process in good faith. 'Both employer and employee have the obligation "to keep communications open" and neither has "a right to obstruct the process." [Citation.] "Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith." [Citation.]' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 971–972 [181 Cal.Rptr.3d 553].)
- "[Employer] asserts that, if it had a duty to engage in the interactive process, the duty was discharged. 'If anything,' it argues, 'it was [employee] who failed to engage in a good faith interactive process.' [Employee] counters [employer] made up its mind before July 2002 that it would not accommodate [employee]'s limitations, and nothing could cause it reconsider that decision. Because the evidence is conflicting and the issue of the parties' efforts and good faith is factual, the claim is properly left for the jury's consideration." (*Gelfo, supra*, 140 Cal.App.4th at p. 62, fn. 23.)
- "None of the legal authorities that [defendant] cites persuades us that the Legislature intended that after a reasonable accommodation is granted, the interactive process continues to apply in a failure to accommodate context. . . . To graft an interactive process intended to apply to the determination of a reasonable accommodation onto a situation in which an employer failed to provide a reasonable, agreed-upon accommodation is contrary to the apparent intent of the FEHA and would not support the public policies behind that provision." (*A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 464 [100 Cal.Rptr.3d 449].)
- "[T]he verdicts on the reasonable accommodations issue and the interactive process claim are not inconsistent. They involve separate causes of action and proof of different facts. Under FEHA, an employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability. 'An employee may file a civil action based on the employer's failure to engage in the interactive process.' Failure to engage in this process is a separate FEHA violation independent from an employer's failure to provide a reasonable disability accommodation, which is also a FEHA violation. An employer may claim there were no available reasonable accommodations. But if it did not engage in a good faith interactive process, 'it cannot be known whether an alternative job would have been found.' The interactive process determines which accommodations are required. Indeed, the interactive process

could reveal solutions that neither party envisioned." (*Wysinger, supra*, 157 Cal.App.4th at pp. 424–425, internal citations omitted.)

- "We disagree . . . with *Wysinger's* construction of section 12940(n). We conclude that the availability of a reasonable accommodation (i.e., a modification or adjustment to the workplace that enables an employee to perform the essential functions of the position held or desired) is necessary to a section 12940(n) claim. [¶] Applying the burden of proof analysis in *Green*, *supra*, 42 Cal.4th 254, we conclude the burden of proving the availability of a reasonable accommodation rests on the employee." (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at pp. 984–985.)
- "We synthesize *Wysinger, Nadaf-Rahrov*, and *Claudio* with our analysis of the law as follows: To prevail on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because ' " '[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. . . .' " ' However, as the *Nadaf-Rahrov* court explained, once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the interactive process should have produced: 'Section 12940[, subdivision](n), which requires proof of failure to engage in the interactive process, is the appropriate cause of action where the employee is unable to identify a specific, available reasonable accommodation while in the workplace and the employer fails to engage in a good faith interactive process to help identify one, but the employee is able to identify a specific, available reasonable accommodation through the litigation process.' " (*Scotch, supra*, 173 Cal.App.4th at pp. 1018–1019.)
- "Well-reasoned precedent supports [defendant's] argument that, in order to succeed on a cause of action for failure to engage in an interactive process, 'an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred.' " (*Shirvanyan, supra,* 59 Cal.App.5th at p. 96.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1048

Chin, et al., California Practice Guide: Employment Litigation, Ch. 9-C, *Disability Discrimination—California Fair Employment and Housing Act (FEHA)*, ¶¶ 9:2280–9:2285, 9:2345–9:2347 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[3][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.35[1][a] (Matthew Bender)

1 California Civil Practice: Employment Litigation, § 2:50 (Thomson Reuters)

2547. Disability-Based Associational Discrimination—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/***nonbinary pronoun***] based on [his/her/***nonbinary pronoun***] association with a person with a disability. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**
2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/ applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**
3. **That [***name of plaintiff***] was [***specify basis of association or relationship, e.g., the brother of [name of associate]***], who had [a] [***e.g., physical condition***];**
4. [**That [***name of associate***]'s [***e.g., physical condition***] was costly to [***name of defendant***] because [***specify reason, e.g., [name of associate] was covered under [plaintiff]'s employer-provided health care plan***];]

   [or]

   [That [*name of defendant***] feared [***name of plaintiff***]'s association with [***name of associate***] because [***specify, e.g., [name of associate] has a disability with a genetic component and [name of plaintiff] may develop the disability as well***];]**

   [or]

   [That [*name of plaintiff***] was somewhat inattentive at work because [***name of associate***]'s [***e.g., physical condition***] requires [***name of plaintiff***]'s attention, but not so inattentive that to perform to [***name of defendant***]'s satisfaction [***name of plaintiff***] would need an accommodation;]**

   [or]

   [[*Specify other basis for associational discrimination***];]**
5. **That [***name of plaintiff***] was able to perform the essential job duties;**
6. **[That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];]**

   [*or***]**

   [That [*name of defendant***] subjected [***name of plaintiff***] to an**

adverse employment action;]

[*or***]**

[That [*name of plaintiff***] was constructively discharged;]**

7. **That [***name of plaintiff***]'s association with [***name of associate***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**
8. **That [***name of plaintiff***] was harmed; and**
9. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

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*New December 2014; Revised May 2017, May 2020, November 2023, May 2024**

Directions for Use

Give this instruction if plaintiff claims that the plaintiff was subjected to an adverse employment action because of the plaintiff's association with a person with a disability or perceived to have a disability. Discrimination based on an employee's association with a person who is (or is perceived to be) disabled is an unlawful employment practice under the FEHA. (See Gov. Code, § 12926(o).)

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(b)–(h), (j), (k).)

Select a term to use throughout to describe the source of the person's disability. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Three versions of disability-based associational discrimination have been recognized, called "expense," "disability by association," and "distraction." (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655–660 [163 Cal.Rptr.3d 392] [claim for "disability-based associational discrimination" adequately pled].) Element 4 sets forth options for the three versions, which are illustrative rather than exhaustive; therefore, an "other" option is provided. (See *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1042 [207 Cal.Rptr.3d 120].)

An element of a disability discrimination case is that the plaintiff must be otherwise qualified to do the job, with or without reasonable accommodation. (*Green v. State*

of California (2007) 42 Cal.4th 254, 262 [64 Cal.Rptr.3d 390, 165 P.3d 118] (see element 5).) However, the FEHA does not expressly require reasonable accommodation for association with a person with a disability. (Gov. Code, § 12940(m) [employer must reasonably accommodate applicant or employee].) Nevertheless, one court has suggested that such a requirement may exist, without expressly deciding the issue. (See *Castro-Ramirez, supra*, 2 Cal.App.5th at pp. 1038–1039.) A reference to reasonable accommodation may be added to element 5 if the court decides to impose this requirement.

Read the first option for element 6 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if the existence of an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 6 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 7 if either the second or third option is included for element 4.

Element 7 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; *Castro-Ramirez, supra*, 2 Cal.App.5th at p. 1037; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

If the question of whether the associate has a disability is disputed, consider giving special instructions defining "medical condition," "mental disability," and "physical disability." (See Gov. Code, § 12926(i), (j), (m) [defining "medical condition," "mental disability," and "physical disability"]; see also Cal. Code Regs., tit. 2, § 11065.)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Association With Person Who Has or Is Perceived to Have a Disability Protected. Government Code section 12926(o).
- " 'Three types of situation are, we believe, within the intended scope of the rarely litigated . . . association section. We'll call them "expense," "disability by association," and "distraction." They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ("expense") his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ("disability by association") the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component

and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.' " (*Rope, supra*, 220 Cal.App.4th at p. 657.)

- "We agree with *Rope* [*supra*] that *Larimer* [*Larimer v. International Business Machines Corp.* (7th Cir. 2004) 370 F.3d 698] provides an illustrative, rather than an exhaustive, list of the kinds of circumstances in which we might find associational disability discrimination. The common thread among the *Larimer* categories is simply that they are instances in which the 'employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person.' As we discuss above, this is an element of a plaintiff's prima facie case—that the plaintiff's association with a disabled person was a substantial motivating factor for the employer's adverse employment action. *Rope* held the alleged facts in that case could give rise to an inference of such discriminatory motive. Our facts do not fit neatly within one of the *Larimer* categories either, but a jury could reasonably infer the requisite discriminatory motive." (*Castro-Ramirez, supra*, 2 Cal.App.5th at p. 1042, internal citation omitted.)
- " '[A]n employer who discriminates against an employee because of the latter's association with a disabled person is liable even if the motivation is purely monetary. But if the disability plays no role in the employer's decision . . . then there is no *disability* discrimination.' " (*Rope, supra*, 220 Cal.App.4th at p. 658, original italics.)
- "A prima facie case of disability discrimination under FEHA requires a showing that (1) the plaintiff suffered from a disability, (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation, and (3) the plaintiff was subjected to adverse employment action because of the disability. Adapting this [disability discrimination] framework to the associational discrimination context, the 'disability' from which the plaintiff suffers is his or her association with a disabled person. . . . [T]he disability must be a substantial factor motivating the employer's adverse employment action." (*Castro-Ramirez, supra*, 2 Cal.App.5th at p. 1037.)
- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra*, 56 Cal.4th at p. 232, original italics.)
- "We do not suggest that discrimination must be alone sufficient to bring about an

employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause." (*Harris, supra*, 56 Cal.4th at p. 229.)

- "[W]hen section 12940, subdivision (m) requires employers to reasonably accommodate 'the known physical . . . disability of an applicant or employee,' read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person." (*Castro-Ramirez, supra*, 2 Cal.App.5th at pp. 1038–1039.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, California Fair Employment And Housing Act (FEHA), ¶¶ 9:2213–9:2215 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2], [4] (Matthew Bender)

2548. Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing (Gov. Code, § 12927(c)(1))

[*Name of plaintiff***] claims that [***name of defendant***] refused to reasonably accommodate [his/her/***nonbinary pronoun***] [***select term to describe basis of limitations, e.g., physical disability***] as necessary to afford [him/her/***nonbinary pronoun***] an equal opportunity to use and enjoy a dwelling. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [***specify defendant's source of authority to provide housing, e.g., owner***] of [a/an] [***specify nature of housing at issue, e.g., apartment building***];**
2. **That [***name of plaintiff***] [sought to rent/was living in/[***specify other efforts to obtain housing***]] the [***e.g., apartment***];**
3. **That [***name of plaintiff***] had [a history of having] [a] [***e.g., physical disability***] [that limited [***insert major life activity***]];**
4. **That [***name of defendant***] knew of, or should have known of, [***name of plaintiff***]'s disability;**
5. **That in order to afford [***name of plaintiff***] an equal opportunity to use and enjoy the [***e.g., apartment***], it was necessary to [***specify accommodation required***];**
6. **That it was reasonable to [***specify accommodation***];**
7. **That [***name of defendant***] refused to make this accommodation.**

New May 2017; Revised May 2020

Directions for Use

This instruction is for use in a case alleging discrimination in housing based on a failure to reasonably accommodate a disability. Under the Fair Employment and Housing Act, "discrimination" includes the "refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling." (Gov. Code, § 12927(c)(1).)

In the introductory paragraph, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes." Use the term in element 3.

In element 2, if the plaintiff encountered a barrier before actually submitting an

application, such as discovering a policy that would make it impossible to live in the unit, specify what the plaintiff did to obtain the housing.

In element 3, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

Modify element 3 if the plaintiff was not actually disabled or had a history of disability, but alleges denial of accommodation because the plaintiff was perceived to be disabled or associated with someone who has, or is perceived to have, a disability. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

In element 5, explain the accommodation in rules, policies, practices that is alleged to be needed.

Sources and Authority

- "Discrimination" Defined Regarding Housing Disability Accommodations. Government Code section 12927(c)(1).
- "Disability" Defined for Housing Discrimination. Government Code section 12955.3.
- "Housing" Defined. Government Code section 12927(d).
- " 'FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination.' In other words, the FHA provides a minimum level of protection that FEHA may exceed. Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [18 Cal.Rptr.3d 669], internal citations omitted.)
- "[T]he basic principles applicable in employment cases should also apply in the housing context." (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 782 [64 Cal.Rptr.2d 301].)
- "In order to establish discrimination based on a refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this accommodation." (*Auburn Woods I Homeowners Assn., supra*, 121 Cal.App.4th at p.1592.)
- "FEHA prohibits, as unlawful discrimination, a 'refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.' 'In order to establish discrimination based on a

refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this accommodation.' " (*Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1051 [188 Cal.Rptr.3d 537], internal citation omitted.)

- "We note that, currently, section 12955.3 explicitly states that 'disability' includes 'any physical or mental disability as defined in Section 12926.' That statute in turn defines 'mental disability' to include "any mental or psychological disorder or condition . . . that limits a major life activity', that is, 'makes the achievement of the major life activity difficult.' 'Major life activities' is to be broadly construed, and includes 'physical, mental, and social activities and working.' " (*Auburn Woods I Homeowners Assn., supra*, 121 Cal.App.4th at p. 1592, internal citations omitted.)
- " 'If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.' This obligation to 'open a dialogue' with a party requesting a reasonable accommodation is part of an interactive process in which each party seeks and shares information." (*Auburn Woods I Homeowners Assn., supra*, 121 Cal.App.4th at p. 1598, internal citation omitted.)
- "This evidence established the requisite causal link between the [defendant]'s no-pets policy and the interference with the [plaintiffs]' use and enjoyment of their condominium." (*Auburn Woods I Homeowners Assn., supra*, 121 Cal.App.4th at p. 1593.)
- "When the reasons for a delay in offering a reasonable accommodation are subject to dispute, the matter is left for the trier of fact to resolve. The administrative law judge properly characterized this lengthy delay as a refusal to provide reasonable accommodation." (*Auburn Woods I Homeowners Assn., supra*, 121 Cal.App.4th at p. 1599, internal citation omitted.)
- "We reiterate that the FEHC did not rule that companion pets are always a reasonable accommodation for individuals with mental disabilities. Each inquiry is fact specific and requires a case-by-case determination." (*Auburn Woods I Homeowners Assn., supra*, 121 Cal.App.4th at p. 1593.)

Secondary Sources

Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1073–1076

7 California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement*, § 214.41 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.14 (Matthew Bender)

2549. Disability Discrimination—Refusal to Permit Reasonable Modification to Housing Unit (Gov. Code, § 12927(c)(1))

[*Name of plaintiff***] claims that [***name of defendant***] refused to permit reasonable modifications of [***name of plaintiff***]'s [***specify type of housing, e.g., apartment***] necessary to afford [***name of plaintiff***] full enjoyment of the premises. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [***specify defendant's source of authority to provide housing, e.g., owner***] of [a/an] [***e.g., apartment building***];**
2. **That [***name of plaintiff***] [sought to rent/was living in/[***specify other efforts to obtain housing***]] the [***e.g., apartment***];**
3. **That [***name of plaintiff***] had [a history of having] [a] [***select term to describe basis of limitations, e.g., physical disability***] [that limited [***insert major life activity***]];**
4. **That [***name of defendant***] knew of, or should have known of, [***name of plaintiff***]'s disability;**
5. **That in order to afford [***name of plaintiff***] an equal opportunity to use and enjoy the [***e.g., apartment***], it was necessary to [***specify modification(s) required***];**
6. **That it was reasonable to expect [***name of defendant***] to [***specify modification(s) required***];**
7. **That [***name of plaintiff***] agreed to pay for [this/these] modification[s]; [and]**
8. **[That [***name of plaintiff***] agreed that [he/she/***nonbinary pronoun***] would restore the interior of the unit to the condition that existed before the modifications, other than for reasonable wear and tear; and]**
9. **That [***name of defendant***] refused to permit [this/these] modification[s].**

*New May 2017; Revised May 2020, November 2023**

Directions for Use

This instruction is for use in a case alleging discrimination in housing based on a failure to permit reasonable modifications to a living unit to accommodate a disability. Under the Fair Employment and Housing Act, "discrimination" includes the refusal to permit, at the expense of the person with a disability, reasonable

modifications of existing premises occupied or to be occupied by the person with a disability, if the modifications may be necessary to afford the person full enjoyment of the premises. (Gov. Code, § 12927(c)(1).)

In element 2, if the plaintiff encountered a barrier before actually submitting an application, such as discovering a policy that would make it impossible to live in the unit, specify what the plaintiff did to obtain the housing.

In element 3, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

In element 3, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

Modify element 3 if the plaintiff did not have a disability or a history of a disability, but alleges denial of accommodation because the plaintiff was perceived to have a disability or associated with someone who has, or is perceived to have, a disability. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

In element 5, specify the modifications that are alleged to be needed.

Element 7 may not apply if section 504 of the Rehabilitation Act of 1973 (applicable to federal subsidized housing) or Title II of the Americans With Disabilities Act requires the landlord to incur the cost of reasonable modifications.

In the case of a rental, the landlord may, if it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification (other than for reasonable wear and tear). (Gov. Code, § 12927(c)(1).) Include element 8 if the premises to be physically altered is a rental unit, and the plaintiff agreed to restoration. If the parties dispute whether restoration is reasonable, presumably the defendant would have to prove reasonableness. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that s/he is asserting].)

Sources and Authority

- Discrimination Defined Regarding Housing Disability Accommodations. Government Code section 12927(c)(1).
- "Disability" Defined for Housing Discrimination. Government Code section 12955.3.
- "Housing" Defined. Government Code section 12927(d).
- " 'FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination.' In other words, the FHA provides a minimum level of

protection that FEHA may exceed. Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [18 Cal.Rptr.3d 669], internal citations omitted.)

- "[T]he basic principles applicable in employment cases should also apply in the housing context." (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 782 [64 Cal.Rptr.2d 301].)
- "We note that, currently, section 12955.3 explicitly states that 'disability' includes 'any physical or mental disability as defined in Section 12926.' That statute in turn defines 'mental disability' to include "any mental or psychological disorder or condition . . . that limits a major life activity', that is, 'makes the achievement of the major life activity difficult.' 'Major life activities' is to be broadly construed, and includes 'physical, mental, and social activities and working.' " (*Auburn Woods I Homeowners Assn., supra*, 121 Cal.App.4th at p. 1592, internal citations omitted.)
- " 'If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.' This obligation to 'open a dialogue' with a party requesting a reasonable accommodation is part of an interactive process in which each party seeks and shares information." (*Auburn Woods I Homeowners Assn., supra*, 121 Cal.App.4th at p. 1598, internal citation omitted.)

Secondary Sources

Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Modifications Under the Fair Housing Act (March 5, 2008), www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1063

7 California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement*, §§ 214.41, 214.43 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.14 (Matthew Bender)

2550–2559. Reserved for Future Use

2560. Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12940(*l*))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/***nonbinary pronoun***] by failing to reasonably accommodate [his/her/***nonbinary pronoun***] religious [belief/observance]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**
2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***other covered relationship to defendant***]];**
3. **That [***name of plaintiff***] has a sincerely held religious belief that [***describe religious belief, observance, or practice***];**
4. **That [***name of plaintiff***]'s religious [belief/observance] conflicted with a job requirement;**
5. **That [***name of defendant***] knew of the conflict between [***name of plaintiff***]'s religious [belief/observance] and the job requirement;**
6. [**That [***name of defendant***] did not explore available reasonable alternatives of accommodating [***name of plaintiff***], including excusing [***name of plaintiff***] from duties that conflict with [***name of plaintiff***]'s religious [belief/observance] or permitting those duties to be performed at another time or by another person, or otherwise reasonably accommodate [***name of plaintiff***]'s religious [belief/observance];]

   [***or***]

   [**That [***name of defendant***] [terminated/refused to hire] [***name of plaintiff***] in order to avoid having to accommodate [***name of plaintiff***]'s religious [belief/observance];]**
7. **That [***name of plaintiff***]'s failure to comply with the conflicting job requirement was a substantial motivating reason for**

   [[*name of defendant***]'s decision to [discharge/refuse to hire/[***specify other adverse employment action***]] [***name of plaintiff***];]**

   [or]

   [[*name of defendant***]'s subjecting [him/her/***nonbinary pronoun***] to an adverse employment action;]**

   [or]

[[his/her/*nonbinary pronoun*] constructive discharge;]

8. **That [*name of plaintiff*] was harmed; and**
9. **That [*name of defendant*]'s failure to reasonably accommodate [*name of plaintiff*]'s religious [belief/observance] was a substantial factor in causing [his/her/*nonbinary pronoun*] harm.**

A reasonable accommodation is one that eliminates the conflict between the religious practice and the job requirement.

If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith.

New September 2003; Revised June 2012, December 2012, June 2013, November 2019, May 2020

Directions for Use

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Regulations provide that refusing to hire an applicant or terminating an employee in order to avoid the need to accommodate a religious practice constitutes religious creed discrimination. (Cal. Code Regs., tit. 2, § 11062.) Give the second option for element 6 if the plaintiff claims that the employer terminated or refused to hire the plaintiff to avoid a need for accommodation.

Element 7 requires that the plaintiff's failure to comply with the conflicting job requirement be a substantial motivating reason for the employer's adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Read the first option if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 7 and also give CACI No. 2510, *"Constructive Discharge" Explained.*

Federal courts construing Title VII of the Civil Rights Act of 1964 have held that the threat of an adverse employment action is a violation if the employee acquiesces to the threat and foregoes religious observance. (See, e.g., *EEOC v. Townley Engineering & Mfg. Co.* (9th Cir.1988) 859 F.2d 610, 614 fn. 5.) While no case has been found that construes the FEHA similarly, element 7 may be modified if the court agrees that this rule applies. In the first option, replace "decision to" with "threat to." Or in the second option, "subjecting [*name of plaintiff*] to" may be replaced with "threatening [*name of plaintiff*] with."

Sources and Authority

- Religious Accommodation Required Under Fair Employment and Housing Act. Government Code section 12940(*l*).
- Scope of Religious Protection. Government Code section 12926(p).
- Scope of Religious Protection. Cal. Code Regs., tit. 2, § 11060(b).
- Reasonable Accommodation and Undue Hardship. Cal. Code Regs., tit. 2, § 11062.
- "In evaluating an argument the employer failed to accommodate an employee's religious beliefs, the employee must establish a prima facie case that he or she had a bona fide religious belief, of which the employer was aware, that conflicts with an employment requirement . . . . Once the employee establishes a prima facie case, then the employer must establish it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370 [58 Cal.Rptr.2d 747], internal citation omitted.)
- "Any reasonable accommodation is sufficient to meet an employer's obligations. However, the employer need not adopt the most reasonable accommodation nor must the employer accept the remedy preferred by the employee. The reasonableness of the employer's efforts to accommodate is determined on a case by case basis . . . . '[O]nce it is determined that the employer has offered a reasonable accommodation, the employer need not show that each of the employee's proposed accommodations would result in undue hardship.' '[W]here the employer has already reasonably accommodated the employee's religious needs, the . . . inquiry [ends].' " (*Soldinger, supra,* 51 Cal.App.4th at p. 370, internal citations omitted.)
- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris*, *supra*, 56 Cal.4th at p. 232, original italics.)
- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause." (*Harris*, *supra*, 56 Cal.4th at p. 229.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 967, 1028, 1052, 1054

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:151, 7:215, 7:305, 7:610–7:611, 7:631–7:634, 7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35[d], 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:71–2:73 (Thomson Reuters)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Religion, pp. 219–224, 226–227; *id.* (2000 supp.) at pp. 100–101

2561. Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship (Gov. Code, §§ 12940(*l*)(1), 12926(u))

[*Name of defendant***] claims that accommodating [***name of plaintiff***]'s [religious belief/religious observance] would create an undue hardship to the operation of [his/her/***nonbinary pronoun***/its] business.**

To succeed on this defense, [*name of defendant***] must prove that [he/she/***nonbinary pronoun***/it] considered reasonable alternative options for accommodating the [religious belief/religious observance], including (1) excusing [***name of plaintiff***] from duties that conflict with [his/her/***nonbinary pronoun***] [religious belief/religious observance][,] [or] (2) permitting those duties to be performed at another time or by another person[, or (3) [***specify other reasonable accommodation***]].**

If you decide that [*name of defendant***] considered but did not adopt [a] reasonable accommodation[s], you must then decide if the accommodation[s] would have created an undue hardship because it would be significantly difficult or expensive, in light of the following factors:**

a. **The nature and cost of the accommodation[s];**

b. **[***Name of defendant***]'s ability to pay for the accommodation[s];**

c. **The type of operations conducted at the facility;**

d. **The impact on the operations of the facility;**

e. **The number of [***name of defendant***]'s employees and the relationship of the employees' duties to one another;**

f. **The number, type, and location of [***name of defendant***]'s facilities; and**

g. **The administrative and financial relationship of the facilities to one another.**

New September 2003; Revoked December 2012; Restored and Revised June 2013; Revised November 2019, May 2020, May 2021

Directions for Use

For religious beliefs and observances, the statute requires the employer (or other covered entity) to demonstrate that the employer explored certain means of accommodating the plaintiff, including two specific possibilities: (1) excusing the plaintiff from duties that conflict with the plaintiff's religious belief or observance or (2) permitting those duties to be performed at another time or by another person.

(Gov. Code, § 12940(*l*)(1).) If there is evidence of another reasonable alternative accommodation, include it as a third means of accommodating the plaintiff.

Sources and Authority

- Religious Accommodation Required Under Fair Employment and Housing Act. Government Code section 12940(*l*)(1).
- "Undue Hardship" Defined. Government Code section 12926(u).
- "If the employee proves a prima facie case and the employer fails to initiate an accommodation for the religious practices, the burden is then on the employer to prove it will incur an undue hardship if it accommodates that belief. '[T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.' . . ." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 371 [58 Cal.Rptr.2d 747], internal citations omitted.)
- "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far. [¶] . . . [¶] Alternatively, the Court of Appeals suggested that [the employer] could have replaced [plaintiff] on his Saturday shift with other employees through the payment of premium wages . . . . To require [the employer] to bear more than a de minimus cost . . . is an undue hardship. Like abandonment of the seniority system, to require [the employer] to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." (*TWA v. Hardison* (1977) 432 U.S. 63, 81, 84 [97 S.Ct. 2264, 53 L.Ed.2d 113], footnote omitted.)
- "We hold that showing 'more than a *de minimis* cost,' as that phrase is used in common parlance, does not suffice to establish 'undue hardship' under Title VII. [*TWA v.*] *Hardison* cannot be reduced to that one phrase. In describing an employer's 'undue hardship' defense, *Hardison* referred repeatedly to 'substantial' burdens, and that formulation better explains the decision. We therefore . . . understand *Hardison* to mean that 'undue hardship' is shown when a burden is substantial in the overall context of an employer's business. This fact-specific inquiry comports with both *Hardison* and the meaning of 'undue hardship' in ordinary speech." (*Groff v. DeJoy* (2023) 600 U.S. 447 [143 S.Ct. 2279, 2294, 216 L.Ed.2d 1041], original italics, internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1025, 1026

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment and Housing Act*, ¶¶ 7:151, 7:215, 7:305, 7:610, 7:631, 7:640–7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* §§ 115.35[2][a], –[c], 115.54[4], 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:71–2:73 (Thomson Reuters)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed.) Religion, pp. 227–234 (2000 supp.) at pp. 100–105

2562–2569. Reserved for Future Use

2570. Age Discrimination—Disparate Treatment—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/***nonbinary pronoun***] because of [his/her/***nonbinary pronoun***] age. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**
2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/ applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**
3. **[That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];]**

   [or]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**
4. **That [***name of plaintiff***] was age 40 or older at the time of the [discharge/[***other adverse employment action***]];**
5. **That [***name of plaintiff***]'s age was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/ [***other adverse employment action***]] [***name of plaintiff***]/conduct];**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2011; Revised June 2012, June 2013, May 2020

Directions for Use

Read the first option for element 3 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI No. 2510, *"Constructive Discharge" Explained.* Select "conduct" in element 5 if the either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the

discriminatory animus based on age and the adverse action (see element 5), and there must be a causal link between the adverse action and the damage (see element 7). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Element 5 requires that age discrimination be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Under the *McDonnell Douglas* (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]) process for allocating burdens of proof and producing evidence, which is used in California for disparate-treatment cases under FEHA, the employee must first present a prima facie case of discrimination. The burden then shifts to the employer to produce evidence of a nondiscriminatory reason for the adverse action. At that point, the burden shifts back to the employee to show that the employer's stated reason was in fact a pretext for a discriminatory act.

Whether or not the employee has met the employee's prima facie burden, and whether or not the employer has rebutted the employee's prima facie showing, are questions of law for the trial court, not questions of fact for the jury. (See *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].) In other words, by the time that the case is submitted to the jury, the plaintiff has already established a prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision. The *McDonnell Douglas* shifting burden drops from the case. The jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent or that of the employer's age-neutral reasons for the employment decision. (See *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1118, fn. 5 [94 Cal.Rptr.2d 579]).

Under FEHA, age-discrimination cases require the employee to show that the employee's job performance was satisfactory at the time of the adverse employment action as a part of the employee's prima facie case (see *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 321 [115 Cal.Rptr.3d 453]), even though it is the employer's burden to produce evidence of a nondiscriminatory reason for the action. Poor job performance is the most common nondiscriminatory reason that an employer advances for the action. Even though satisfactory job performance may be an element of the employee's prima facie case, it is not an element that the employee must prove to the trier of fact. Under element 5 and CACI No. 2507, the burden remains with the employee to ultimately prove that age discrimination was a substantial motivating reason for the action. (See *Muzquiz*, *supra*, 79 Cal.App.4th at p. 1119.)

See also the Sources and Authority to CACI No. 2500, *Disparate Treatment—Essential Factual Elements*.

Sources and Authority

- Age Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- "Age" Defined. Government Code section 12926(b).
- Disparate Treatment; Layoffs Based on Salary. Government Code section 12941.
- "In order to make out a prima facie case of age discrimination under FEHA, a plaintiff must present evidence that the plaintiff (1) is over the age of 40; (2) suffered an adverse employment action; (3) was performing satisfactorily at the time of the adverse action; and (4) suffered the adverse action under circumstances that give rise to an inference of unlawful discrimination, i.e., evidence that the plaintiff was replaced by someone significantly younger than the plaintiff." (*Sandell*, *supra*, 188 Cal.App.4th at p. 321.)
- "In other words, '[b]y the time that the case is submitted to the jury, . . . the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision, leaving only the issue of the employer's discriminatory intent for resolution by the trier of fact. Otherwise, the case would have been disposed of as a matter of law for the trial court. That is to say, if the plaintiff cannot make out a prima facie case, the employer wins as a matter of law. If the employer cannot articulate a nondiscriminatory reason for the adverse employment decision, the plaintiff wins as a matter of law. In those instances, no fact-finding is required, and the case will never reach a jury. [¶] In short, if and when the case is submitted to the jury, the construct of the shifting burden "drops from the case," and the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's race or age-neutral reasons for the employment decision.' " (*Muzquiz*, *supra*, 79 Cal.App.4th at p. 1118, fn. 5.)
- "Because the only issue properly before the trier of fact was whether the [defendant]'s adverse employment decision was motivated by discrimination on the basis of age, the shifting burdens of proof regarding appellant's prima facie case and the issue of legitimate nondiscriminatory grounds were actually irrelevant." (*Muzquiz*, *supra*, 79 Cal.App.4th at p. 1119.)
- "An employee alleging age discrimination must ultimately prove that the adverse employment action taken was based on his or her age. Since direct evidence of such motivation is seldom available, the courts use a system of shifting burdens as an aid to the presentation and resolution of age discrimination cases. That system necessarily establishes the basic framework for reviewing motions for summary judgment in such cases." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1002 [67 Cal.Rptr.2d 483], internal citations omitted.)
- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that

liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris*, *supra*, 56 Cal.4th at p. 232, original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris*, *supra*, 56 Cal.4th at p. 229.)
- "While we agree that a plaintiff must demonstrate some basic level of competence at his or her job in order to meet the requirements of a prima facie showing, the burden-shifting framework established in *McDonnell Douglas* compels the conclusion that any measurement of such competency should, to the extent possible, be based on objective, rather than subjective, criteria. A plaintiff's burden in making a prima facie case of discrimination is not intended to be 'onerous.' Rather, the prima facie burden exists in order to weed out patently unmeritorious claims." (*Sandell*, *supra*, 188 Cal.App.4th at p. 322, internal citations omitted.)
- "A discharge is not 'on the ground of age' within the meaning of this prohibition unless age is a 'motivating factor' in the decision. Thus, ' "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." ' '[A]n employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' " (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 978 [117 Cal.Rptr.2d 647].)
- "[D]ownsizing alone is not necessarily a sufficient explanation, under the FEHA, for the consequent dismissal of an age-protected worker. An employer's freedom to consolidate or reduce its work force, and to eliminate positions in the process, does not mean it may 'use the occasion as a convenient opportunity to get rid of its [older] workers.' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1041–1044

Chin et al., California Practice Guide: Employment Litigation, Ch. 8-B, *California Fair Employment and Housing Act*, ¶¶ 8:740, 8:800 et seq. (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under*

Equal Employment Opportunity Laws, § 41.31 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.43 (Matthew Bender)

2571–2579. Reserved for Future Use

2580. Pregnancy Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12945(a)(3)(A))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate a condition related to [pregnancy/[,/or] childbirth/[,/or] [a related medical condition]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was an employer;**
2. **That [***name of plaintiff***] was an employee of [***name of defendant***];**
3. **That [***name of plaintiff***] had a condition related to [pregnancy/[,/ or] childbirth [,/or] [a related medical condition]];**
4. **That [***name of plaintiff***] requested accommodation of this condition with the advice of a health care provider;**
5. **That [***name of plaintiff***]'s employer refused to provide a reasonable accommodation;**
6. **That [***name of plaintiff***], with the reasonable accommodation, could have performed the essential functions of the job;**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New November 2023

Directions for Use

Although this instruction is titled *Pregnancy Discrimination—Failure to Accommodate—Essential Factual Elements*, the requirement to provide a requested reasonable accommodation because of pregnancy under this provision of FEHA includes pregnancy, childbirth, or any related medical condition. (Gov. Code, § 12945(a)(3)(A).)

For an instruction defining "reasonable accommodation" in this context, see CACI No. 2581, *Pregnancy Discrimination—"Reasonable Accommodation" Explained*.

Sources and Authority

- Pregnancy Accommodation Required Under Fair Employment and Housing Act. Government Code section 12945(a).
- "Condition related to pregnancy, childbirth, or a related medical condition" Defined. Cal. Code Regs., tit. 2, § 11035.
- "Drawing from the statutory language and applicable regulatory law, as well as

pertinent FEHA case law, we conclude a cause of action under section 12945(a)(3)(A) requires proof that: (1) the plaintiff had a condition related to pregnancy, childbirth, or a related medical condition; (2) the plaintiff requested accommodation of this condition, with the advice of her health care provider; (3) the plaintiff's employer refused to provide a reasonable accommodation; and (4) with the reasonable accommodation, the plaintiff could have performed the essential functions of the job." (*Lopez v. La Casa de Las Madres* (2023) 89 Cal.App.5th 365, 370–371 [305 Cal.Rptr.3d 824].)

- "We agree that section 12945 affords important protections to employees affected by pregnancy, over and above the protections of section 12940. These additional protections include a right to up to four months of pregnancy-disability leave, and a right to temporary transfer to a less strenuous job if such a 'transfer can be reasonably accommodated'. Section 12945(a)(3)(A) also protects a right to reasonable accommodation for a condition associated with pregnancy or childbirth, even when this condition does not rise to the level of a formally recognized disability. Section 12945(a)(3)(A) is, in this regard, broader than section 12940(m), which addresses an employer's obligation to accommodate 'disability.' But none of these provisions entitles an employee to a job she cannot perform." (*Lopez, supra,* 89 Cal.App.5th at pp. 381–382, internal citations omitted.)

Secondary Sources

8 Witkin Summary of California Law (11th ed. 2017) Constitutional Law, § 1034

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.22 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, §§ 8.10–8.12 (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *California Fair Employment and Housing Act*, § 43.01 (Matthew Bender)

2581. Pregnancy Discrimination—"Reasonable Accommodation" Explained

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A "reasonable accommodation" is a reasonable change to the work environment or the way a job is usually done that allows an employee with a condition related to [pregnancy/[,/or] childbirth/[,/or] [related conditions]] to perform the essential duties of the job.

Reasonable accommodations may include the following:

a. Changing work schedules;

b. Providing furniture like a stool or chair or modifying equipment or devices;

c. Permitting longer or more frequent breaks;

d. Changing workplace practices or policies;

e. Reassigning the employee temporarily to an open position that is less strenuous or less hazardous;

f. Changing job responsibilities; [or]

g. Providing a reasonable amount of break time and a private space for lactation[./; or]

[h. [*Specify other reasonable accommodation particular to the case***].]**

New November 2023

Directions for Use

Give this instruction to explain "reasonable accommodation" as used in CACI No. 2580, *Pregnancy Discrimination—Failure to Accommodate—Essential Factual Elements*.

Sources and Authority

- Employer Obligation to Make Reasonable Accommodation. Government Code section 12945(a).
- "Reasonable Accommodation" Defined. Government Code section 12926(p).
- "Reasonable Accommodation" Defined. Cal. Code Regs., tit. 2, §§ 11035(s), 11040.

Secondary Sources

8 Witkin Summary of California Law (11th ed. 2017) Constitutional Law, § 1034

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.22 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, §§ 8.10–8.12

(Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *California Fair Employment and Housing Act*, § 43.01 (Matthew Bender)

2582–2599. Reserved for Future Use

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] an [employer/[***other covered entity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of plaintiff***]'s [***protected status***] a substantial motivating reason for [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]] a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [***name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2013, December 2016

Directions for Use

This verdict form is based on CACI No. 2500, *Disparate Treatment—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

Modify question 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because he or she was perceived to be a member, or

associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2501. Disparate Treatment—Affirmative Defense—Bona fide Occupational Qualification (Gov. Code, § 12940(a))

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] an [employer/[***other covered entity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of plaintiff***]'s [***protected status***] a substantial motivating reason for [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was the job requirement regarding [***protected status***] reasonably necessary for the operation of [***name of defendant***]'s business?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, skip questions 6, 7, and 8, and answer question 9.

6. **Did [***name of defendant***] have a reasonable basis for believing that substantially all [***members of protected group***] are unable to safely**

and efficiently perform that job?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip questions 7 and 8, and answer question 9.

7. Was it impossible or highly impractical for [*name of defendant***] to consider whether each [applicant/employee] was able to safely and efficiently perform the job?**

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, skip question 8 and answer question 9.

8. Was it impossible or highly impractical for [*name of defendant***] to rearrange job responsibilities to avoid using [***protected status***] as a job requirement?**

_____ Yes _____ No

If your answer to question 8 is no, then answer question 9. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. Was [*name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]] a substantial factor in causing harm to [***name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2013, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, and CACI No. 2501, *Affirmative Defense—Bona fide Occupational Qualification*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

Modify question 4 if the plaintiff was not actually a member of the protected class, but alleges discrimination because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the damages listed in question 10 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award

prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2502. Disparate Impact (Gov. Code, § 12940(a))

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] an [employer/[***other covered entity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] have [an employment practice of [***describe practice***]/a selection policy of [***describe policy***]] that had a disproportionate adverse effect on [***describe protected group—for example, persons over the age of 40***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Is [***name of plaintiff***] [***protected status***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of defendant***]'s [employment practice/selection policy] a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2502, *Disparate Impact—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2502.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages,

especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories.*

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2503. Disparate Impact (Gov. Code, § 12940(a))—Affirmative Defense—Business Necessity/Job Relatedness—Rebuttal to Business Necessity/Job Relatedness Defense

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We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] an [employer/[***other covered entity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] have [an employment practice of [***describe practice***]/a selection policy of [***describe policy***]] that had a disproportionate adverse effect on [***describe protected group—for example, persons over the age of 40***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Is [***name of plaintiff***] [***protected status***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was the purpose of the [employment practice/selection policy] to operate the business safely and efficiently?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, skip questions 6, 7, and 8, and answer question 9.

6. **Did the [employment practice/selection policy] substantially**

accomplish this business purpose?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip questions 7 and 8, and answer question 9.

7. Was there an alternative [employment practice/selection policy] that would have accomplished the business purpose equally well?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Would this alternative [employment practice/selection policy] have had less adverse impact on [*describe members of protected group—for example, persons over the age of 40***]?**

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. Was [*name of defendant***]'s [employment practice/selection policy] a substantial factor in causing harm to [***name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2502, *Disparate Impact—Essential Factual Elements,* CACI No. 2503, *Affirmative Defense—Business Necessity/Job Relatedness,* and CACI No. 2504, *Disparate Impact—Rebuttal to Business Necessity/Job Relatedness Defense.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2502.

If specificity is not required, users do not have to itemize all the damages listed in question 10 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2504. Retaliation (Gov. Code, § 12940(h))

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [***describe protected activity***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[Did [***name of defendant***] [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***]?]**

   [or]

   [Did [*name of defendant***] engage in conduct that, taken as a whole, materially and adversely affected the terms and conditions of [***name of plaintiff***]'s employment?]**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of plaintiff***]'s [***describe protected activity***] a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***]/conduct]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, August 2007, December 2010, June 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2505, *Retaliation—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Read the second option for question 2 in cases involving a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. Give both options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. Also select "conduct" in question 3 if the second option or both options are included for question 2.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] an employee of [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of alleged harasser*] make unwanted sexual advances to [*name of plaintiff*] or engage in other unwanted verbal or physical conduct of a sexual nature?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Were terms of employment, job benefits, or favorable working conditions made contingent on [*name of plaintiff*]'s acceptance of [*name of alleged harasser*]'s sexual advances or conduct?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **At the time of [his/her/*nonbinary pronoun*] conduct, was [*name of alleged harasser*] a supervisor or agent for [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of alleged harasser*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2015, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2520, *Quid pro quo Sexual Harassment—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Relationships other than employer/employee can be substituted in question number 1, as in element 1 in CACI No. 2520.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages,

especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2506A. Work Environment Harassment—Conduct Directed at Plaintiff—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the harassment severe or pervasive?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Would a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] [or [his/her/*nonbinary pronoun*/its] supervisors or agents] know or should [he/she/*nonbinary pronoun*/it/they] have known of the harassing conduct?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of defendant*] [or [his/her/*nonbinary pronoun*/its] supervisors or agents] fail to take immediate and appropriate corrective action?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021, May 2024

Directions for Use

This verdict form is based on CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521A. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

Modify question 2 if the plaintiff was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*.

This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2506B. Work Environment Harassment—Conduct Directed at Others—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] personally witness harassing conduct that took place in [his/her/*nonbinary pronoun*] immediate work environment?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the harassment severe or pervasive?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Would a reasonable [*describe member of protected group, e.g.,* woman] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [*e.g., women*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you

answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Did [***name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] know or should [he/she/***nonbinary pronoun***/it/they] have known of the harassing conduct?**

   _____ Yes _____ No

   If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. **Did [***name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] fail to take immediate and appropriate corrective action?**

   _____ Yes _____ No

   If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. **Was the harassing conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021, May 2024

Directions for Use

This verdict form is based on CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521B. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2506C. Work Environment Harassment—Sexual Favoritism—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was there sexual favoritism in the work environment?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the sexual favoritism severe or pervasive?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Would a reasonable [*describe member of protected group, e.g.,* woman] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] [or [his/her/*nonbinary pronoun*/its] supervisors or agents] know or should [he/she/*nonbinary pronoun*/it/they] have known of the sexual favoritism?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of defendant*] [or [his/her/*nonbinary pronoun*/its] supervisors or agents] fail to take immediate and appropriate corrective action?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical

pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, December 2016, May 2020, May 2021, November 2021, May 2024

Directions for Use

This verdict form is based on CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2507A. Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of covered entity***]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[2. Was [*name of individual defendant***] an employee of [***name of covered entity***]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. **Was [***name of plaintiff***] subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the harassment severe or pervasive?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Would a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Did [***name of plaintiff***] consider the work environment to be**

hostile, intimidating, offensive, oppressive, or abusive?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of individual defendant***] [participate in/assist/ [or] encourage] the harassing conduct?**

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021, May 2022, May 2024

Directions for Use

This verdict form is based on CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Include optional question 2 only if optional element 2 is included in CACI No. 2522A.

Modify question 3 if the plaintiff was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2507B. Work Environment Harassment—Conduct Directed at Others—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of covered entity***]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[2. **Was [***name of individual defendant***] an employee of [***name of covered entity***]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. **Did [***name of plaintiff***] personally witness harassing conduct that took place in [his/her/***nonbinary pronoun***] immediate work environment?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the harassment severe or pervasive?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Would a reasonable [***describe member of protected group, e.g.,* **woman] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [*e.g., women*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of individual defendant*] [participate in/assist/ [or] encourage] the harassing conduct?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021, May 2022, May 2024

Directions for Use

This verdict form is based on CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Include optional question 2 only if optional element 2 is included in CACI No. 2522B.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2507C. Work Environment Harassment—Sexual Favoritism—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of covered entity***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[2. **Was [***name of individual defendant***] an employee of [***name of covered entity***]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. **Was there sexual favoritism in the work environment?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the sexual favoritism severe or pervasive?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Would a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Did [***name of plaintiff***] consider the work environment to be**

hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of individual defendant***] [participate in/assist/ [or] encourage] the sexual favoritism?**

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical

pain/mental suffering:] **$_____]**

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, December 2014, December 2016, May 2020, May 2021, November 2021, May 2022, May 2024

Directions for Use

This verdict form is based on CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Include optional question 2 only if optional element 2 is included in CACI No. 2522C.

Depending on the facts of the case, other factual scenarios for employer liability can be substituted in question 7, as in element 7 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [an employer/[***other covered entity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] [know that [***name of plaintiff* **had/treat [***name of plaintiff***] as if [he/she/***nonbinary pronoun***] had] [a history of having] [a] [***select term to describe basis of limitations, e.g., physical condition***] [that limited [***insert major life activity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of plaintiff***] able to perform the position's essential job duties without an accommodation?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then skip question 5 and answer question 6. If you answered no, then answer question 5.

5. **Was [***name of plaintiff***] able to perform the position's essential job duties with reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., condition***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Did [***name of defendant***] [discharge/refuse to hire/[***other adverse*

employment action]] [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of plaintiff***]'s [perceived] [history of [a]] [***e.g., physical condition***] a substantial motivating reason for [***name of defendant***]'s decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [*name of defendant***]'s [decision/conduct] a substantial factor in causing harm to [***name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2007, December 2009, June 2010, December 2010, June 2013, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2540. Depending on the facts of the case, other factual scenarios can be substituted in questions 3 and 7, as in elements 3 and 6 of the instruction.

For question 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select "know that [*name of plaintiff*] had." For a perceived disability, select "treat [*name of plaintiff*] as if [he/she/*nonbinary pronoun*] had."

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in question 3. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (*l*) [no requirement that medical condition limit major life activity].)

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual

forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2509. Disability Discrimination—Reasonable Accommodation (Gov. Code, § 12940(m))

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [an employer/[***other covered entity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] have [a] [***select term to describe basis of limitations, e.g., physical condition***] [that limited [***insert major life activity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] know of [***name of plaintiff***]'s [***e.g., physical condition* **[that limited [***insert major life activity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of plaintiff***] able to perform the essential job duties with reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., physical condition***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] fail to provide reasonable accommodation for [*name of plaintiff*]'s [*e.g., physical condition*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of defendant*]'s failure to provide reasonable accommodation a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2009, December 2009, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2541.

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in questions 3 and 4. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (*l*) [no requirement that medical condition limit major life activity].)

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2510. Disability Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship (Gov. Code, § 12940(m))

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [an employer/[***other covered entity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] have [a] [***select term to describe basis of limitations, e.g., physical condition***] [that limited [***insert major life activity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] know of [***name of plaintiff***]'s [***e.g., physical condition***] [that limited [***insert major life activity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of plaintiff***] able to perform the essential job duties with reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., physical condition***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] fail to provide reasonable accommodation for [*name of plaintiff*]'s [*e.g., physical condition*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Would [*name of plaintiff*]'s proposed accommodations have created an undue hardship to the operation of [*name of defendant*]'s business?

_____ Yes _____ No

If your answer to question 7 is no, then answer question 8. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [*name of defendant*]'s failure to provide a reasonable accommodation a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical

pain/mental suffering:] **$_____]**

[d. Future noneconomic loss, including [physical pain/mental suffering:] **$_____]**

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2009, December 2009, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*, and CACI No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship*. If a different affirmative defense is at issue, this form should be tailored accordingly.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2541.

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in questions 3 and 4. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (*l*) [no requirement that medical condition limit major life activity].)

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2511. Religious Creed Discrimination—Failure to Accommodate (Gov. Code, § 12940(*l*))

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [an employer/[***other covered entity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Does [***name of plaintiff***] have a sincerely held religious belief that [***describe religious belief, observance, or practice***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of plaintiff***]'s religious [belief/observance] conflict with a job requirement?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] know of the conflict between [***name of plaintiff***]'s religious [belief/observance] and the job requirement?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Did [***name of defendant***] reasonably accommodate [***name of plaintiff***]'s religious [belief/observance]?**

_____ Yes _____ No

If your answer to question 6 is no, then answer question 7. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of plaintiff***]'s failure to comply with the conflicting job requirement a substantial motivating reason for [***name of defendant***]'s [discharge of/refusal to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [*name of defendant***]'s failure to reasonably accommodate [***name of plaintiff***]'s religious [belief/observance] a substantial factor in causing harm to [***name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2512. Religious Creed Discrimination—Failure to Accommodate—Affirmative Defense—Undue Hardship (Gov. Code, §§ 12926(u), 12940(*l*))

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [an employer/[***other covered entity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Does [***name of plaintiff***] have a sincerely held religious belief that [***describe religious belief, observance, or practice***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of plaintiff***]'s religious [belief/observance] conflict with a job requirement?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] know of the conflict between [***name of plaintiff***]'s religious [belief/observance] and the job requirement?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Did [***name of defendant***] reasonably accommodate [***name of*

plaintiff]**'s religious [belief/observance]?**

_____ **Yes** _____ **No**

If your answer to question 6 is no, then answer question 7. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. **Did [***name of defendant***] explore available ways to accommodate [***name of plaintiff***]'s religious [belief/observance]?**

_____ **Yes** _____ **No**

If your answer to question 7 is yes, then answer question 8. If you answered no, skip question 8 and answer question 9.

8. **Could [***name of defendant***] have accommodated [***name of plaintiff***]'s religious [belief/observance] without causing undue hardship to [***name of defendant***]'s business?**

_____ **Yes** _____ **No**

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. **Was [***name of plaintiff***]'s failure to comply with the conflicting job requirement a substantial motivating reason for [***name of defendant***]'s [discharge of/refusal to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

_____ **Yes** _____ **No**

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. **Was [***name of defendant***]'s failure to reasonably accommodate [***name of plaintiff***]'s religious [belief/observance] a substantial factor in causing harm to [***name of plaintiff***]?**

_____ **Yes** _____ **No**

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

11. **What are [***name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2012, June 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements* (see Gov. Code, §§ 12926(u), 12940(*l*)) and CACI No. 2561, *Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 11 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual

forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2513. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [an employer/[***other covered entity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] have [a] [***select term to describe basis of limitations, e.g., physical condition***] [that limited [***insert major life activity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of plaintiff***] request that [***name of defendant***] make reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., physical condition***] so that [he/she/***nonbinary pronoun***] would be able to perform the essential job requirements?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of plaintiff***] willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she/***nonbinary pronoun***] would be able to perform the essential job requirements?**

   _____ **Yes** _____ **No**

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] fail to participate in a timely, good-faith interactive process with [*name of plaintiff*] to determine whether reasonable accommodation could be made?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[7. Could [*name of defendant*] have made a reasonable accommodation when the interactive process should have taken place?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

8. Was [*name of defendant*]'s failure to participate in a good-faith interactive process a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New April 2009; Revised December 2009, December 2010, December 2016, May 2022, May 2024

Directions for Use

This verdict form is based on CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in question 3. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

Bracketed question 7 reflects that there is a split of authority as to whether the employee must also prove that a reasonable accommodation was available. (Compare *Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 87 [273 Cal.Rptr.3d 312] ["the availability of a reasonable accommodation is an essential element of an interactive process claim"] and *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings section 12940(n) claim bears burden of proving a reasonable accommodation was available before employer can be held

liable under the statute] with *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; see *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018–1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict].)

Do not include the transitional language following question 8 and question 9 if the only damages claimed are also claimed under Government Code section 12940(m) on reasonable accommodation. Use CACI No. VF-2509, *Disability Discrimination—Reasonable Accommodation,* or CACI No. VF-2510, *Disability Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship,* to claim these damages.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2514. Failure to Prevent Harassment, Discrimination, or Retaliation

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We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] fail to take all reasonable steps to prevent the [harassment/discrimination/retaliation]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of defendant*]'s failure to prevent the [harassment/discrimination/retaliation] a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

   Total Future Economic Damages: $_____]

   [c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

   [d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New June 2010; Revised December 2010, June 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2527, *Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant*. These questions should be added to the verdict form that addresses the underlying claim of discrimination, retaliation, or harassment if the plaintiff also asserts a separate claim against the employer for failure to prevent the underlying conduct. The jury should not reach these questions unless it finds that the underlying claim is proved.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 3 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2515. Limitation on Remedies—Same Decision

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] an [employer/[***other covered entity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of plaintiff***]'s [***protected status or activity***] a substantial motivating reason for [***name of defendant***]'s [discharge of/refusal to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***specify employer's stated legitimate reason, e.g., plaintiff's poor job performance***] also a substantial motivating reason for [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, skip question 6 and answer question 7.

6. **Would [***name of defendant***] have [discharged/refused to hire/[***other*

adverse employment action]] [*name of plaintiff*] **anyway at that time based on** [*e.g., plaintiff's poor job performance*] **had** [*name of defendant*] **not also been substantially motivated by [discrimination/retaliation]?**

_____ **Yes** _____ **No**

If your answer to question 6 is no, then answer question 7. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of defendant*]**'s [discharge/refusal to hire/**[*other adverse employment action*]] **a substantial factor in causing harm to** [*name of plaintiff*]**?**

_____ **Yes** _____ **No**

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]**'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2013; Revised December 2015, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 2512, *Limitation of Damages—Same Decision.* It incorporates questions from VF-2500, *Disparate Treatment,* and VF-2504, *Retaliation,* to guide the jury through the evaluation of the employer's purported legitimate reason for the adverse employment action.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Question 5 asks the jury to determine whether the employer's stated legitimate reason actually was a motivating reason for the adverse action. In this way, the jury evaluates the employer's reason once. If it finds that it was an actual motivating reason, it then proceeds to question 6 to consider whether the employer has proved "same decision," that is, that it would have taken the adverse employment action anyway for the legitimate reason, even though it may have also had a discriminatory or retaliatory motivation. If the jury answers "no" to question 5 it then proceeds to consider substantial-factor causation of harm and damages in questions 7 and 8.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

Modify question 4 if the plaintiff was not actually a member of the protected class, but alleges discrimination because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*.

This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2516–VF-2599. Reserved for Future Use

Judicial Council of California Civil Jury Instructions

CACI*

* Pronounced "Casey"

As approved at the
Judicial Council's Rules Committee October 2024 Meeting
and Judicial Council November 2024 Meeting

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Series 2600–5000

Judicial Council of California
Advisory Committee on Civil Jury Instructions

Hon. Adrienne M. Grover, Chair

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SERIES 3200 SONG-BEVERLY CONSUMER WARRANTY ACT

CALIFORNIA FAMILY RIGHTS ACT

2600. Violation of CFRA Rights—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [refused to grant [him/her/***nonbinary pronoun***] [family care/medical] leave] [refused to return [him/her/***nonbinary pronoun***] to the same or a comparable job when [his/her/***nonbinary pronoun***] [family care/medical] leave ended] [***other violation of CFRA rights***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was eligible for [family care/medical] leave;**

2. **That [***name of plaintiff***] [requested/took] leave [***insert one of the following:***]**

   [for the birth of [*name of plaintiff***]'s child or bonding with the child;]**

   [for the placement of a child with [*name of plaintiff***] for adoption or foster care;]**

   [to care for [*name of plaintiff***]'s [child/parent/spouse/domestic partner/grandparent/grandchild/sibling] who had a serious health condition;]**

   [to care for an individual designated by [*name of plaintiff***] [who is a blood relative/whose association to [***name of plaintiff***] is equivalent to a family relationship] who had a serious health condition;]**

   [for [*name of plaintiff***]'s own serious health condition that made [him/her/***nonbinary pronoun***] unable to perform the functions of [his/her/***nonbinary pronoun***] job with [***name of defendant***];]**

   [for [*specify qualifying military exigency related to covered active duty or call to covered active duty of a spouse, domestic partner, child, or parent, e.g., [name of plaintiff]'s spouse's upcoming military deployment on short notice***];]**

3. **That [***name of plaintiff***] provided reasonable notice to [***name of defendant***] of [his/her/***nonbinary pronoun***] need for [family care/medical] leave, including its expected timing and length. [If [***name of defendant***] notified [his/her/***nonbinary pronoun***/its] employees that 30 days' advance notice was required before the leave was to begin, then [***name of plaintiff***] must show that [he/she/***nonbinary pronoun***] gave that notice or, if 30 days' notice was not reasonably possible under the circumstances, that [he/she/***nonbinary pronoun***] gave notice as soon as possible];**

4. **That [*name of defendant*] [refused to grant [*name of plaintiff*]'s request for [family care/medical] leave/refused to return [*name of plaintiff*] to the same or a comparable job when [his/her/*nonbinary pronoun*] [family care/medical] leave ended/*other violation of CFRA rights*];**
5. **That [*name of plaintiff*] was harmed; and**
6. **That [*name of defendant*]'s [decision/conduct] was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised October 2008, May 2021, May 2023

Directions for Use

This instruction is intended for use when an employee claims violation of the CFRA (Gov. Code, § 12945.1 et seq.). In addition to a qualifying employer's refusal to grant CFRA leave, CFRA violations include failure to provide benefits as required by CFRA and loss of seniority.

In the fourth bracketed option of element 2, if the plaintiff's relationship or association with the designated individual is contested, select either a blood relative or an associated person, or both, as applicable. (Gov. Code, § 12945.2(b)(2).) Omit both options if the plaintiff's relationship or association with the designated individual is not contested.

The second-to-last bracketed option in element 2 does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions. (Gov. Code, § 12945.2(b)(5)(C).) If there is a dispute concerning the existence of a "serious health condition," the court must instruct the jury as to the meaning of this term. (See Gov. Code, § 12945.2(b)(13).) If there is no dispute concerning the relevant individual's condition qualifying as a "serious health condition," it is appropriate for the judge to instruct the jury that the condition qualifies as a "serious health condition."

The last bracketed option in element 2 requires a qualifying exigency for military family leave related to the covered active duty or call to covered active duty of the employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States. That phrase is defined in the Unemployment Insurance Code. (See Unemp. Ins. Code, § 3302.2.)

Give the bracketed sentence under element 3 only if the facts involve an expected birth, placement for adoption, or planned medical treatment, and there is evidence that the employer required 30 days' advance notice of leave. (See Cal. Code Regs., tit. 2, § 11091(a)(2).)

Sources and Authority

- California Family Rights Act. Government Code section 12945.2.
- "Designated Person" Defined. Government Code section 12945.2(b)(2).

- "Employer" Defined. Government Code section 12945.2(b)(4).
- "Parent" Defined. Government Code section 12945.2(b)(11) (Assem. Bill 1033; Stats. 2021, ch. 327) [adding parent-in-law to the definition of parent].
- "Serious Health Condition" Defined. Government Code section 12945.2(b)(13).
- "An employee who takes CFRA leave is guaranteed that taking such leave will not result in a loss of job security or other adverse employment actions. Upon an employee's timely return from CFRA leave, an employer must generally restore the employee to the same or a comparable position. An employer is not required to reinstate an employee who cannot perform her job duties after the expiration of a protected medical leave." (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487 [130 Cal.Rptr.3d 350], footnote and internal citations omitted, superseded on other grounds by statute.)
- "A CFRA interference claim ' "consists of the following elements: (1) the employee's entitlement to CFRA leave rights; and (2) the employer's interference with or denial of those rights." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 601 [210 Cal.Rptr.3d 59].)
- "[C]ourts have distinguished between two theories of recovery under the CFRA and the FMLA. 'Interference' claims prevent employers from wrongly interfering with employees' approved leaves of absence, and 'retaliation' or 'discrimination' claims prevent employers from terminating or otherwise taking action against employees because they exercise those rights." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 920 [182 Cal. Rptr. 3d 644, 341 P.3d 438].)
- "An interference claim under CFRA does not invoke the burden shifting analysis of the *McDonnell Douglas* test. Rather, such a claim requires only that the employer deny the employee's entitlement to CFRA-qualifying leave. A CFRA interference claim 'consists of the following elements: (1) the employee's entitlement to CFRA leave rights; and (2) the employer's interference with or denial of those rights.' " (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 250 [206 Cal.Rptr.3d 841], internal citations omitted.)
- "The right to reinstatement is unwaivable but not unlimited." (*Richey, supra*, 60 Cal.4th at p. 919.)
- "It is not enough that [plaintiff's] mother had a serious health condition. [Plaintiff's] participation to provide care for her mother had to be 'warranted' during a 'period of treatment or supervision . . . .' " (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 995 [94 Cal.Rptr.2d 643], internal citation and footnote omitted.)
- "[T]he relevant inquiry is whether a serious health condition made [plaintiff] unable to do her job at defendant's hospital, not her ability to do her essential job functions 'generally' . . . ." (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 214 [74 Cal.Rptr.3d 570, 180 P.3d 321].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1060,

1061

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-A, *Overview Of Key Statutes*, ¶ 12:32 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:146, 12:390, 12:421, 12:857, 12:1201, 12:1300 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18–4.20

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, §§ 8.25[2], 8.30[1], [2], 8.31[2], 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][a], [b] (Matthew Bender)

California Civil Practice: Employment Litigation § 5:40 (Thomson Reuters)

2601. Eligibility

To show that [he/she/*nonbinary pronoun*] was eligible for [family care/medical] leave, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was an employee of [*name of defendant*];**

[2. That [*name of defendant*] directly employed five or more employees for a wage or salary;]

3. **That at the time [*name of plaintiff*] [requested/began] leave, [he/she/*nonbinary pronoun*] had more than 12 months of service with [*name of defendant*] and had worked at least 1,250 hours for [*name of defendant*] during the previous 12 months; and**

4. **That at the time [*name of plaintiff*] [requested/began] leave [*name of plaintiff*] had taken no more than 12 weeks of family care or medical leave in the 12-month period [*define period*].**

New September 2003; Revised June 2011, May 2021

Directions for Use

The CFRA applies to employers who directly employ five or more employees (and to the state and any political or civil subdivision of the state and cities of any size). (Gov. Code, § 12945.2(b)(4).) Include element 2 only if there is a factual dispute about the number of people the defendant directly employed for a wage or salary.

Sources and Authority

- Right to Family Care and Medical Leave. Government Code section 12945.2(a).

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-A, *Overview of Key Leave Laws*, ¶ 12:32 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:87, 12:125, 12:390, 12:421, 12:1201, 12:1300 (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][c] (Matthew Bender)

2602. Reasonable Notice by Employee of Need for CFRA Leave

For notice of the need for leave to be reasonable, [*name of plaintiff*] must make [*name of defendant*] aware that [he/she/*nonbinary pronoun*] needs [family care/medical] leave, when the leave will begin, and how long it is expected to last. The notice can be verbal or in writing and does not need to mention the law. An employer cannot require disclosure of any medical diagnosis, but should ask for information necessary to decide whether the employee is entitled to leave.

New September 2003; Revised May 2021

Sources and Authority

- Reasonable Notice Required. Government Code section 12945.2(g).
- Additional Requirements. Government Code section 12945.2(h)–(j).
- CFRA Notice Requirements. California Code of Regulations, title 2, section 11091.
- "In enacting CFRA 'the Legislature expressly delegated to [California's Fair Employment and Housing] Commission the task of "adopt[ing] a regulation specifying the elements of a reasonable request" for CFRA leave.' The regulation adopted by the commission provides, in part, to request CFRA leave an employee 'shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA or FMLA, or even mention CFRA or FMLA, to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. . . . The employer should inquire further of the employee if necessary to determine whether the employee is requesting CFRA leave and to obtain necessary information concerning the leave (i.e., commencement date, expected duration, and other permissible information).' The regulation further provides, 'Under all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as CFRA or CFRA/FMLA qualifying, based on information provided by the employee . . . , and to give notice of the designation to the employee.' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 602–603 [210 Cal.Rptr.3d 59], quoting Cal. Code Regs., tit. 2, § 11091(a)(1), internal citations omitted.)
- "The employee must 'provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave. The employer in turn is charged with responding to the leave request "as soon as practicable and in any event no later than ten calendar days after receiving the request.' " (*Olofsson v. Mission*

Linen Supply (2012) 211 Cal.App.4th 1236, 1241 [150 Cal.Rptr.3d 446], internal citations omitted.)

- "[Cal. Code Regs., tit. 2, § 11091(a)(1)] appears to presume the existence of circumstances in which an employee is able to provide an employer with notice of the need for leave. Indeed, the regulation permits employers to 'require that employees provide at least 30 days' advance notice before CFRA leave is to begin *if the need for the leave is foreseeable* based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or a family member.' However, the regulations provide that this 30-day general rule is inapplicable when the need for medical leave is not foreseeable: 'If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, *notice must be given as soon as practicable*.' Further, '[a]n employer shall not deny a CFRA leave, the need for which is an emergency or is otherwise unforeseeable, on the basis that the employee did not provide advance notice of the need for the leave, *so long as the employee provided notice to the employer as soon as practicable*.' " (*Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 563 [212 Cal.Rptr.3d 682], original italics; see Cal. Code Regs. tit. 2, § 11091(a)(2)–(4).)
- "When viewed as a whole, it is clear that CFRA and its implementing regulations envision a scheme in which employees are provided reasonable time within which to request leave for a qualifying purpose, and to provide the supporting certification to demonstrate that the requested leave was, in fact, for a qualifying purpose, particularly when the need for leave is not foreseeable or when circumstances have changed subsequent to an initial request for leave." (*Bareno, supra,* 7 Cal.App.5th at p. 565.)
- "[A]n employer bears a burden, under CFRA, to inquire further if an employee presents the employer with a CFRA-qualifying reason for requesting leave." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 249 [206 Cal.Rptr.3d 841].)
- "Whether notice is sufficient under CFRA is a question of fact." (*Soria, supra,* 5 Cal.App.5th at p. 603.)
- "That plaintiff called in sick was, by itself, insufficient to put [defendant] on notice that he needed CFRA leave for a serious health condition." (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1255 [82 Cal.Rptr.3d 440].)
- "The regulations thus expressly contemplate that an employee may be out on CFRA-protected leave *prior* to providing medical certification regarding that leave." (*Bareno, supra,* 7 Cal.App.5th at p. 568, original italics; see Cal. Code Regs., tit. 2, § 11091(b)(3).)
- "CFRA establishes that a certification issued by an employee's health provider is sufficient if it includes '[t]he date on which the serious health condition commenced'; '[t]he probable duration of the condition'; and '[a] statement that,

due to the serious health condition, the employee is unable to perform the function of his or her position.' " (*Bareno, supra,* 7 Cal.App.5th at pp. 569–570.)

- "[A]n employee need not share his or her medical condition with the employer, and a certification need not include such information to be considered sufficient: 'For medical leave for the employee's own serious health condition, this certification *need not,* but may, at the employee's option, identify the serious health condition involved.' " (*Bareno, supra,* 7 Cal.App.5th at p. 570, fn. 18, original italics.)
- "Under the CFRA regulations, the employer has a duty to respond to the leave request within 10 days, but clearly and for good reason the law does not specify that the response must be tantamount to approval or denial." (*Olofsson, supra*, 211 Cal.App.4th at p. 1249.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:852–12:853, 12:855–12:857 (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][e] (Matthew Bender)

2603. "Comparable Job" Explained

"Comparable job" means a job that is the same or close to the employee's former job in responsibilities, duties, pay, benefits, working conditions, and schedule. It must be at the same location or a similar geographic location.

New September 2003; Revised May 2021

Directions for Use

Give this instruction only if comparable job is an issue under the plaintiff's CFRA claim.

Sources and Authority

- Employment in a Comparable Position. Government Code section 12945.2(b)(6).
- Employment in a Comparable Position. Cal. Code Regs., tit. 2, § 11087(i).
- "[W]hile we will accord great weight and respect to the [Fair Employment and Housing Commission]'s regulations that apply to the necessity for leave, along with any applicable federal FMLA regulations that the Commission incorporated by reference, we still retain ultimate responsibility for construing [CFRA]." (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 994–995 [94 Cal.Rptr.2d 643].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*,¶¶ 12:1138–12:1139, 12:1150, 12:1154–12:1156 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, §§ 8.30, 8.31 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][k] (Matthew Bender)

2604–2609. Reserved for Future Use

2610. Affirmative Defense—No Certification From Health Care Provider

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[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] denied [***name of plaintiff***]'s request for leave because [he/she/***nonbinary pronoun***] did not provide a health care provider's certification of [his/her/***nonbinary pronoun***] need for leave. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] told [***name of plaintiff***] in writing that [he/she/***nonbinary pronoun***/it] required written certification from [***name of plaintiff***]'s health care provider to [grant/extend] leave; and**
2. **That [***name of plaintiff***] did not provide [***name of defendant***] with the required certification from a health care provider [within the time set by [***name of defendant***] or as soon as reasonably possible].**

New September 2003

Directions for Use

The time set by the defendant described in element 2 must be at least 15 days.

Sources and Authority

- Certification of Health Care Provider. Government Code section 12945.2(j).
- Certification of Health Care Provider: Child Care. Government Code section 12945.2(i).
- Certification of Health Care Provider: Return to Work. Government Code section 12945.2(j)(4).
- "Health Care Provider" Defined. Government Code section 12945.2(b)(10).
- Notice and Certification. Cal. Code Regs., tit. 2, § 11088(b).

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1058

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:311, 12:880, 12:883–12:884, 12:905, 12:915 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.26 (Matthew Bender)

2611. Affirmative Defense—Fitness for Duty Statement

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*/it] refused to return [*name of plaintiff*] to work because [he/she/*nonbinary pronoun*] did not provide a written statement from [his/her/*nonbinary pronoun*] health-care provider that [he/she/*nonbinary pronoun*] was fit to return to work. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of defendant*] has a uniformly applied practice or policy that requires employees on leave because of their own serious health condition to provide a written statement from their health-care provider that they are able to return to work; and**
2. **That [*name of plaintiff*] did not provide [*name of defendant*] with a written statement from [his/her/*nonbinary pronoun*] health-care provider of [his/her/*nonbinary pronoun*] fitness to return to work.**

New September 2003

Sources and Authority

- Certification on Health Care Provider: Child Care. Government Code section 12945.2(i).
- Certification of Health Care Provider: Return to Work. Government Code section 12945.2(j)(4).
- "Health Care Provider" Defined. Government Code section 12945.2(b)(10).
- Notice and Certification. Cal. Code Regs., tit. 2, § 11088(b).

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:311, 12:880, 12:884, 12:915 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.28 (Matthew Bender)

2612. Affirmative Defense—Employment Would Have Ceased

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*/it] was not required to allow [*name of plaintiff*] to return to work when [his/her/*nonbinary pronoun*] [family care/medical] leave was over because [his/her/*nonbinary pronoun*] employment would have ended for other reasons. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of defendant*] would have [discharged/laid off] [*name of plaintiff*] if [he/she/*nonbinary pronoun*] had continued to work during the leave period; and**
2. **That [*name of plaintiff*]'s [family care/medical] leave was not a reason for [discharging [him/her/*nonbinary pronoun*]/laying [him/her/*nonbinary pronoun*] off].**

An employee on [family care/medical] leave has no greater right to the employee's job or to other employment benefits than if that employee had continued working during the leave.

New September 2003; Revised May 2020

Sources and Authority

- Limitations of Right to Reinstatement. Cal. Code Regs., tit. 2, § 11089(c)(1).
- "Section 11089, subdivision (c)(1) states in part: 'An employee has no greater right to reinstatement or to other benefits . . . of employment than if the employee had been continuously employed during the CFRA leave period.' This defense is qualified, however, by the requirement that '[a]n employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny reinstatement.' " (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 919 [182 Cal. Rptr. 3d 644, 341 P.3d 438].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:1189, 12:1191 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.30[4] (Matthew Bender)

2613–2619. Reserved for Future Use

2620. CFRA Rights Retaliation—Essential Factual Elements (Gov. Code, § 12945.2(k))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her/***nonbinary pronoun***] for [[requesting/taking] [family care/medical] leave/[***other protected activity***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was eligible for [family care/medical] leave;**
2. **That [***name of plaintiff***] [[requested/took] [family care/medical] leave/[***other protected activity***]];**
3. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**
4. **That [***name of plaintiff***]'s [[request for/taking of] [family care/medical] leave/[***other protected activity***]] was a substantial motivating reason for [discharging/[***other adverse employment action***]] [him/her/***nonbinary pronoun***];**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s retaliatory conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2012, June 2013, May 2018, May 2021

Directions for Use

Use this instruction in cases of alleged retaliation for an employee's exercise of rights granted by the California Family Rights Act (CFRA). (See Gov. Code, § 12945.2(k).) The instruction assumes that the defendant is plaintiff's present or former employer, and therefore it must be modified if the defendant is a prospective employer or other person.

The "other protected activity" option of the opening paragraph and elements 2 and 4 could be providing information or testimony in an inquiry or a proceeding related to CFRA rights. (Gov. Code, § 12945.2(k).

The CFRA reaches a broad range of adverse employment actions short of actual discharge. (See Gov. Code, § 12945.2(k).) Element 3 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, *"Adverse Employment Action" Explained*, and CACI No. 2510, *"Constructive Discharge" Explained*, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 4 uses the term "substantial motivating reason" to express both intent and

causation between the employee's exercise of a CFRA right and the adverse employment action. "Substantial motivating reason" has been held to be the appropriate standard under the discrimination prohibitions of the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether this standard applies to CFRA retaliation cases has not been addressed by the courts.

Sources and Authority

- Retaliation Prohibited Under California Family Rights Act. Government Code section 12945.2(k), (q).
- Retaliation Prohibited Under Fair Employment and Housing Act. Government Code section 12940(h).
- "The elements of a cause of action for retaliation in violation of CFRA are " '(1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA [leave]; (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of her exercise of her right to CFRA [leave]." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 604 [210 Cal.Rptr.3d 59].)
- "Similar to causes of action under FEHA, the *McDonnell Douglas* burden shifting analysis applies to retaliation claims under CFRA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 248 [206 Cal.Rptr.3d 841].)
- " 'When an adverse employment action "follows hard on the heels of protected activity, the timing often is strongly suggestive of retaliation." ' " (*Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 571 [212 Cal.Rptr.3d 682].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1058–1060

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:1300, 12:1301 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18–4.20

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][c] (Matthew Bender)

2621–2699. Reserved for Future Use

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] eligible for family care or medical leave?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] [request/take] leave for the birth of [his/her/*nonbinary pronoun*] child or bonding with the child?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of plaintiff*] provide reasonable notice to [*name of defendant*] of [his/her/*nonbinary pronoun*] need for [family care/medical] leave?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of defendant*] [refuse to grant [*name of plaintiff*]'s request for [family care/medical] leave] [refuse to return [*name of plaintiff*] to the same or a comparable job when [his/her/*nonbinary pronoun*] [family care/medical] leave ended] [*other violation of CFRA rights*]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of defendant*]'s [decision/conduct] a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2600, *Violation of CFRA Rights—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Other factual situations can be substituted in question 2 as in element 2 of CACI No. 2600.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2601. Violation of CFRA Rights—Affirmative Defense—Employment Would Have Ceased

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] eligible for family care or medical leave?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of plaintiff***] [request/take] leave for the birth of [his/her/***nonbinary pronoun***] child or bonding with the child?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] provide reasonable notice to [***name of defendant***] of [his/her/***nonbinary pronoun***] need for [family care/medical] leave?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] refuse to return [***name of plaintiff***] to the same or to a comparable job when [his/her/***nonbinary pronoun***] [family care/medical] leave ended?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Would [***name of defendant***] have [discharged/laid off] [***name of plaintiff***] if [he/she/***nonbinary pronoun***] had continued to work during the leave period?**

   _____ Yes _____ No

   If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of defendant*]'s [decision/conduct] a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

2024

Directions for Use

This verdict form is based on CACI No. 2600, *Violation of CFRA Rights—Essential Factual Elements*, and CACI No. 2612, *Affirmative Defense—Employment Would Have Ceased*. If a different affirmative defense is at issue, this form should be tailored accordingly.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Other factual situations can be substituted in question 2 as in element 2 of CACI No. 2600.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] eligible for family care or medical leave?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] [[request/take] [family care/medical] leave/[*other protected activity*]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] [discharge/[*other adverse employment action*]] [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of plaintiff*]'s [[request for/taking] [family care/medical] leave/[*other protected activity*]] a substantial motivating reason for [*name of defendant*]'s decision to [discharge/[*other adverse employment action*]]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of defendant*]'s retaliatory conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2620, *CFRA Rights Retaliation—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages,

especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2603–VF-2699. Reserved for Future Use

LABOR CODE ACTIONS

2700. Nonpayment of Wages—Essential Factual Elements (Lab. Code, §§ 201, 202, 218)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] unpaid wages. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] performed work for [***name of defendant***];**
2. **That [***name of defendant***] owes [***name of plaintiff***] wages under the terms of the employment; and**
3. **The amount of unpaid wages.**

"Wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.

New September 2003; Revised December 2005, December 2013, June 2015

Directions for Use

This instruction is for use in a civil action for payment of wages. Depending on the allegations in the case, the definition of "wages" may be modified to include additional compensation, such as earned vacation, nondiscretionary bonuses, or severance pay.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of wage orders, adopted by the Industrial Welfare Commission. All of the wage orders define hours worked as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (*Hernandez v. Pacific Bell Telephone Co.* (2018) 29 Cal.App.5th 131, 137 [239 Cal.Rptr.3d 852]; see, e.g., Wage Order 4-2001, subd. 2(K).) The two parts of the definition are independent factors, each of which defines whether certain time spent is compensable as "hours worked." Thus, an employee who is subject to an employer's control does not have to be working during that time to be compensated. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582–584 [94 Cal.Rptr.2d 3, 995 P.2d 139].) Courts have identified various factors bearing on an employer's control during on-call time. However, what qualifies as hours worked is a question of law. (*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838–840 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Therefore, the jury should not be instructed on the factors to consider in determining whether the employer has exercised sufficient control over the employee during the contested period to require compensation.

However, the jury should be instructed to find any disputed facts regarding the factors. For example, one factor is whether a fixed time limit for the employee to

respond to a call was unduly restrictive. Whether there was a fixed time limit would be a disputed fact for the jury. Whether it was unduly restrictive would be a matter of law for the court.

The court may modify this instruction or write an appropriate instruction if the defendant employer claims a permissible setoff from the plaintiff employee's unpaid wages. Under California Wage Orders, an employer may deduct from an employee's wages for cash shortage, breakage, or loss of equipment if the employer proves that this was caused by a dishonest or willful act or by the gross negligence of the employee. (See, e.g., Cal. Code Regs., tit. 8, § 11010, subd. 8.)

Sources and Authority

- Right of Action for Wage Claim. Labor Code section 218.
- Wages Due on Discharge. Labor Code section 201.
- Wages Due on Quitting. Labor Code section 202.
- "Wages" Defined, Labor Code section 200.
- Wages Partially in Dispute. Labor Code section 206(a).
- Deductions From Pay. Labor Code section 221, California Code of Regulations, Title 8, section 11010, subdivision 8.
- Nonapplicability to Government Employers. Labor Code section 220.
- Employer Not Entitled to Release. Labor Code section 206.5.
- Private Agreements Prohibited. Labor Code section 219(a).
- "As an employee, appellant was entitled to the benefit of wage laws requiring an employer to promptly pay all wages due, and prohibiting the employer from deducting unauthorized expenses from the employee's wages, deducting for debts due the employer, or recouping advances absent the parties' express agreement." (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1330 [200 Cal.Rptr.3d 315].)
- "The Labor Code's protections are 'designed to ensure that employees receive their full wages at specified intervals while employed, as well as when they are fired or quit,' and are applicable not only to hourly employees, but to highly compensated executives and salespeople." *(Davis, supra*, 245 Cal.App.4th at p. 1331, internal citation omitted.)
- "[W]ages include not just salaries earned hourly, but also bonuses, profit-sharing plans, and commissions." (*Davis, supra*, 245 Cal.App.4th at p. 1332, fn. 20.)
- "The Industrial Welfare Commission (IWC) was created in 1913 with express authority to adopt regulations—called wage orders—governing wages, hours, and working conditions in the state of California. These wage orders, being the product of quasi-legislative rulemaking under a broad delegation of legislative power, are entitled to great deference, and they have the dignity and force of statutory law." (*Stoetzl v. Department of Human Resources* (2019) 7 Cal.5th 718, 724–725 [248 Cal.Rptr.3d 891, 443 P.3d 924], internal citations omitted.)

- "The two phrases of the definition—'time during which an employee is subject to the control of an employer' and 'time the employee is suffered or permitted to work, whether or not required to do so'—establish independent factors that each define 'hours worked.' 'Thus, an employee who is subject to an employer's control does not have to be working during that time to be compensated under [the applicable wage order].' The time an employee is ' "suffered or permitted to work, whether or not required to do so," ' includes time the employee is working but not under the employer's control, such as unauthorized overtime, provided the employer has knowledge of it." (*Hernandez, supra,* 29 Cal.App.5th at p. 137, internal citations omitted.)
- "[A]n employee's on-call or standby time may require compensation." (*Mendiola, supra*, 60 Cal.4th at p. 840.)
- " '[T]he standard of "suffered or permitted to work" is met when an employee is engaged in certain tasks or exertion that a manager would recognize as work. Mere transportation of tools, which does not add time or exertion to a commute, does not meet this standard.' We agree with this construction of the 'suffer or permit to work' test." (*Hernandez, supra*, 29 Cal.App.5th at p. 142, internal citation omitted.)
- "[Labor Code] section 221 has long been held to prohibit deductions from an employee's wages for cash shortages, breakage, loss of equipment, and other business losses that may result from the employee's simple negligence." (*Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1118 [41 Cal.Rptr.2d 46].)
- "[A]n employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee." (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 6 [177 Cal.Rptr. 803].)
- "In light of the wage order's remedial purpose requiring a liberal construction, its directive to compensate employees for all time worked, the evident priority it accorded that mandate notwithstanding customary employment arrangements, and its concern with small amounts of time, we conclude that the de minimis doctrine has no application under the circumstances presented here. An employer that requires its employees to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate the employee for that time by invoking the de minimis doctrine." (*Troester v. Starbucks Corp.* 5 Cal.5th 829, 847 [235 Cal.Rptr.3d 820, 421 P.3d 1114].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 437–439

Chin et al., California Practice Guide: Employment Litigation, Ch.1-A, *Background*, ¶ 1:22 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.11-D, *Payment Of*

Wages, ¶¶ 11:456, 11:470, 11:470.1, 11:512–11:514 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶ 11:1459 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws,* § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes,* §§ 250.13[1][a], 250.40[3][a], 250.65 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 4:67, 4:75 (Thomson Reuters)

2701. Nonpayment of Minimum Wage—Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] the difference between the wages paid by [***name of defendant***] and the wages [***name of plaintiff***] should have been paid according to the minimum wage rate required by state law. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] performed work for [***name of defendant***];**
2. **That [***name of plaintiff***] was paid less than the minimum wage by [***name of defendant***] for some or all hours worked; and**
3. **The amount of wages owed.**

The minimum wage for labor performed from [*beginning date***] to [***ending date***] was [***minimum wage rate***] per hour.**

An employee is entitled to be paid the legal minimum wage rate even if the employee agrees to work for a lower wage.

New September 2003; Revised June 2005, June 2014, June 2015, May 2020

Directions for Use

The court must determine the prevailing minimum wage rate from applicable state or federal law. (See, e.g., Cal. Code Regs., tit. 8, § 11000.) The jury must be instructed accordingly.

Both liquidated damages (See Lab. Code, § 1194.2) and civil penalties (See Lab. Code, § 1197.1) may be awarded on a claim for nonpayment of minimum wage.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of 18 wage orders, adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) The California Labor Code and the IWC's wage orders provide that certain employees are exempt from minimum wage requirements (for example, outside salespersons; see Lab. Code, § 1171), and that under certain circumstances employers may claim credits for meals and lodging against minimum wage pay (see Cal. Code Regs., tit. 8, § 11000, subd. 3, § 11010, subd. 10, and § 11150, subd. 10(B)). The assertion of an exemption from wage and hour laws is an affirmative defense. (See generally *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].) The advisory committee has chosen not to write model instructions for the numerous fact-specific affirmative defenses to minimum wage claims. (Cf. CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption,* and CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption*.)

Sources and Authority

- Employee Right to Recover Minimum Wage or Overtime Compensation. Labor Code section 1194(a).
- Recovery of Liquidated Damages. Labor Code section 1194.2.
- Civil Penalties, Restitution and Liquidated Damages. Labor Code section 1197.1(a).
- "Wages" Defined. Labor Code section 200.
- Payment of Uncontested Wages Required. Labor Code section 206(a).
- Action by Department to Recover Unpaid Minimum Wage or Overtime Compensation. Labor Code section 1193.6(a).
- Duties of Industrial Welfare Commission. Labor Code section 1173.
- "Labor Code section 1194 accords an employee a statutory right to recover unpaid wages from an employer who fails to pay the minimum wage." (*Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal.App.4th 66, 74 [196 Cal.Rptr.3d 352].)
- "Labor Code section 1194 does not define the employment relationship nor does it specify who may be liable for unpaid wages. Specific employers and employees become subject to the minimum wage requirements only through and under the terms of wage orders promulgated by the IWC, the agency formerly authorized to regulate working conditions in California." (*Flowers, supra*, 243 Cal.App.4th at p. 74.)
- "The provision of board, lodging or other facilities *may* sometimes be considered in determining whether an employer has met minimum wage requirements for nonexempt employees." (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 958 [219 Cal.Rptr.3d 580], original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 417–421, 437–439

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment of Wages*, ¶¶ 11:456, 11:513, 11:545 11:547 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment of Overtime Compensation*, ¶ 11:730 et seq. (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶¶ 11:1342, 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 2, *Minimum Wages*, §§ 2.02[1], 2.03[1], 2.04[1], 2.05[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.13[1][a], 250.14[d] (Matthew Bender)

California Civil Practice: Employment Litigation §§ 4:67, 4:76 (Thomson Reuters)

2702. Nonpayment of Overtime Compensation—Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] overtime pay as required by state law. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] performed work for [***name of defendant***];**
2. **That [***name of plaintiff***] worked overtime hours;**
3. **That [***name of defendant***] knew or should have known that [***name of plaintiff***] had worked overtime hours;**
4. **That [***name of plaintiff***] was [not paid/paid less than the overtime rate] for some or all of the overtime hours worked; and**
5. **The amount of overtime pay owed.**

Overtime hours are the hours worked longer than [*insert applicable definition(s) of overtime hours***].**

Overtime pay is [*insert applicable formula***].**

An employee is entitled to be paid the legal overtime pay rate even if the employee agrees to work for a lower rate.

New September 2003; Revised June 2005, June 2014, June 2015, May 2020, November 2021

Directions for Use

The court must determine the overtime compensation rate under applicable state or federal law. (See, e.g., Lab. Code, §§ 1173, 1182; Cal. Code Regs., tit. 8, § 11000, subd. 2, § 11010, subd. 4(A), and § 11150, subd. 4(A).) If an employee earns a flat sum bonus during a pay period, under state law the overtime pay rate is calculated using the actual number of nonovertime hours worked by the employee during the pay period. (*Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 573 [229 Cal.Rptr.3d 347, 411 P.3d 528].) The jury must be instructed on the applicable overtime pay formula. It is possible that the overtime rate will be different over different periods of time.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code, and a series of 18 wage orders adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2014) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Both the Labor Code and the IWC wage orders provide for certain exemptions from overtime laws. (See, e.g., Lab. Code, § 1171 [outside salespersons are exempt from overtime requirements]). The assertion of an employee's exemption is an affirmative defense, which presents a mixed

question of law and fact. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].) For instructions on exemptions, see CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption*, and CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption*.

Sources and Authority

- Employee Right to Recover Minimum Wage or Overtime Compensation. Labor Code section 1194(a).
- Recovery of Liquidated Damages. Labor Code section 1194.2.
- "Wages" Defined. Labor Code section 200.
- Payment of Uncontested Wages Required. Labor Code section 206(a).
- What Hours Worked Are Overtime. Labor Code section 510.
- Rate of Compensation. Labor Code section 515(d).
- Action by Department to Recover Unpaid Minimum Wage or Overtime Compensation. Labor Code section 1193.6(a).
- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez*, *supra*, 20 Cal.4th at pp. 794–795.)
- "[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation . . . ." (*Jong v. Kaiser Foundation Health Plan, Inc.* (2014) 226 Cal.App.4th 391, 395 [171 Cal.Rptr.3d 874] [applying rule under federal Fair Labor Standards Act to claims under California Labor Code].)
- "[A]n employer's actual or constructive knowledge of the hours its employees work is an issue of fact . . . ." (*Jong*, *supra*, 226 Cal.App.4th at p. 399.)
- "The question whether [plaintiff] was an outside salesperson within the meaning of applicable statutes and regulations is . . . a mixed question of law and fact." (*Ramirez*, *supra*, 20 Cal.4th at p. 794.)
- "The FLSA [federal Fair Labor Standards Act] requires overtime pay only if an employee works more than 40 hours per week, regardless of the number of hours worked during any one day. California law, codified at Labor Code section 510, is more stringent and requires overtime compensation for '[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek.' " (*Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal.App.4th 66, 83 [196 Cal.Rptr.3d 352], internal citation omitted.)
- "We conclude that the flat sum bonus at issue here should be factored into an employee's regular rate of pay by dividing the amount of the bonus by the total

number of nonovertime hours actually worked during the relevant pay period and using 1.5, not 0.5, as the multiplier for determining the employee's overtime pay rate." (*Alvarado, supra,* 4 Cal.5th at p. 573.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 417, 420, 421, 437, 438, 439

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment Of Wages*, ¶¶ 11:456, 11:470.1 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment Of Overtime Compensation*, ¶¶ 11:730, 11:955 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶¶ 11:1342, 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 3, *Overtime Compensation and Regulation of Hours Worked*, §§ 3.03[1], 3.04[1], 3.07[1], 3.08[1], 3.09[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.40 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:76 (Thomson Reuters)

2703. Nonpayment of Overtime Compensation—Proof of Overtime Hours Worked

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State law requires California employers to keep payroll records showing the hours worked by and wages paid to employees.

If [*name of defendant***] did not keep accurate records of the hours worked by [***name of plaintiff***], then [***name of plaintiff***] may prove the number of overtime hours worked by making a reasonable estimate of those hours.**

In determining the amount of overtime hours worked, you may consider [*name of plaintiff***]'s estimate of the number of overtime hours worked and any evidence presented by [***name of defendant***] that [***name of plaintiff***]'s estimate is unreasonable.**

New September 2003; Revised June 2005, December 2005, November 2019

Directions for Use

This instruction is intended for use when a nonexempt employee plaintiff is unable to provide evidence of the precise number of hours worked because of the employer's failure to keep accurate payroll records. (See *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727–728 [245 Cal.Rptr. 36].)

Sources and Authority

- Right of Action for Unpaid Overtime. Labor Code section 1194(a).
- Employer Duty to Keep Payroll Records. Labor Code section 1174(d).
- "[W]here the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee. In such a situation, imprecise evidence by the employee can provide a sufficient basis for damages." (*Furry v. East Bay Publishing, LLC* (2018) 30 Cal.App.5th 1072, 1079 [242 Cal.Rptr.3d 144].)
- "[W]here the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee. In such a situation, imprecise evidence by the employee can provide a sufficient basis for damages." (*Furry v. East Bay Publishing, LLC* (2018) 30 Cal.App.5th 1072, 1079 [242 Cal.Rptr.3d 144].)
- "Although the employee has the burden of proving that he performed work for which he was not compensated, public policy prohibits making that burden an impossible hurdle for the employee. . . . 'In such situation . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence

of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.' " (*Hernandez, supra,* 199 Cal.App.3d at p. 727, internal citation omitted.)

- "Once an employee shows that he performed work for which he was not paid, the *fact* of damage is certain; the only uncertainty is the *amount* of damage. [Citation.] In such a case, it would be a perversion of justice to deny all relief to the injured person, thereby relieving the wrongdoer from making any restitution for his wrongful act." (*Furry, supra,* 30 Cal.App.5th at p. 1080, original italics.)
- "That [plaintiff] had to draw his time estimates from memory was no basis to completely deny him relief." (*Furry, supra,* 30 Cal.App.5th at p. 1081.)
- "It is the trier of fact's duty to draw whatever reasonable inferences it can from the employee's evidence where the employer cannot provide accurate information." (*Hernandez, supra,* 199 Cal.App.3d at p. 728, internal citation omitted.)
- "Absent an explicit, mutual wage agreement, a fixed salary does not serve to compensate an employee for the number of hours worked under statutory overtime requirements. . . . [¶] Since there was no evidence of a wage agreement between the parties that appellant's . . . per week compensation represented the payment of minimum wage or included remuneration for hours worked in excess of 40 hours per week, . . . appellant incurred damages of uncompensated overtime." (*Hernandez, supra,* 199 Cal.App.3d at pp. 725–726, internal citations omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment of Wages*, ¶ 11:456 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment of Overtime Compensation*, ¶ 11:955 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶ 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws,* § 5.72[1] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.40 (Matthew Bender)

2704. Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] is entitled to recover a penalty based on [***name of defendant***]'s failure to pay [his/her/** *nonbinary pronoun***] [wages/***insert other claim***] when due after [***name of plaintiff***]'s employment ended. [***Name of defendant***] was required to pay [***name of plaintiff***] all wages owed [on the date that/within 72 hours of the date that] [***name of plaintiff***]'s employment ended.**

You must decide whether [*name of plaintiff***] has proved [he/she/***nonbinary pronoun***] is entitled to recover a penalty. I will decide the amount of the penalty, if any, to be imposed. To recover this penalty, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of plaintiff***]'s employment with [***name of defendant***] ended; and**
2. **That [***name of defendant***] willfully failed to pay [***name of plaintiff***] all wages when due.**

The term "willfully" means only that the employer intentionally failed or refused to pay the wages. It does not imply a need for any additional bad motive.

[*Name of plaintiff***] must also prove the following:**

1. **[***Name of plaintiff***]'s daily wage rate at the time [his/her/***nonbinary pronoun***] employment with [***name of defendant***] ended; and**
2. **[The date on which [***name of defendant***] finally paid [***name of plaintiff***] all wages due/That [***name of defendant***] never paid [***name of plaintiff***] all wages].**

[The term "wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.]

New September 2003; Revised June 2005, May 2019, May 2020, November 2021

Directions for Use

The first part of this instruction sets forth the elements required to obtain a waiting time penalty under Labor Code section 203. The second part is intended to instruct the jury on the facts required to assist the court in calculating the amount of waiting time penalties. Some or all of these facts may be stipulated, in which case they may be omitted from the instruction. Select between the factual scenarios in element 2 of the second part: the employer eventually paid all wages due or the employer never paid the wages due.

The court must determine when final wages are due based on the circumstances of the case and applicable law. (See Lab. Code, §§ 201, 202.) Final wages are generally due on the day an employee is discharged by the employer (Lab. Code, § 201(a)), but are not due for 72 hours if an employee quits without notice. (Lab. Code, § 202(a).)

If there is a factual dispute, for example, whether plaintiff gave advance notice of the intention to quit, or whether payment of final wages by mail was authorized by plaintiff, the court may be required to give further instruction to the jury.

The definition of "wages" may be deleted if it is included in other instructions.

Sources and Authority

- Wages of Discharged Employee Due Immediately. Labor Code section 201.
- Wages of Employee on Quitting. Labor Code section 202.
- Willful Failure to Pay Wages of Discharged Employee. Labor Code section 203.
- Right of Action for Unpaid Wages. Labor Code section 218.
- "Wages" Defined. Labor Code section 200.
- Payment for Accrued Vacation of Terminated Employee. Labor Code section 227.3.
- Wages Partially in Dispute. Labor Code section 206(a).
- Exemption for Certain Governmental Employers. Labor Code section 220(b).
- "Labor Code section 203 empowers a court to award 'an employee who is discharged or who quits' a penalty equal to up to 30 days' worth of the employee's wages '[i]f an employer *willfully* fails to pay' the employee *his* full wages immediately (if discharged) or within 72 hours (if he or she quits). It is called a waiting time penalty because it is awarded for effectively making the employee wait for his or her final paycheck. A waiting time penalty may be awarded when the final paycheck is for less than the applicable wage—whether it be the minimum wage, a prevailing wage, or a living wage." (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 867 [233 Cal.Rptr.3d 524], original italics, internal citations omitted.)
- " '[T]he public policy in favor of full and prompt payment of an employee's earned wages is fundamental and well established . . .' and the failure to timely pay wages injures not only the employee, but the public at large as well. We have also recognized that sections 201, 202, and 203 play an important role in vindicating this public policy. To that end, the Legislature adopted the penalty provision as a disincentive for employers to pay final wages late. It goes without saying that a longer statute of limitations for section 203 penalties provides additional incentive to encourage employers to pay final wages in a prompt manner, thus furthering the public policy." (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400 [117 Cal.Rptr.3d 377, 241 P.3d 870], internal citations omitted.)
- " 'The plain purpose of [Labor Code] sections 201 and 203 is to compel the

immediate payment of earned wages upon a discharge.' The prompt payment of an employee's earned wages is a fundamental public policy of this state." (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 962 [219 Cal.Rptr.3d 580], internal citation omitted.)

- "The statutory policy favoring prompt payment of wages applies to employees who retire, as well as those who quit for other reasons." (*McLean v. State* (2016) 1 Cal.5th 615, 626–627 [206 Cal.Rptr.3d 545, 377 P.3d 796].)
- "[M]issed-break premium pay constitutes wages for purposes of Labor Code section 203, and so waiting time penalties are available under that statute if the premium pay is not timely paid." (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 117 [293 Cal.Rptr.3d 599, 509 P.3d 956].)
- "[A]n employer may not delay payment for several days until the next regular pay period. Unpaid wages are due *immediately* upon discharge. This requirement is strictly applied and may not be 'undercut' by company payroll practices or 'any industry habit or custom to the contrary.' " (*Kao, supra,* 12 Cal.App.5th at p. 962, original italics, internal citation omitted.)
- " ' "[T]o be at fault within the meaning of [section 203], the employer's refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, 'willful' merely means that the employer intentionally failed or refused to perform an act which was required to be done." . . .' " (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 54 [155 Cal.Rptr.3d 18].)
- "In civil cases the word 'willful' as ordinarily used in courts of law, does not necessarily imply anything blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." (*Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891 [236 Cal.Rptr.3d 626].)
- "[A]n employer's reasonable, good faith belief that wages are not owed may negate a finding of willfulness." (*Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468 [155 Cal.Rptr.3d 915].)
- "A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recover[y] on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist." (*Kao, supra,* 12 Cal.App.5th at p. 963.)
- "A 'good faith dispute' excludes defenses that 'are unsupported by any evidence, are unreasonable, *or* are presented in bad faith.' Any of the three precludes a defense from being a good faith dispute. Thus, [defendant]'s good faith does not cure the objective unreasonableness of its challenge or the lack of evidence to support it." (*Diaz, supra,* 23 Cal.App.5th at pp. 873–874, original italics, internal citations omitted.)

- "A proper reading of section 203 mandates a penalty equivalent to the employee's daily wages for each day he or she remained unpaid up to a total of 30 days. . . . [¶] [T]he critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days." (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493 [80 Cal.Rptr.2d 175].)
- " 'A tender of the wages due at the time of the discharge, if properly made and in the proper amount, terminates the further accumulation of penalty, but it does not preclude the employee from recovering the penalty already accrued.' " (*Oppenheimer v. Sunkist Growers, Inc.* (1957) 153 Cal.App.2d Supp. 897, 899 [315 P.2d 116], citation omitted.)
- "[Plaintiff] fails to distinguish between a request for statutory penalties provided by the Labor Code for employer wage-and-hour violations, which were recoverable directly by employees well before the Act became part of the Labor Code, and a demand for 'civil penalties,' previously enforceable only by the state's labor law enforcement agencies. An example of the former is section 203, which obligates an employer that willfully fails to pay wages due an employee who is discharged or quits to pay the employee, in addition to the unpaid wages, a penalty equal to the employee's daily wages for each day, not exceeding 30 days, that the wages are unpaid." (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377–378 [36 Cal.Rptr.3d 31].)
- "In light of the unambiguous statutory language, as well as the practical difficulties that would arise under defendant's interpretation, we conclude there is but one reasonable construction: section 203(b) contains a single, three-year limitations period governing all actions for section 203 penalties irrespective of whether an employee's claim for penalties is accompanied by a claim for unpaid final wages." (*Pineda*, *supra*, 50 Cal.4th at p. 1398.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 437–439

Chin et al., California Practice Guide: Employment Litigation, Ch. 1-A, *Introduction—Background*, ¶ 1:22 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Compensation—Coverage and Exemptions—In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Compensation—Payment of Wages*, ¶¶ 11:456, 11:470.1, 11:510, 11:513–11:515 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Compensation—Enforcing California Laws Regulating Employee Compensation*, ¶¶ 11:1458–11:1459, 11:1461–11:1461.1 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-B, *Remedies—Contract Damages*, ¶ 17:148 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.16[2][d], 250.30 et seq. (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:74 (Thomson Reuters)

2705. Independent Contractor—Affirmative Defense—Worker Was Not Hiring Entity's Employee (Lab. Code, § 2775)

[*Name of defendant***] claims that [***name of plaintiff***] was not [his/her/***nonbinary pronoun***/its] employee, but rather an independent contractor. To establish that [***name of plaintiff***] was an independent contractor, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] is under the terms of the contract and in fact free from the control and direction of [***name of defendant***] in connection with the performance of the work that [***name of plaintiff***] was hired to do;**
2. **That [***name of plaintiff***] performs work for [***name of defendant***] that is outside the usual course of [***name of defendant***]'s business; and**
3. **That [***name of plaintiff***] is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed for [***name of defendant***].**

New November 2018; Revised May 2020, May 2021, November 2021

Directions for Use

This instruction may be used if a hiring entity claims that the worker is an independent contractor and not an employee, and is primarily intended for use in cases involving claims under the Labor Code, the Unemployment Insurance Code, or a wage order. Any person providing services or labor for remuneration is presumptively an employee. (Lab. Code, § 2775; see *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 913–914, & fn. 3 [232 Cal.Rptr.3d 1, 416 P.3d 1].) The hiring entity has the burden to prove independent contractor status. (Lab. Code, § 2775(b)(1); *Dynamex, supra,* 4 Cal.5th at p. 916.) This instruction may not be appropriate if the hiring entity claims independent contractor status based on Proposition 22 (Bus. & Prof. Code, § 7451) or one of the many exceptions listed in Labor Code sections 2776–2784. For an instruction on employment status under the *Borello* test, see CACI No. 3704, *Existence of "Employee" Status Disputed*.

The jury decides whether a worker is an employee or an independent contractor only when there are disputed issues of fact material to the determination. (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342 [221 Cal.Rptr.3d 1].) On undisputed facts, the court decides whether the relationship is employment as a matter of law. (*Dynamex, supra,* 4 Cal.5th at p. 963.)

Sources and Authority

- Worker Status: Employees. Labor Code section 2775.

- "The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." (*Dynamex, supra,* 4 Cal.5th at pp. 955–956.)
- "A business that hires any individual to provide services to it can always be said to knowingly 'suffer or permit' such an individual to work for the business. A literal application of the suffer or permit to work standard, therefore, would bring within its reach even those individuals hired by a business—including unquestionably independent plumbers, electricians, architects, sole practitioner attorneys, and the like—who provide only occasional services unrelated to a company's primary line of business and who have traditionally been viewed as working in their own independent business." (*Dynamex, supra,* 4 Cal.5th at pp. 948–949.)
- "A multifactor standard—like the economic reality standard or the *Borello* standard—that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages. A number of state courts, administrative agencies and academic commentators have observed, however, that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage and hour context." (*Dynamex, supra,* 4 Cal.5th at p. 954.)
- "Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor." (*Dynamex, supra,* 4 Cal.5th at pp. 959–960, internal citations omitted.)
- "A company that labels as independent contractors a class of workers who are

not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself." (*Dynamex, supra,* 4 Cal.5th at p. 962.)

- "The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences and, as such, must be affirmed on appeal if supported by substantial evidence. The question is one of law only if the evidence is undisputed. 'The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.' " (*Espejo, supra,* 13 Cal.App.5th at pp. 342–343.)
- "It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three parts of the ABC standard. Furthermore, inasmuch as a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an employee for purposes of the wage order, *a court* is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for *a court* to determine whether or not part B or part C of the ABC standard has been satisfied than for *the court* to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes of part A of the standard, the significant advantages of the ABC standard—in terms of increased clarity and consistency—will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question." (*Dynamex, supra,* 4 Cal.5th at p. 963, italics added.)
- "An entity that controls the business enterprise may be an employer even if it did not 'directly hire, fire or supervise' the employees. Multiple entities may be employers where they 'control different aspects of the employment relationship.' 'This occurs, for example, when one entity (such as a temporary employment agency) hires and pays a worker, and another entity supervises the work.' 'Supervision of the work, in the specific sense of exercising control over how services are performed, is properly viewed as one of the "working conditions" . . . .' " (*Castaneda v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1019 [177 Cal.Rptr.3d 581].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 29A

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, Coverage and Exemptions—In General, ¶ 11:115 et seq. (The Rutter Group)

Wilcox, California Employment Law, Ch. 250, *Employment Law: Wage and Hour*

Disputes, § 250.13 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 1, *Overview of Wage and Hour Laws*, § 1.04 (Matthew Bender)

2706–2709. Reserved for Future Use

2710. Solicitation of Employee by Misrepresentation—Essential Factual Elements (Lab. Code, § 970)

[*Name of plaintiff***] claims that [***name of defendant***] made [a] false representation[s] about work to persuade [him/her/***nonbinary pronoun***] to change [his/her/***nonbinary pronoun***] residence. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] made [a] representation[s] to [***name of plaintiff***] about [***insert one or more of the following***:]**

   [the kind, character, or existence of work;]

   [the length of time work would last;]

   [the compensation for work;]

   [the sanitary or housing conditions relating to work;]

   [the existence or nonexistence of any pending strike, lockout, or other labor dispute affecting work;]

2. **That [***name of defendant***]'s representation(s) [was/were] not true;**
3. **That [***name of defendant***] knew when the representation[s] [was/were] made that [it/they] [was/were] not true;**
4. **That [***name of defendant***] intended that [***name of plaintiff***] rely on the representation[s];**
5. **That [***name of plaintiff***] reasonably relied on [***name of defendant***]'s representation[s] and changed [his/her/***nonbinary pronoun***] residence for the purpose of working for [***name of defendant***];**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of plaintiff***]'s reliance on [***name of defendant***]'s representation(s) was a substantial factor in causing [his/her/***nonbinary pronoun***] harm.**

New September 2003

Directions for Use

If the statutory action under Labor Code section 970 is applicable, do not give the common-law fraud instruction. For other jury instructions regarding opinions as statements of fact, misrepresentations to third parties, reliance, and reasonable reliance, see CACI Nos. 1904 through 1908 in the Fraud or Deceit series.

Sources and Authority

- False Representations in Labor Recruitment. Labor Code section 970.

- Violation is Misdemeanor. Labor Code section 971.
- Civil Liability for Violation. Labor Code section 972.
- "[S]ection 970, although applied . . . to other employment situations, was enacted to protect migrant workers from the abuses heaped upon them by unscrupulous employers and potential employers, especially involving false promises made to induce them to move in the first instance." (*Tyco Industries, Inc. v. Superior Court* (1985) 164 Cal.App.3d 148, 155 [211 Cal.Rptr. 540], internal citation and italics omitted.)
- "To establish . . . a claim [for violation of section 970], [plaintiff] had to prove that defendants made a knowingly false representation regarding the length of her employment . . . with the intent to persuade her to move there from another place to take the position." (*Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App.4th 547, 553 [27 Cal.Rptr.2d 531].)
- "[Section 970] requires the employee to demonstrate that his or her employer made 'knowingly false representations' concerning the nature, duration or conditions of employment. . . . [¶] Moreover, under the statute an employee must establish that the employer induced him or her to relocate or change residences." (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1392 [88 Cal.Rptr.2d 802].)
- "The words 'to change from one place to another' import temporary as well as permanent relocation of residence, as contrasted with a mere change in the site of employment. The quantitative fact that the change of residence was to be only for two weeks rather than for a longer period would not appear to affect the qualitative misrepresentations, nor does it render the statute inapplicable." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 239–240 [102 Cal.Rptr. 1, 497 P.2d 225].)
- "The construction of a statute and whether it is applicable to a factual situation present solely questions of law. Although the trial court erred in determining that the Labor Code sections 970 and 972 were not applicable and hence the issue of double damages was not submitted to the jury, the record reflects that the jury specifically found that [defendant] made false representations to induce [plaintiff] to accept the position in California. Given the express findings by the jury, it is unnecessary to remand this case for a retrial on the limited issue of damages. . . . We therefore modify the judgment to reflect double damages in accordance with Labor Code section 972." (*Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514, 1522–1523 [273 Cal.Rptr. 296], internal citation omitted, overruled on other grounds, *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 499

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-D, *Implied*

Covenant of Good Faith and Fair Dealing, ¶¶ 4:351, 5:532, 5:540, 5:892.10, 16:493(The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-E, *Defamation*, ¶¶ 5:532, 5:540 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-K, *False Imprisonment*, ¶¶ 5:891–5:8932.10 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 16-E, *Statute of Limitations*, ¶ 16:493 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, § 4.51

4 Wilcox, California Employment Law, Ch. 63, *Causes of Action Related to Wrongful Termination*, § 63.06[1] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 249.30, 249.80 (Matthew Bender)

California Civil Practice: Employment Litigation § 6:27 (Thomson Reuters)

2711. Preventing Subsequent Employment by Misrepresentation—Essential Factual Elements (Lab. Code, § 1050)

[*Name of plaintiff*] claims that [*name of defendant*] made [a] false representation[s] to prevent [him/her/*nonbinary pronoun*] from obtaining employment. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That after [*name of plaintiff*]'s employment with [*name of defendant*] ended, [*name of defendant*] made [a] representation(s) to [*name of prospective employer*] about [*name of plaintiff*];**
2. **That [*name of defendant*]'s representation[s] [was/were] not true;**
3. **That [*name of defendant*] knew the representation[s] [was/were] not true when [he/she/*nonbinary pronoun*/it] made [it/them];**
4. **That [*name of defendant*] made the representation[s] with the intent of preventing [*name of plaintiff*] from obtaining employment;**
5. **That [*name of plaintiff*] was harmed; and**
6. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

For jury instructions regarding opinions as statements of fact and the definition of an important fact, see CACI Nos. 1904 and 1905 in the Fraud or Deceit series. For an instruction on the qualified privilege pursuant to Civil Code section 47(c), see CACI No. 1723 in the Defamation series.

It is unclear whether elements 3 and 4 are necessary elements to this cause of action.

Sources and Authority

- Preventing Later Employment by Misrepresentation. Labor Code section 1050.
- Permitting Violation is Misdemeanor. Labor Code section 1052.
- Civil Liability for Violation. Labor Code section 1054.
- Truthful Statement for Termination of Employment. Labor Code section 1053.
- Privileged Publications. Civil Code section 47(c).
- "Section 1054 provides for a damage remedy for the party aggrieved by a violation of the section 1050 prohibition against an employer blacklisting a

former employee. It is patent that the aggrieved party must be the blacklisted employee, not a union, since the latter can neither be fired nor quit." (*Service Employees Internat. Union, Local 193, AFL-CIO v. Hollywood Park, Inc.* (1983) 149 Cal.App.3d 745, 765 [197 Cal.Rptr. 316].)

- "Labor Code section 1050 applies only to misrepresentations made to prospective employers other than the defendant. [¶] . . . [T]he Legislature intended that Labor Code section 1050 would apply only to misstatements to other potential employers, not to misstatements made internally by employees of the party to be charged." (*Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 288–289 [186 Cal.Rptr. 184].)
- A communication without malice solicited by a prospective employer from a former employer would be privileged in accordance with Civil Code section 47(c). (See *O'Shea v. General Telephone Co.* (1987) 193 Cal.App.3d 1040, 1047 [238 Cal.Rptr. 715].)
- "We . . . recognize that '[t]he primary purpose of punitive damages is to punish the defendant and make an example of him.' Since this purpose is the same as the treble damages authorized by Labor Code section 1054, we do not sanction a double recovery for the plaintiff. In the new trial on damages, the jury should be instructed on the subject of punitive damages based on malice or oppression. Any verdict finding compensatory damages must be trebled by the court. Plaintiff may then elect to have judgment entered in an amount which reflects either the statutory trebling, or the compensatory and punitive damages." (*Marshall v. Brown* (1983) 141 Cal.App.3d 408, 419 [190 Cal.Rptr. 392].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 302, 373, 374, 377, 379, 387, 416, 455, 459

Chin et al., California Practice Guide: Employment Litigation, Ch.4-D, *Implied Covenant of Good Faith and Fair Dealing*, ¶ 4:351 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-E, *Defamation*, ¶¶ 5:532, 5:540 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-K, *False Imprisonment*, ¶¶ 5:891–5:893 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 16-E, *Statute of Limitations*, ¶ 16:493 (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 63, *Causes of Action Related to Wrongful Termination*, § 63.06[2] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 249.22[3][a], 249.31, 249.81 (Matthew Bender)

California Civil Practice: Employment Litigation § 6:29 (Thomson Reuters)

2712–2719. Reserved for Future Use

2720. Affirmative Defense—Nonpayment of Overtime—Executive Exemption

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] is not required to pay [***name of plaintiff***] for overtime because [***name of plaintiff***] is an executive employee. [***Name of plaintiff***] is exempt from overtime pay requirements as an executive if [***name of defendant***] proves all of the following:**

1. **[***Name of plaintiff***]'s duties and responsibilities involve management of [***name of defendant***]'s [business/enterprise] or of a customarily recognized department or subdivision of the [business/enterprise];**
2. **[***Name of plaintiff***] customarily and regularly directs the work of two or more employees;**
3. **[***Name of plaintiff***] has the authority to hire or fire employees, or [his/her/***nonbinary pronoun***] suggestions as to hiring or firing and as to advancement and promotion or other changes in status are given particular weight;**
4. **[***Name of plaintiff***] customarily and regularly exercises discretion and independent judgment;**
5. **[***Name of plaintiff***] performs executive duties more than half of the time; and**
6. **[***Name of plaintiff***]'s monthly salary is at least [***insert amount that is twice the state minimum wage for full time employment***].**

In determining whether [*name of plaintiff***] performs executive duties more than half of the time, the most important consideration is how [he/she/***nonbinary pronoun***] actually spends [his/her/***nonbinary pronoun***] time. But also consider whether [***name of plaintiff***]'s practice differs from [***name of defendant***]'s realistic expectations of how [***name of plaintiff***] should spend [his/her/***nonbinary pronoun***] time and the realistic requirements of the job.**

[Each of [*name of plaintiff***]'s activities is either an exempt or a nonexempt activity depending on the primary purpose for which [he/she/***nonbinary pronoun***] undertook it at that time. Time spent on an activity is either exempt or nonexempt, not both.]**

New December 2012; Revised June 2014

Directions for Use

This instruction is an affirmative defense to an employee's claim for statutory

overtime earnings. (See CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements*.) The employer claims that the employee is an exempt executive. (See Lab. Code, § 515(a).) The employer must prove all of the elements. (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1014 [118 Cal.Rptr.3d 834].) For an instruction for the affirmative defense of administrative exemption, see CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption.*

This instruction is based on Industrial Welfare Commission Wage Order 9, which is applicable to the transportation industry. (See 8 Cal. Code Regs., § 11090.) Different wage orders are applicable to different industries. (See Lab. Code, § 515.) The requirements of the executive exemptions under the various wage orders are essentially the same. (Cf., e.g., 8 Cal. Code Regs., § 11040, Wage Order 4, applicable to persons employed in professional, technical, clerical, mechanical, and similar occupations.).

The exemption requires that the employee be primarily engaged in duties that "meet the test of the exemption." (See 8 Cal. Code Regs., § 11090 sec. 1(A)(1)(e), sec. 2(J) ("primarily" means more than one-half the employee's work time).) This requirement is expressed in element 5. However, the contours of executive duties are quite detailed in the wage orders, which incorporate federal regulations under the Fair Labor Standards Act and also provide some specific examples. (See also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802 [85 Cal.Rptr.2d 844, 978 P.2d 2].) In many cases, it will be advisable to instruct further with details from the applicable wage order and regulations as to what constitutes "executive duties" in element 5.

Include the optional last paragraph if a particular work activity arguably involves more than one purpose and could be characterized as exempt or nonexempt, depending on its primary purpose.

This instruction may be expanded to provide examples of the specific exempt and nonexempt activities relevant to the work at issue. (See, e.g., *Heyen v. Safeway, Inc.* (2013) 216 Cal.App.4th 795, 808–809 [157 Cal.Rptr.3d 280].)

Sources and Authority

- Exemptions to Overtime Requirements. Labor Code section 515(a).
- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez, supra*, 20 Cal.4th at pp. 794–795.)
- "In order to discharge its burden to show [plaintiff] was exempt as an executive employee pursuant to Wage Order 9, [defendant] was required to demonstrate the following: (1) his duties and responsibilities involve management of the enterprise or a 'customarily recognized department or subdivision thereof'; (2) he customarily and regularly directs the work of two or more employees; (3) he has the authority to hire or terminate employees, or his suggestions as to hiring, firing, promotion or other changes in status are given 'particular weight'; (4) he

customarily and regularly exercises discretion and independent judgment; (5) he is primarily engaged in duties that meet the test of the exemption; and (6) his monthly salary is equivalent to no less than two times the state minimum wage for full-time employment." (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1014 [citing 8 Cal. Code Regs., § 11090, subd. 1(A)(1)].)

- "Determining whether or not all of the elements of the exemption have been established is a fact-intensive inquiry." (*United Parcel Service Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1014.)
- "Review of the determination that [plaintiff] was not an exempt employee is a mixed question of law and fact. Whether an employee satisfies the elements of the exemption is a question of fact reviewed for substantial evidence. The appropriate manner of evaluating the employee's duties is a question of law that we review independently." (*Heyen, supra,* 216 Cal.App.4th at p. 817, internal citations omitted.)
- "The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee. Wage Order 9 expressly provides that '[t]he *work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work,* together with the employer's realistic expectations and the realistic requirements of the job, shall be considered . . . .' No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. 'A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations . . . .' " (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1014–1015, original italics, internal citation omitted.)
- "This is not a day-by-day analysis. The issue is whether the employees ' "spend more than 51% of their time on managerial tasks in any given workweek." ' " (*Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 473, fn. 36 [216 Cal.Rptr.3d 390])
- "Put simply, 'the regulations do not recognize "hybrid" activities—i.e., activities that have both "exempt" and "nonexempt" aspects. Rather, the regulations require that each discrete task be separately classified as either "exempt' or "nonexempt." [Citations.]' [¶] We did not state, however, that the same task must always be labeled exempt or nonexempt: '[I]dentical tasks may be "exempt" or 'nonexempt" based on the purpose they serve within the organization or department.' " (*Batze, supra, 10 Cal.App.5th at p. 474*.)
- "[T]he federal regulations incorporated into Wage Order 7 do not support the 'multi-tasking' standard proposed by [defendant]. Instead, they suggest, as the trial court correctly instructed the jury, that the trier of fact must categorize tasks as either 'exempt' or 'nonexempt' based on the purpose for which [plaintiff]

undertook them." (*Heyen, supra*, 216 Cal.App.4th at p. 826.)

- "Wage Order 4 refers to compensation in the form of a 'salary.' It does not define the term. The regulation does not use a more generic term, such as 'compensation' or 'pay.' Either of these terms would encompass hourly wages, a fixed annual salary, and anything in between. 'Salary' is a more specific form of compensation. A salary is generally understood to be a fixed rate of pay as distinguished from an hourly wage. Thus, use of the word 'salary' implies that an exempt employee's pay must be something other than an hourly wage. California's Labor Commission noted in an opinion letter dated March 1, 2002, that the Division of Labor Standards Enforcement (DLSE) construes the IWC wage orders to incorporate the federal salary-basis test for purposes of determining whether an employee is exempt or nonexempt." (*Negri v. Koning & Associates* (2013) 216 Cal.App.4th 392, 397–398 [156 Cal.Rptr.3d 697, footnote omitted.)
- "[T]he costs incurred by an employer to provide an employee with board, lodging or other facilities may not count towards the minimum salary amount required for exemption . . . ." (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 958 [219 Cal.Rptr.3d 580].)
- "The rule is that state law requirements for exemption from overtime pay must be at least as protective of the employee as the corresponding federal standards. Since federal law requires that, in order to meet the salary basis test for exemption the employee would have to be paid a predetermined amount that is not subject to reduction based upon the number of hours worked, state law requirements must be at least as protective." (*Negri, supra,* 216 Cal.App.4th at p. 398, internal citation omitted.)
- "Under California law, to determine whether an employee was properly classified as 'exempt,' the trier of fact must look not only to the 'work actually performed by the employee during the . . . workweek,' but also to the 'employer's realistic expectations and the realistic requirements of the job.' " (*Heyen, supra,* 216 Cal.App.4th at p. 828.)
- "Having recognized California's distinctive quantitative approach to determining which employees are outside salespersons, we must then address an issue implicitly raised by the parties that caused some confusion in the trial court and the Court of Appeal: Is the number of hours worked in sales-related activities to be determined by the number of hours that the employer, according to its job description or its estimate, claims the employee should be working in sales, or should it be determined by the actual average hours the employee spent on sales activity? The logic inherent in the IWC's quantitative definition of outside salesperson dictates that neither alternative would be wholly satisfactory. On the one hand, if hours worked on sales were determined through an employer's job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in sales activities during most of his working hours and falls below the 50 percent mark

due to his own substandard performance should not thereby be able to evade a valid exemption. A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the *realistic* requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job." (*Ramirez, supra,* 20 Cal.4th at pp. 801–802, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 392 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:345 et seq. (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 2, *Minimum Wages*, §§ 2.04, 2.06 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.71 (Matthew Bender)

Simmons, Wage and Hour Manual for California Employers, Ch. 2, *Coverage of Wage and Hour Laws* (Castle Publications Limited)

Simmons, Wage and Hour Manual for California Employers, Ch. 10, *Exemptions* (Castle Publications Limited)

2721. Affirmative Defense—Nonpayment of Overtime—Administrative Exemption

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[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] is not required to pay [***name of plaintiff***] for overtime because [***name of plaintiff***] is an administrative employee. [***Name of plaintiff***] is exempt from overtime pay requirements as an administrator if [***name of defendant***] proves all of the following:**

1. **[***Name of plaintiff***]'s duties and responsibilities involve the performance of office or nonmanual work directly related to management policies or general business operations of [***name of defendant***] or [***name of defendant***]'s customers;**

2. **[***Name of plaintiff***] customarily and regularly exercises discretion and independent judgment;**

3. **[[***Name of plaintiff***] performs, under general supervision only, specialized or technical work that requires special training, experience, or knowledge;]**

   [*or***]**

   [[*Name of plaintiff***] regularly and directly assists a proprietor or bona fide executive or administrator;]**

   [*or***]**

   [[*Name of plaintiff***] performs special assignments and tasks under general supervision only;]**

4. **[***Name of plaintiff***] performs administrative duties more than half of the time; and**

5. **[***Name of plaintiff***]'s monthly salary is at least [***insert amount that is twice the state minimum wage for full time employment***].**

In determining whether [*name of plaintiff***] performs administrative duties more than half of the time, the most important consideration is how [he/she/***nonbinary pronoun***] actually spends [his/her/***nonbinary pronoun***] time. But also consider whether [***name of plaintiff***]'s practice differs from [***name of defendant***]'s realistic expectations of how [***name of plaintiff***] should spend [his/her/***nonbinary pronoun***] time and the realistic requirements of the job.**

[Each of [*name of plaintiff***]'s activities is either an exempt or a nonexempt activity depending on the primary purpose for which [he/she/***nonbinary pronoun***] undertook it at that time. Time spent on an activity is**

either exempt or nonexempt, not both.]

New December 2012; Revised June 2014

Directions for Use

This instruction is an affirmative defense to an employee's claim for statutory overtime earnings. (See CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements*.) The employer claims that the employee is an exempt administrator. (See Lab. Code, § 515(a).) The employer must prove all of the elements. (*Eicher v. Advanced Business Integrators, Inc*. (2007) 151 Cal.App.4th 1363 1372 [61 Cal.Rptr.3d 114].) For an instruction for the affirmative defense of executive exemption, see CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption.*

This instruction is based on Industrial Welfare Commission Wage Order 9, which is applicable to the transportation industry. (See 8 Cal. Code Regs., § 11090.) Different wage orders are applicable to different industries. (See Lab. Code, § 515.) The requirements of the administrative exemptions under the various wage orders are essentially the same. (Cf., e.g., 8 Cal. Code Regs., § 11040, Wage Order 4, applicable to persons employed in professional, technical, clerical, mechanical, and similar occupations.).

The exemption requires that the employee be "primarily engaged in duties that meet the test of the exemption." (See 8 Cal. Code Regs., § 11090 sec. 1(A)(2)(f), sec. 2(J) ("primarily" means more than one-half the employee's work time).) This requirement is expressed in element 4. However, the contours of administrative duties are quite detailed in the wage orders, which incorporate federal regulations under the Fair Labor Standards Act and also provide some specific examples. (See also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802 [85 Cal.Rptr.2d 844, 978 P.2d 2].) In many cases, it will be advisable to instruct further with details from the applicable wage order and regulations as to what constitutes "administrative duties" (element 4) and the meaning of "directly related" (element 1).

Include the optional last paragraph if a particular work activity arguably involves more than one purpose and could be characterized as exempt or nonexempt, depending on its primary purpose.

This instruction may be expanded to provide examples of the specific exempt and nonexempt activities relevant to the work at issue. (See, e.g., *Heyen v. Safeway, Inc.* (2013) 216 Cal.App.4th 795, 808–809 [157 Cal.Rptr.3d 280].)

Sources and Authority

- Exemptions to Overtime Requirements. Labor Code section 515(a).
- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez, supra,* 20 Cal.4th at pp. 794–795.)
- "In order to establish that [plaintiff] was exempt as an administrative employee,

[defendant] was required to show all of the following: (1) his duties and responsibilities involve the performance of office or nonmanual work directly related to management policies or general business operations of [defendant]; (2) he customarily and regularly exercises discretion and independent judgment; (3) he performs work requiring special training, experience, or knowledge under general supervision only (the two alternative prongs of the general supervision element are not pertinent to our discussion); (4) he is primarily engaged in duties that meet the test of exemption; and (5) his monthly salary is equivalent to no less than two times the state minimum wage for full-time employment." (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1028 [relying on 8 Cal. Code Regs., § 11090, subd. 1(A)(2)].)

- "Read together, the applicable Labor Code statutes, wage orders, and incorporated federal regulations now provide an explicit and extensive framework for analyzing the administrative exemption." (*Harris v. Superior Court* (2011) 53 Cal.4th 170, 182 [135 Cal.Rptr.3d 247, 266 P.3d 953].)
- "Determining whether or not all of the elements of the exemption have been established is a fact-intensive inquiry." (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1014 [118 Cal.Rptr.3d 834].)
- "Review of the determination that [plaintiff] was not an exempt employee is a mixed question of law and fact. Whether an employee satisfies the elements of the exemption is a question of fact reviewed for substantial evidence. The appropriate manner of evaluating the employee's duties is a question of law that we review independently." (*Heyen, supra,* 216 Cal.App.4th at p. 817, internal citations omitted.)
- "The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee. Wage Order 9 expressly provides that '[t]he *work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work,* together with the employer's realistic expectations and the realistic requirements of the job, shall be considered . . . .' No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. 'A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations . . . .' " (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1014–1015, original italics, internal citation omitted.)
- "This is not a day-by-day analysis. The issue is whether the employees ' "spend more than 51% of their time on managerial tasks in any given workweek." ' " (*Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 473, fn. 36 [216 Cal.Rptr.3d 390].)
- "Put simply, 'the regulations do not recognize "hybrid" activities—i.e., activities

that have both "exempt" and "nonexempt" aspects. Rather, the regulations require that each discrete task be separately classified as either "exempt' or "nonexempt." [Citations.]' [¶] We did not state, however, that the same task must always be labeled exempt or nonexempt: ' [I]dentical tasks may be "exempt" or 'nonexempt" based on the purpose they serve within the organization or department.' " (*Batze, supra*, 10 Cal.App.5th at p. 474.)

- "In basic terms, the administrative/production worker dichotomy distinguishes between administrative employees who are primarily engaged in ' "administering the business affairs of the enterprise" ' and production-level employees whose ' "primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market." [Citation.]' ¶¶ [T]he dichotomy is a judicially created creature of the common law, which has been effectively superseded in this context by the more specific and detailed statutory and regulatory enactments." (*Harris, supra*, 53 Cal.4th at pp. 183, 188.)
- "We do not hold that the administrative/production worker dichotomy . . . can never be used as an analytical tool. We merely hold that the Court of Appeal improperly applied the administrative/production worker dichotomy as a dispositive test. [¶] . . . [I]n resolving whether work qualifies as administrative, courts must consider the particular facts before them and apply the language of the statutes and wage orders at issue. Only if those sources fail to provide adequate guidance . . . is it appropriate to reach out to other sources." (*Harris, supra*, 53 Cal.4th at p. 190.)
- "[T]he federal regulations incorporated into Wage Order 7 do not support the 'multi-tasking' standard proposed by [defendant]. Instead, they suggest, as the trial court correctly instructed the jury, that the trier of fact must categorize tasks as either 'exempt' or 'nonexempt' based on the purpose for which [plaintiff] undertook them." (*Heyen, supra*, 216 Cal.App.4th at p. 826.)
- "Wage Order 4 refers to compensation in the form of a 'salary.' It does not define the term. The regulation does not use a more generic term, such as 'compensation' or 'pay.' Either of these terms would encompass hourly wages, a fixed annual salary, and anything in between. 'Salary' is a more specific form of compensation. A salary is generally understood to be a fixed rate of pay as distinguished from an hourly wage. Thus, use of the word 'salary' implies that an exempt employee's pay must be something other than an hourly wage. California's Labor Commission noted in an opinion letter dated March 1, 2002, that the Division of Labor Standards Enforcement (DLSE) construes the IWC wage orders to incorporate the federal salary-basis test for purposes of determining whether an employee is exempt or nonexempt." (*Negri v. Koning & Associates* (2013) 216 Cal.App.4th 392, 397–398 [156 Cal.Rptr.3d 697, footnote omitted.)
- "[T]he costs incurred by an employer to provide an employee with board, lodging or other facilities may not count towards the minimum salary amount required for exemption . . . ." (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 958 [219 Cal.Rptr.3d 580].)

- "The rule is that state law requirements for exemption from overtime pay must be at least as protective of the employee as the corresponding federal standards. Since federal law requires that, in order to meet the salary basis test for exemption the employee would have to be paid a predetermined amount that is not subject to reduction based upon the number of hours worked, state law requirements must be at least as protective." (*Negri, supra*, 216 Cal.App.4th at p. 398.)
- "Under California law, to determine whether an employee was properly classified as 'exempt,' the trier of fact must look not only to the 'work actually performed by the employee during the . . . workweek,' but also to the 'employer's realistic expectations and the realistic requirements of the job.' " (*Heyen, supra*, 216 Cal.App.4th at p. 828.)
- "Having recognized California's distinctive quantitative approach to determining which employees are outside salespersons, we must then address an issue implicitly raised by the parties that caused some confusion in the trial court and the Court of Appeal: Is the number of hours worked in sales-related activities to be determined by the number of hours that the employer, according to its job description or its estimate, claims the employee should be working in sales, or should it be determined by the actual average hours the employee spent on sales activity? The logic inherent in the IWC's quantitative definition of outside salesperson dictates that neither alternative would be wholly satisfactory. On the one hand, if hours worked on sales were determined through an employer's job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in sales activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption. A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the *realistic* requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job." (*Ramirez, supra*, 20 Cal.4th at pp. 801–802, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 392 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:345 et seq. (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 2, *Minimum Wages*, § 2.04 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.71 (Matthew Bender)

Simmons, Wage and Hour Manual for California Employers, Ch. 2, *Coverage of Wage and Hour Laws* (Castle Publications Limited)

Simmons, Wage and Hour Manual for California Employers, Ch. 10, *Exemptions* (Castle Publications Limited)

2722–2731. Reserved for Future Use

2732. Retaliatory Unfair Immigration-Related Practice—Essential Factual Elements (Lab. Code, § 1019)

[*Name of plaintiff***] claims that [***name of defendant***] [***specify unfair immigration-related practice, e.g., threatened to report [him/her/nonbinary pronoun] to immigration authorities***] in retaliation for [his/her/***nonbinary pronoun***] [***specify right, e.g., making a claim for minimum wage***]. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***]**

   [in good faith filed a complaint or informed someone about [*name of defendant***]'s alleged [***specify violation of Labor Code or local ordinance, e.g., failure to pay the minimum wage to its employees***];]**

   [or]

   [sought information regarding whether or not [*name of defendant***] was in compliance with [***specify requirement under Labor Code or local ordinance, e.g., minimum wage requirements***];]**

   [or]

   [informed someone of that person's potential rights and remedies for [*name of defendant***]'s alleged [***specify violation of Labor Code or local ordinance, e.g., failure to pay the minimum wage to its employees***] and assisted [him/her/***nonbinary pronoun***] in asserting those rights;]**

2. **That [***name of defendant***]**

   [requested more or different documents than those that are required by federal immigration law, or refused to honor documents that on their face reasonably appeared to be genuine;]

   [or]

   [used the federal E-Verify system to check the employment authorization status of [*name of plaintiff***] at a time or in a manner not required or authorized by federal immigration law;]**

   [or]

   [filed or threatened to file a false [police report/report or complaint with a state or local agency];]

   [or]

   [contacted or threatened to contact immigration authorities;]

3. **That [***name of defendant***]'s conduct was for the purpose of, or with the intent of, retaliating against [***name of plaintiff***] for**

exercising [his/her/*nonbinary pronoun*] legally protected rights;

4. **That [*name of plaintiff*] was harmed; and**
5. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

[If you find that [*name of defendant*] acted as described in element 2 fewer than 90 days after [*name of plaintiff*] acted as described in element 1, you may but are not required to conclude, without further evidence, that [*name of defendant*] acted with a retaliatory purpose and intent.]

New December 2014; Revised May 2020

Directions for Use

One who is the victim of an "unfair immigration-related practice" as defined, or that person's representative, may bring a civil action for equitable relief and any damages or penalties. (Lab. Code, § 1019(a).) While most commonly this claim would be brought by an employee against an employer, the statute prohibits unfair immigration-related practices by "an employer or any other person" against "an employee or other person." (Lab. Code, § 1019(d)(1).) Therefore, the statute does not require an employment relationship between the parties.

Engaging in an unfair immigration-related practice against a person within 90 days of the person's exercise of protected rights raises a rebuttable presumption that the defendant did so in retaliation for the plaintiff's exercise of those rights. (Lab. Code, § 1019(c).) The statute does not specify whether the presumption is one affecting only the burden of producing evidence (see Evid. Code, §§ 603, 604) or one affecting the burden of proof. (See Evid. Code, § 605.) If the statute implements a public policy against the use of immigration-related coercion to deter workers from exercising their rights under the Labor Code, its presumption would affect the burden of proof. (See Evid. Code, § 605.) The last optional paragraph of the instruction may then be given if applicable on its facts. If, however, the presumption affects only the burden of producing evidence, it ceases to exist when the defendant produces evidence rebutting the presumption, such as a reason for the action other than retaliation. (Evid. Code, § 604.) In that case, the last paragraph would not be given.

Sources and Authority

- Retaliatory Use of Immigration-Related Practices. Labor Code section 1019.
- Unlawful Employment of Aliens. 8 United States Code section 1324a.

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 359

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-E, California Labor Code, ¶ 7:1510 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

11 California Forms or Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][b] (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

2733–2739. Reserved for Future Use

2740. Violation of Equal Pay Act—Essential Factual Elements (Lab. Code, § 1197.5)

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was paid at a wage rate that is less than the rate paid to employees of [the opposite sex/another race/another ethnicity]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was paid less than the rate paid to [a] person[s] of [the opposite sex/another race/another ethnicity] working for [***name of defendant***];**
2. **That [***name of plaintiff***] was performing substantially similar work as the other person[s], considering the overall combination of skill, effort, and responsibility required; and**
3. **That [***name of plaintiff***] was working under similar working conditions as the other person[s].**

New May 2018; Revised January 2019, November 2019, May 2020

Directions for Use

The California Equal Pay Act prohibits paying employees at lower wage rates than rates paid to employees of the opposite sex or a different race or ethnicity for substantially similar work. (Lab. Code, § 1197.5(a), (b).) An employee receiving less than the wage to which the employee is entitled may bring a civil action to recover the balance of the wages, including interest, and an equal amount as liquidated damages. Costs and attorney fees may also be awarded. (Lab. Code, § 1197.5(h).) There is no requirement that an employee show discriminatory intent as an element of the claim. (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 622–625, 629 [3 Cal.Rptr.3d 844].)

This instruction presents singular and plural options for the comparator, the employee or employees whose pay and work are being compared to the plaintiff's to establish a violation of the Equal Pay Act. The statute refers to *employees* of the opposite sex or different race or ethnicity. There is language in cases, however, that suggests that a single comparator (e.g., one woman to one man) is sufficient. (See *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324 [55 Cal.Rptr.3d 732] [plaintiff had to show that she is paid lower wages than *a male comparator*, italics added]; *Green, supra,* 111 Cal.App.4th at p. 628 [plaintiff in a section 1197.5 action must first show that the employer paid *a male employee* more than a female employee for equal work, italics added].) No California case has expressly so held, however.

There are a number of defenses that the employer may assert to defend what appears to be an improper pay differential. (Lab. Code, § 1197.5(a), (b).) See CACI

No. 2741, *Affirmative Defense—Different Pay Justified,* and CACI No. 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity*, for instructions on the employer's affirmative defenses. (See Lab. Code, § 1197.5(a)(1), (b)(1).)

Sources and Authority

- Right to Equal Pay Based on Gender, Race, or Ethnicity. Labor Code section 1197.5(a), (b).
- Private Right of Action to Enforce Equal Pay Claim. Labor Code section 1197.5(h).
- "This section was intended to codify the principle that an employee is entitled to equal pay for equal work without regard to gender." (*Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 104 [165 Cal.Rptr. 100, 611 P.2d 441].)
- "To prove a prima facie case of wage discrimination, 'a plaintiff must establish that, based on gender, the employer pays different wages to employees doing substantially similar work under substantially similar conditions. [Footnote omitted.]' 'If that prima facie showing is made, the burden shifts to the employer to prove the disparity is permitted by one of the EPA's [four] statutory exceptions—[such as,] that the disparity is based on a factor other than sex.' But a plaintiff must show 'not only that she [was] paid lower wages than a male comparator for equal work, but that she has selected the proper comparator.' 'The [EPA] does not prohibit variations in wages; it prohibits *discriminatory* variations in wages. . . . [Accordingly,] "a comparison to a specifically chosen employee should be scrutinized closely to determine its usefulness." ' " (*Allen v. Staples, Inc.* (2022) 84 Cal.App.5th 188, 194 [299 Cal.Rptr.3d 779], original italics, internal citations omitted.)
- "[T]he plaintiff in a section 1197.5 action must first show that the employer paid a male employee more than a female employee ' "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." ' " (*Green, supra,* 111 Cal.App.4th at p. 628.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination,* ¶ 11:1075 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, Employment Law: *Wage and Hour Disputes,* § 250.14 (Matthew Bender)

2741. Affirmative Defense—Different Pay Justified

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*/it] was justified in paying [*name of plaintiff*] a wage rate that was less than the rate paid to employees of [the opposite sex/another race/another ethnicity]. To establish this defense, [*name of defendant*] must prove all of the following:

1. **That the wage differential was based on one or more of the following factors:**

   [a. A seniority system;]

   [b. A merit system;]

   [c. A system that measures earnings by quantity or quality of production;]

   [d. (*Specify alleged bona fide factor(s) other than sex, race, or ethnicity, such as education, training, or experience.***).]**

2. **That each factor was applied reasonably; and**

3. **That the factor[s] that [*name of defendant*] relied on account[s] for the entire wage differential.**

Prior salary does not justify any disparity in current compensation.

New May 2018; Revised January 2019

Directions for Use

The California Equal Pay Act presents four factors that an employer may offer to justify a pay differential that results in an apparent pay disparity based on gender, race, or ethnicity. Factors a, b, and c in element 1 are specific.

If factor d is selected, the jury must also be instructed with CACI No. 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity,* which establishes what bona fide factors other than sex, race, or ethnicity may justify a pay differential. (See Lab. Code, § 1197.5(a)(1), (b)(1).) Choose the factor or factors that the employer asserts as justification.

Sources and Authority

- Factors Justifying Pay Differential. Labor Code section 1197.5(a)(1), (b)(1).

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination,* ¶ 11:1075 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal*

Employment Opportunity Laws, § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes,* § 250.14 (Matthew Bender)

2742. Bona Fide Factor Other Than Sex, Race, or Ethnicity

[*Name of defendant***] claims that [***specify bona fide factor other than sex, race, or ethnicity***] is a legitimate factor other than [sex/race/ethnicity] that justifies paying [***name of plaintiff***] at a wage rate that is less than the rate paid to employees of [the opposite sex/another race/another ethnicity].**

[*Specify factor***] is a factor that justifies the pay differential only if [***name of defendant***] proves all of the following:**

1. **That the factor is not based on or derived from a [sex/race/ethnicity]-based differential in compensation;**
2. **That the factor is job related with respect to [***name of plaintiff***]'s position; and**
3. **That the factor is consistent with a business necessity.**

A "business necessity" means an overriding legitimate business purpose such that the factor effectively fulfills the business purpose it is supposed to serve.

This defense does not apply, however, if [*name of plaintiff***] proves that an alternative business practice exists that would serve the same business purpose without producing the pay differential.**

New May 2018

Directions for Use

This instruction must be given along with CACI No. 2741, *Affirmative Defense—Different Pay Justified,* if factor d of element 1 of CACI No. 2741 is chosen: a bona fide factor other than sex, race, or ethnicity, such as education, training, or experience. This factor applies only if the employer demonstrates that the factor is not based on or derived from a sex, race, or ethnicity-based differential in compensation, is job-related with respect to the position in question, and is consistent with a business necessity. "Business necessity" means an overriding legitimate business purpose such that the factor effectively fulfills the business purpose it is supposed to serve. This defense does not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential. (See Lab. Code, § 1197.5(a)(1)(D), (b)(1)(D).)

Sources and Authority

- Bona Fide Factor Other Than Sex, Race, or Ethnicity. Labor Code section 1197.5(a)(1)(D), (b)(1)(D).

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination,* ¶ 11:1077.10 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes,* § 250.14 (Matthew Bender)

2743. Equal Pay Act—Retaliation—Essential Factual Elements (Lab. Code, § 1197.5(k))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her/***nonbinary pronoun***] for [pursuing/assisting another in the enforcement of] [his/her/***nonbinary pronoun***] right to equal pay regardless of [sex/race/ethnicity]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***specify acts taken by plaintiff to invoke, enforce, or assist in the enforcement of the right to equal pay***];**
2. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**
3. **That [***name of plaintiff***]'s [pursuit of/assisting in the enforcement of another's right to] equal pay was a substantial motivating reason for [***name of defendant***]'s [discharging/[***other adverse employment action***]] [***name of plaintiff***];**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s retaliatory conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New May 2018; Revised May 2020, May 2024

Directions for Use

Use this instruction in cases of alleged retaliation against an employee under the Equal Pay Act. The Act prohibits adverse employment actions against an employee who has invoked the protections of or taken steps to enforce it. (Lab. Code, § 1197.5(k)(1) [protecting the right of employees to invoke the protections of the Act, assist in enforcement of the Act, disclose their wages, discuss the wages of others, inquire about another employee's wages, or encourage other employees to exercise their rights under the Act].) Modify the instruction as necessary to describe the employee's protected activity in the first sentence. An employee who has been retaliated against may bring a civil action for reinstatement, reimbursement for lost wages and work benefits, interest, and equitable relief. (Lab. Code, § 1197.5(k)(2).)

Note that there are two causation elements. First, there must be a causal connection between the employee's protected activity and the adverse employment action (element 3). Second, the employee must have suffered harm because of the employer's retaliatory acts (element 5).

Element 3 uses the term "substantial motivating reason" to express both intent and causation between the employee's protected activity and the adverse employment action. "Substantial motivating reason" has been held to be the appropriate standard

under the discrimination prohibitions of the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether this standard applies to the Equal Pay Act retaliation cases has not been addressed by the courts.

If an employer takes adverse action within 90 days of an employee's exercise of rights protected by the Equal Pay Act, there is a rebuttable presumption in favor of the employee's claim. (Lab. Code, § 1197.5(k)(1).) Consider modifying this instruction and/or giving additional instructions regarding the rebuttable presumption.

Sources and Authority

- Retaliation Prohibited Under Equal Pay Act. Labor Code section 1197.5(k).
- Rebuttable Presumption in Favor of Employee's Claim. Labor Code section 1197.5(k)(1).

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 430

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination,* ¶ 11:1077.20 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.14[b] (Matthew Bender)

2744–2749. Reserved for Future Use

2750. Failure to Reimburse Employee for Necessary Expenditures or Losses—Essential Factual Elements (Lab. Code, § 2802(a))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reimburse [him/her/***nonbinary pronoun***] for necessary [expenditures/ [and] losses]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] incurred [expenditures/ [and] losses] as a direct consequence of [discharging [his/her/***nonbinary pronoun***] job duties/obeying the directions of [***name of defendant***]];**
2. **That the [expenditures/ [and] losses] were necessary and reasonable;**
3. **That [***name of defendant***] failed to reimburse [***name of plaintiff***] for the full amount of the [expenditures/ [and] losses]; and**
4. **The amount of the [expenditures/ [and] losses] that [***name of defendant***] failed to compensate.**

["Necessary [expenditures/ [and] losses]" may include [expenditures/ [and] losses] [*name of plaintiff***] would have incurred even if [he/she/***nonbinary pronoun***] did not also incur them as a direct consequence of discharging [his/her/***nonbinary pronoun***] job duties or obeying the directions of [***name of defendant***].]**

New November 2021

Directions for Use

This instruction assumes the plaintiff is an employee and the defendant is the employer. The instruction will need to be modified if there is a dispute about the defendant's status as an employer or the plaintiff's status as an employee of the defendant. Labor Code section 2802 covers necessary expenditures and losses. If only one of those is at issue, select the appropriate option.

If there is an argument that the directions of the employer were unlawful, modify the instruction as necessary. (See Lab. Code, § 2802(a).)

Necessary expenditures and losses may include some personal expenses, for example, the cost of a personal cellphone that is used to make work-related calls. (See *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1144 [176 Cal.Rptr.3d 407].) Omit the final paragraph if personal expenses are not at issue.

Sources and Authority

- Obligations of Employer to Indemnify. Labor Code section 2802(a).
- "We conclude that an employer may satisfy its statutory reimbursement

obligation by paying employees enhanced compensation in the form of increases in base salary or increases in commission rates, or both, provided there is a means or method to apportion the enhanced compensation to determine what amount is being paid for labor performed and what amount is reimbursement for business expenses." (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 559 [67 Cal.Rptr.3d 468, 169 P.3d 889].)

- "Does an employer always have to reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone, or is the reimbursement obligation limited to the situation in which the employee incurred an extra expense that he or she would not have otherwise incurred absent the job? The answer is that reimbursement is always required. Otherwise, the employer would receive a windfall because it would be passing its operating expenses on to the employee. Thus, to be in compliance with section 2802, the employer must pay some reasonable percentage of the employee's cell phone bill." (*Cochran, supra,* 228 Cal.App.4th at p. 1144.)
- "In calculating the reimbursement amount due under section 2802, the employer may consider not only the actual expenses that the employee incurred, but also whether each of those expenses was 'necessary,' which in turn depends on the reasonableness of the employee's choices. For example, an employee's choice of automobile will significantly affect the costs incurred. An employee who chooses an expensive model and replaces it frequently will incur substantially greater depreciation costs than an employee who chooses a lower priced model and replaces it less frequently. Similarly, some vehicles use substantially more fuel or require more frequent or more costly maintenance and repairs than others. The choice of vehicle will also affect insurance costs. Other employee choices, such as the brand and grade of gasoline or tires and the shop performing maintenance and repairs, will also affect the actual costs. Thus, calculation of automobile expense reimbursement using the actual expenses method requires not only detailed recordkeeping by the employee and complex allocation calculations, but also the exercise of judgment (by the employer, the employee, and officials charged with enforcement of § 2802) to determine whether the expenses incurred were reasonable and therefore necessary." (*Gattuso, supra,* 42 Cal.4th at p. 568.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 440, 442

2 Wilcox, California Employment Law, Ch. 30, *Employer's Tort Liability to Third Parties for Conduct of Employees*, § 30.09 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.21 (Matthew Bender)

2751. Reserved for Future Use

2752. Tip Pool Conversion—Essential Factual Elements (Lab. Code, § 351)

[*Name of plaintiff***] claims that [***name of defendant***] [took money/allowed [***specify ineligible individual(s) or class(es) of individuals***] to take money] from a tip pool that [***name of plaintiff***] was entitled to receive. [The court has determined that [***specify ineligible individual(s) or class(es) of individuals***] [was/were] not eligible to receive money from a tip pool.]**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [a/an] [employer/[***other covered entity***]];**
2. **That [***name of plaintiff***] was an employee of [***name of defendant***];**
3. **That [***name of defendant***] maintained a tip pool in which money left by patrons in an amount over and above the actual amount due for [***specify services rendered or goods, food, drink, or articles sold***] was pooled to be distributed among employees including [***name of plaintiff***]; and**
4. **[That [***name of defendant***] took money from the tip pool that [***name of plaintiff***] was entitled to receive.]**

   [*or***]**

   [That [*name of defendant***] allowed [***specify ineligible individual(s) or class(es) of individuals***] to take money from the tip pool that [***name of plaintiff***] was entitled to receive.]**

[*Name of plaintiff***] does not have to prove the exact amount of money that was taken.**

[*Name of defendant***] is required to keep accurate records of all tips or gratuities received by [him/her/***nonbinary pronoun***/it] for [his/her/***nonbinary pronoun***/its] employees.**

New November 2021

Directions for Use

This instruction sets forth the elements required for an employee to establish wrongful conversion of tip pool money.

Element 1 may be omitted if there is no dispute regarding the defendant's status as an employer.

Element 4 presents alternative factual scenarios: the defendant's direct conversion of tip pool money and the defendant's misallocation of tip pool money to any individual who should not be included in the tip pool, for example, the employer,

the owner, managers, and supervisors. For the second option, the court must determine as a matter of law whether an individual was properly included in the tip pool. (See Lab. Code, § 350(a), (d) [defining employer and agent to include "every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees"], § 351 [prohibiting employers and agents from receiving any gratuity paid to an employee by a patron]. Include the optional sentence in the introductory paragraph if the court has determined that the defendant allowed ineligible individuals to partake in the tip pool.

Sources and Authority

- "Employer" Defined. Labor Code section 350(a).
- "Employee" Defined. Labor Code section 350(b).
- "Gratuity" Defined. Labor Code section 350(e).
- Employee Gratuities. Labor Code section 351.
- Employer's Duty to Keep Records. Labor Code section 353.
- "The purpose of section 351, as spelled out in the language of the statute, is to prevent an employer from collecting, taking or receiving gratuity income or any part thereof, as his own as part of his daily gross receipts, from deducting from an employee's wages any amount on account of such gratuity, and from requiring an employee to credit the amount of the gratuity or any part thereof against or as a part of his wages. And the legislative intent reflected in the history of the statute, was to ensure that employees, not employers, receive the full benefit of gratuities that patrons intend for the sole benefit of those employees who serve them." (*Leighton v. Old Heidelberg, Ltd.* (1990) 219 Cal.App.3d 1062, 1068 [268 Cal.Rptr. 647].)
- "[W]hen a customer leaves a tip in a collective tip box, the customer necessarily understands the tip is not intended for a particular person and the tip will be divided among the behind-the-counter service employees. It is undisputed that these employees consist of baristas and shift supervisors. It would be inconsistent with the purpose of the statute to *require* an employer to disregard the customer's intent and to instead compel the employer to redirect the tips to only some of the service personnel." (*Chau v. Starbucks Corp.* (2009) 174 Cal.App.4th 688, 699 [94 Cal.Rptr.3d 593], original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 456

1 Wilcox, California Employment Law, Ch. 4, *Payment of Wages*, § 4.10 (Matthew Bender)

2753. Failure to Pay All Vested Vacation Time—Essential Factual Elements (Lab. Code, § 227.3)

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her/*nonbinary pronoun*] compensation for unpaid vacation time that [*name of plaintiff*] earned but did not use before being terminated.

To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was [a/an] [employer/[*specify other covered entity*]];**
2. **That [*name of plaintiff*] was an employee of [*name of defendant*];**
3. **That [*name of defendant*] did not pay [him/her/*nonbinary pronoun*] for all earned and unused vacation time at [his/her/*nonbinary pronoun*] final rate of pay in accordance with the [contract of employment/employer policy]; and**
4. **The amount owed to [*name of plaintiff*] for earned and unused vacation time.**

New November 2021

Directions for Use

Element 1 may be omitted if there is no dispute regarding the defendant's status as an employer.

An employee's proportionate right to a paid vacation vests as the labor is rendered. (*Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 784 [183 Cal.Rptr. 846, 647 P.2d 122].) If there is a dispute as to the amount of vested vacation time, the jury should be instructed to determine a pro rata share of vested vacation time. "[A]n employment contract or employer policy shall not provide for forfeiture of vested vacation upon termination." (Lab. Code, § 227.3.)

Sources and Authority

- Payment of Vested Vacation Wages Upon Termination. Labor Code section 227.3.
- "Employer" Defined. Labor Code section 350(a).
- "Employee" Defined. Labor Code section 350(b).
- "The right to a paid vacation, when offered in an employer's policy or contract of employment, constitutes deferred wages for services rendered. Case law from this state and others, as well as principles of equity and justice, compel the conclusion that a proportionate right to a paid vacation 'vests' as the labor is rendered. Once vested, the right is protected from forfeiture by section 227.3. On termination of employment, therefore, the statute requires that an employee be

paid in wages for a pro rata share of his vacation pay." (*Suastez, supra,* 31 Cal.3d at p. 784.)

- "Under Labor Code section 227.3, an employee has the right to be paid for unused vacation only after the 'employee is terminated without having taken off his vested vacation time.' Thus, termination of employment is the event that converts the employer's obligation to allow an employee to take vacation from work into the monetary obligation to pay that employee for unused vested vacation time. Consequently, [the plaintiff's] cause of action to enforce his statutory right to be paid for vested vacation did not accrue until the date his employment was terminated." (*Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1576–1577 [50 Cal.Rptr.3d 166], footnote omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 461–463

1 Wilcox, California Employment Law, Ch. 4, *Payment of Wages*, § 4.10; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.16 (Matthew Bender)

2754. Reporting Time Pay—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] scheduled or otherwise required [him/her/***nonbinary pronoun***] to [report to work/report to work for a second shift] but when [***name of plaintiff***] reported to work, [***name of defendant***] [failed to put [***name of plaintiff***] to work/furnished a shortened [workday/shift]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [a/an] [employer/[***specify other covered entity***]];**
2. **That [***name of plaintiff***] was an employee of [***name of defendant***];**
3. **That [***name of defendant***] required [***name of plaintiff***] to report to work for one or more [workdays/second shifts];**
4. **That [***name of plaintiff***] reported for work; and**
5. **That [***name of defendant***] [failed to put [***name of plaintiff***] to work/ furnished less than [half of the usual day's work/two hours of work on a second shift]].**

If you find that [*name of plaintiff***] has proved all of the above elements, you must determine the amount of wages [***name of defendant***] must pay to [***name of plaintiff***]. For each workday when an employee reports to work, as required, but is either not put to work or furnished with less than half the usual day's hours, the employer must pay wages for half the usual or scheduled day's hours at the employee's regular rate of pay (and in no event for less than two hours or more than four hours).**

[*Name of plaintiff***]'s regular rate of pay in this case is [***specify amount***].**

[For each occasion when an employee is required to report for a second shift in the same workday but is furnished less than two hours of work, the employer must pay wages for two hours at the employee's regular rate of pay.]

"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.

New November 2021; Revised May 2022

Directions for Use

This instruction is intended to instruct the jury on factual determinations required for the judge to then calculate damages for the defendant's failure to pay reporting time under section 5 of the Industrial Welfare Commission's wage orders. (Cal. Code Regs., tit. 8, § 11010, subd. 5, § 11020, subd. 5, § 11030, subd. 5, § 11040,

subd. 5, § 11050, subd. 5, § 11060, subd. 5, § 11070, subd. 5, § 11080, subd. 5, § 11090, subd. 5, § 11100, subd. 5, § 11110, subd. 5, § 11120, subd. 5, § 11130, subd. 5, § 11140, subd. 5, § 11150, subd. 5, and § 11160, subd. 5.)

Select the appropriate bracketed language in the introductory paragraph and elements 3 and 5, and indicate whether the plaintiff was not provided work at all or was provided a shortened shift, or both, in the introductory paragraph and element 5. If the case involves both first and second shifts, the instruction will need to be modified.

Element 1 may be omitted if there is no dispute regarding the defendant's status as an employer.

Modify the instruction as appropriate if the plaintiff claims that the defendant required telephonic reporting to work before the start of a potential shift. (See *Ward v. Tilly's, Inc.* (2019) 31 Cal.App.5th 1167, 1171 [243 Cal.Rptr.3d 461].)

Include the bracketed next to last paragraph only if the plaintiff claims that the defendant required the plaintiff to report for work a second time in a single workday.

Sources and Authority

- "Employee" and "Employer" Defined. Title 8 California Code of Regulations sections 11010–11160.
- "Person" Defined. Lab. Code section 18.
- Reporting Time Pay. Title 8 California Code of Regulations sections 11010–11160 (subd. 5 of each section).
- "We conclude that the on-call scheduling alleged in this case triggers Wage Order 7's reporting time pay requirements. As we explain, on-call shifts burden employees, who cannot take other jobs, go to school, or make social plans during on-call shifts—but who nonetheless receive no compensation from [the defendant] unless they ultimately are called in to work. This is precisely the kind of abuse that reporting time pay was designed to discourage." (*Ward, supra,* 31 Cal.App.5th at p. 1171.)
- "[W]e conclude, contrary to the trial court, that an employee need not necessarily physically appear at the workplace to 'report for work.' Instead, 'report[ing] for work' within the meaning of the wage order is best understood as presenting oneself *as ordered*. 'Report for work,' in other words, does not have a single meaning, but instead is defined by the party who directs the manner in which the employee is to present himself or herself for work—that is, by the employer. [¶] As thus interpreted, the reporting time pay requirement operates as follows. If an employer directs employees to present themselves for work by physically appearing at the workplace at the shift's start, then the reporting time requirement is triggered by the employee's appearance at the jobsite. But if the employer directs employees to present themselves for work by logging on to a computer remotely, or by appearing at a client's jobsite, or by setting out on a trucking route, then the employee 'reports for work' by doing

those things. And if, as plaintiff alleges in this case, the employer directs employees to present themselves for work by telephoning the store two hours prior to the start of a shift, then the reporting time requirement is triggered by the telephonic contact." (*Ward, supra,* 31 Cal.App.5th at p. 1185, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 432

1 Wilcox, California Employment Law, Ch. 1, *Overview of Wage and Hour Laws*, § 1.05; Ch. 3, *Determining Compensable Hours and Proper Payment Amounts*, § 3.13 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.71 (Matthew Bender)

2755–2759. Reserved for Future Use

2760. Rest Break Violations—Introduction (Lab. Code, § 226.7)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] pay because [***name of defendant***] did not authorize and permit one or more paid rest breaks.**

An employee is entitled to a paid 10-minute rest break during every four-hour work period[. /, or major fraction of four hours.] [However, an employee is not entitled to a rest break if the total daily work time is less than three and one-half hours.] This means that over the course of a workday [*name of plaintiff***] was due [***specify which rest breaks are at issue, e.g., a paid 10-minute rest break after working longer than three and one-half hours and a second paid 10-minute rest break after working more than six hours but no more than ten hours***]. [Rest breaks must occur, if practical under the circumstances, in the middle of each four-hour work period. [***Specify any additional timing requirement(s) of the rest breaks at issue if delay is at issue.***]]**

An employer must relieve the employee of all work duties and relinquish control over how the employee spends time during each 10-minute rest break. This includes not requiring employees to remain on call or on-site during rest breaks. An employer, however, does not have an obligation to keep records of employee rest breaks or to ensure that an employee takes each rest break.

"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.

[Rest breaks, which are paid, and meal breaks, which are unpaid, have different requirements. You should consider claims for rest break violations separately from claims for meal break violations. A rest break cannot be combined with a meal break or with another 10-minute rest break. For example, providing an unpaid meal break does not satisfy the employer's obligation to authorize and permit a paid 10-minute rest break.]

New December 2022

Directions for Use

Give this instruction with CACI No. 2761, *Rest Break Violations-Essential Factual Elements*.

This instruction is intended for use by nonexempt employees subject to section 12(C) of Industrial Welfare Commission wage orders 1-2001 through 11-2001, 13-2001 through 15-2001, and 17-2001. Other wage orders contain exceptions to the common rule. Different rest period rules apply to certain employees of emergency

ambulance providers; do not give this instruction in a case involving those employees. (See Lab. Code, §§ 880–890, added by initiative, Gen. Elec. (Nov. 6, 2018), commonly known as Prop. 11.) Different on-call rest period rules apply to security officers employed in the security services industry. (See Lab. Code, § 226.7(f).) This instruction should be modified in a case involving security officers.

Specify in the second paragraph which breaks the plaintiff claims to have missed if there is uniformity in that allegation. Rest break claims can also involve noncompliant timing. If so, specify the noncompliant timing issue in the second paragraph. Rest breaks are based on "the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof." (See, e.g., Cal. Code Regs., tit. 8, § 11010, subd. 12(A).) The wage orders' language means that "[e]mployees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1029 [139 Cal.Rptr.3d 315, 273 P.3d 513].) Include the bracketed phrase "or major fraction of four hours" in the second paragraph only if it will assist the jury in understanding the scheduling of rest breaks. "Though not defined in the wage order, a 'major fraction' long has been understood—legally, mathematically, and linguistically—to mean a fraction greater than one-half." (*Brinker Restaurant Corp., supra,* 53 Cal.4th at p. 1028.)

The definition of "workday" may be omitted if it is included in another instruction.

Give the optional final paragraph only if both rest breaks and meal breaks are at issue in the case.

Sources and Authority

- Right of Action for Missed Meal and Rest and Recovery Periods. Labor Code section 226.7.
- "Workday" Defined. Labor Code section 500.
- Rest Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 12.
- "An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—it has violated the wage order and is liable. No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it." (*Brinker Restaurant Corp., supra,* 53 Cal. 4th at p. 1033.)
- "What we conclude is that state law prohibits on-duty and on-call rest periods. During required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time." (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 260 [211 Cal.Rptr.3d 634, 385 P.3d 823], abrogated in part by Lab. Code, § 226.7(f)(5).)

- "[O]ne cannot square the practice of compelling employees to remain at the ready, tethered by time and policy to particular locations or communications devices, with the requirement to relieve employees of all work duties and employer control during 10-minute rest periods." (*Augustus, supra,* 2 Cal.5th at p. 269, abrogated in part by Lab. Code, § 226.7(f)(5).)
- "Because rest periods are 10 minutes in length (Wage Order 4, subd. 12(A)), they impose practical limitations on an employee's movement. That is, during a rest period an employee generally can travel at most five minutes from a work post before returning to make it back on time. Thus, one would expect that employees will ordinarily have to remain on site or nearby. This constraint, which is of course common to all rest periods, is not sufficient to establish employer control." (*Augustus, supra,* 2 Cal.5th at p. 270.)
- "Although section 12(A) of Wage Order 1-2001 does not describe the considerations relevant to such a justification, we conclude that a departure from the preferred schedule is permissible only when the departure (1) will not unduly affect employee welfare and (2) is tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule." (*Rodriguez v. E.M.E., Inc.* (2016) 246 Cal.App.4th 1027, 1040 [201 Cal.Rptr.3d 337].)
- "[W]e hold that the Court of Appeal erred in construing section 226.7 as a penalty and applying a one-year statute of limitations. The statute's plain language, the administrative and legislative history, and the compensatory purpose of the remedy compel the conclusion that the 'additional hour of pay' is a premium wage intended to compensate employees, not a penalty." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1114 [56 Cal.Rptr.3d 880, 155 P.3d 284], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 390

1 Wilcox, California Employment Law, Ch. 2, *Applicability of Rules Governing Hours Worked*, §§ 2.08, 2.09 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 3, *Determining Compensable Hours and Proper Payment Amounts*, § 3.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.14 (Matthew Bender)

2761. Rest Break Violations—Essential Factual Elements (Lab. Code, § 226.7)

To establish a rest break violation, [*name of plaintiff*] must prove both of the following:

1. **That [*name of plaintiff*] worked for [*name of defendant*] on one or more workdays for at least three and one-half hours; and**
2. **That [*name of defendant*] did not authorize and permit [*name of plaintiff*] to take one or more 10-minute rest breaks to which [*name of plaintiff*] was entitled.**

New December 2022

Directions for Use

Element 1 states the minimum shift length for a rest break. Depending on the length of the shift, multiple rest breaks could be at issue. Element 1 can be modified to cover longer shifts and multiple rest breaks.

The jury must also decide how much pay is owed for any rest break violations. (See CACI No. 2762, *Rest Break Violations—Pay Owed*.)

Sources and Authority

- Right of Action for Missed Meal and Rest and Recovery Periods. Labor Code section 226.7.
- Rest Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 12.
- "An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—it has violated the wage order and is liable. No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it." (*Brinker Restaurant Corp., supra*, 53 Cal.4th at p. 1033.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 390

1 Wilcox, California Employment Law, Ch. 2, *Applicability of Rules Governing Hours Worked*, §§ 2.08, 2.09 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 3, *Determining Compensable Hours and Proper Payment Amounts*, § 3.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.14 (Matthew Bender)

2762. Rest Break Violations—Pay Owed

For each workday on which [*name of plaintiff*] has proved one or more rest break violations, [*name of defendant*] must pay one additional hour of pay at [*name of plaintiff*]'s regular rate of pay. You must determine the amount of pay owed for the rest break violations that [*name of plaintiff*] has proved.

[The "regular rate of pay" for [*name of plaintiff*] from [*insert beginning date*] to [*insert ending date*] was [*insert applicable formula*]. [*Repeat as necessary for date ranges with different regular rates of pay.*] Multiply the regular rate of pay by the number of workdays for which [*name of plaintiff*] has proved one or more rest break violations.]

New December 2022

Directions for Use

Give this instruction with CACI No. 2760, *Rest Break Violations-Introduction*, and CACI No. 2761, *Rest Break Violations-Essential Factual Elements*.

Regular rate of pay includes the employee's base hourly rate of pay and all other forms of nondiscretionary compensation earned during the same pay period, including, for example, nondiscretionary bonuses, commissions, and shift differentials. (See *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 [280 Cal.Rptr.3d 783, 489 P.3d 1166] [holding that "the term 'regular rate of compensation' in [Labor Code] section 226.7(c) has the same meaning as 'regular rate of pay' in [Labor Code] section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee"].) The regular rate of pay may be different over different periods of time. The court must determine the method for calculating plaintiff's regular rate of pay. If different regular rates of pay are at issue, define the plaintiff's regular rate of pay for all relevant date ranges.

An employer must pay a premium wage of one hour of pay at the employee's regular rate of compensation for any rest breaks not provided. (Lab. Code, § 226.7(c).) This instruction may need to be modified if there is evidence of an employer's paying premium wages for any rest break violations.

The definition of "regular rate of pay" may be omitted if it is included in another instruction.

Sources and Authority

- Right of Action for Missed Meal and Rest and Recovery Periods. Labor Code section 226.7.
- Rest Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 12.
- "[W]e hold that the term 'regular rate of compensation' in section 226.7(c) has

the same meaning as 'regular rate of pay' in section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee. This interpretation of section 226.7(c) comports with the remedial purpose of the Labor Code and wage orders and with our general guidance that the 'state's labor laws are to be liberally construed in favor of worker protection.' " (*Ferra, supra,* 11 Cal.5th at p. 878.)

- "[W]e hold that the Court of Appeal erred in construing section 226.7 as a penalty and applying a one-year statute of limitations. The statute's plain language, the administrative and legislative history, and the compensatory purpose of the remedy compel the conclusion that the 'additional hour of pay' is a premium wage intended to compensate employees, not a penalty." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1114 [56 Cal.Rptr.3d 880, 155 P.3d 284], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 390

1 Wilcox, California Employment Law, Ch. 2, *Applicability of Rules Governing Hours Worked*, §§ 2.08, 2.09 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 3, *Determining Compensable Hours and Proper Payment Amounts*, § 3.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.14 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4.1, 4.74, 4.76 (Thomson Reuters)

2763–2764. Reserved for Future Use

2765. Meal Break Violations—Introduction (Lab. Code, §§ 226.7, 512)

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her/*nonbinary pronoun*] pay because [*name of defendant*] did not provide one or more meal breaks.

Employers are required to provide meal breaks at specified times during a workday. [*Specify any scheduling requirement(s) of the meal breaks at issue if delay or interruption is at issue.*] In this case, [*name of plaintiff*] was entitled to a 30-minute unpaid meal break for each period of work lasting longer than five hours. This means that over the course of a workday, [*name of plaintiff*] was due [*specify which meal breaks are at issue, e.g., a first meal break that starts after no more than five hours of work and a second meal break to start after no more than ten hours of work.*]

A meal break complies with the law if the employer does all of the following:

1. **Provides a reasonable opportunity to take uninterrupted 30-minute meal breaks on time;**
2. **Does not impede the employee from taking 30-minute meal breaks;**
3. **Does not discourage the employee from taking 30-minute meal breaks;**
4. **Relieves the employee of all duties during 30-minute meal breaks; and**
5. **Relinquishes control over the employee's activities during 30-minute meal breaks, including not requiring the employee to stay on the premises.**

An employer, however, is not required to police meal breaks, ensure that an employee takes a meal break, or ensure that an employee does no work during a meal break.

"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.

[Meal breaks, which are unpaid, and rest breaks, which are paid, have different requirements. You should consider claims for meal break violations separately from claims for rest break violations. For example, providing an unpaid meal break does not satisfy the employer's obligation to provide an employee with a paid 10-minute rest break.]

New December 2022

Directions for Use

This instruction assumes a nonexempt employee who is entitled to one or more meal breaks. It should be read before the other meal break instructions. (See CACI No. 2766A, *Meal Break Violations—Essential Factual Elements*, and CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*.) It may need to be modified in certain limited circumstances, for example, if waiver of meal breaks is at issue. (See CACI No. 2770, *Affirmative Defense—Meal Breaks—Waiver by Mutual Consent*, and CACI No. 2771, *Affirmative Defense—Meal Breaks—Written Consent to On-Duty Meal Breaks*.)

Specify the meal breaks at issue and any scheduling requirements in the second paragraph.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of 18 wage orders, adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Different meal period rules apply to certain employees of emergency ambulance providers; do not give this instruction in a case involving those employees. (See Lab. Code, §§ 880–890, added by initiative, Gen. Elec. (Nov. 6, 2018), commonly known as Prop. 11.) Other exceptions to the meal period rules exist, which may require modifying this instruction. For example, persons employed in the motion picture and broadcasting industries are entitled to a meal break after six hours of work. (See Lab. Code, § 512(d); Wage Order 12-2001.) Other exceptions to the meal period rules include most instances where the Industrial Welfare Commission authorized adoption of a working condition order permitting a meal period to commence after six hours of work, certain commercial drivers, certain workers in the wholesale baking industry, and workers covered by collective bargaining agreements that meet specified requirements. (Lab. Code, § 512(b)–(e).)

The Labor Code and the wage orders exempt certain employees from receiving premium pay for meal period violations (for example, executives). The assertion of an exemption from wage and hour laws is an affirmative defense, which presents a mixed question of law and fact. (See *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].)

The definition of "workday" may be omitted if it is included in another instruction.

Give the optional final paragraph only if both meal breaks and rest breaks are at issue in the case.

Sources and Authority

- Right of Action for Meal and Rest and Recovery Period Violations. Labor Code section 226.7.
- Meal Periods. Labor Code section 512.
- Meal Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 11.

- Employer Duty to Keep Time Records. Cal. Code Regs., tit. 8, §§ 11010–11030, 11060–11110, 11150, ¶ 11(C), 11040–11050 & 11130–11140, ¶ 11(A), § 11120, ¶ 11(B), § 11160, ¶ 10(D).
- "Workday" Defined. Labor Code section 500.
- "An employer's duty with respect to meal breaks under both section 512, subdivision (a) and Wage Order No. 5 is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040 [139 Cal.Rptr.3d 315, 273 P.3d 513].)
- "[U]nder the relevant statute and wage order, an employee becomes entitled to premium pay for missed or noncompliant meal and rest breaks precisely because she was required to work when she should have been relieved of duty: required to work too long into a shift without a meal break; required in whole or part to work through a break; or, as was the case here, required to remain on duty without an appropriate agreement in place authorizing on-duty meal breaks." (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 106–107 [293 Cal.Rptr.3d 599, 509 P.3d 956].)
- "Accordingly, we conclude that Wage Order No. 5 imposes no meal timing requirements beyond those in section 512. Under the wage order, as under the statute, an employer's obligation is to provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work." (*Brinker Restaurant Corp., supra*, 53 Cal.4th at p. 1049.)
- "An employee who remains on duty during lunch is providing the employer services; so too the employee who works without relief past the point when permission to stop to eat or rest was legally required. Section 226.7 reflects a determination that work in such circumstances is worth more—or should cost the employer more—than other work, and so requires payment of a premium." (*Naranjo, supra,* 13 Cal.5th at p. 107.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 390–391

1 Wilcox, California Employment Law, Ch. 2, *Applicability of Rules Governing Hours Worked*, §§ 2.08, 2.09 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 3, *Determining Compensable Hours and Proper Payment Amounts*, § 3.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.14 (Matthew Bender)

2766A. Meal Break Violations—Essential Factual Elements (Lab. Code, §§ 226.7, 512)

To establish a meal break violation, [*name of plaintiff*] must prove both of the following:

1. **That [*name of plaintiff*] worked for [*name of defendant*] for one or more workdays for a period lasting longer than five hours; and**
2. **That [*name of defendant*] did not provide [*name of plaintiff*] with the opportunity to take [a/an] [timely] uninterrupted meal break of at least 30 minutes [for each five-hour period worked].**

New December 2022

Directions for Use

If the case involves allegedly untimely meal breaks or more than one meal break, select either or both of the bracketed options in element 2.

Do not give this instruction for any meal break claims involving the rebuttable presumption of a violation based on an employer's records. (See CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*.)

The jury must also decide how much pay is owed for any meal break violations. (See CACI No. 2767, *Meal Break Violations—Pay Owed*.)

Sources and Authority

- Right of Action for Meal and Rest and Recovery Period Violations. Labor Code section 226.7.
- Meal Periods. Labor Code section 512.
- Meal Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 11.

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 390–391

1 Wilcox, California Employment Law, Ch. 2, *Applicability of Rules Governing Hours Worked*, §§ 2.08, 2.09 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 3, *Determining Compensable Hours and Proper Payment Amounts*, § 3.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.14 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4.1, 4.4 (Thomson Reuters)

2766B. Meal Break Violations—Rebuttable Presumption—Employer Records

An employer must keep accurate records of the start and end times of each meal break. [*Specify noncompliance in records that gives rise to rebuttable presumption of meal break violation, e.g., missing time records, records showing missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday may prove a meal break violation.***]**

If you decide that [*name of plaintiff***] has proved that [[***name of defendant***] did not keep accurate records of compliant meal breaks/[***name of defendant***]'s records show [missed/ [,/or] shortened/ [,/or] delayed] meal breaks], then your decision on [***name of plaintiff***]'s meal break claim must be for [***name of plaintiff***] unless [***name of defendant***] proves all of the following:**

1. **That [***name of defendant***] provided [***name of plaintiff***] a reasonable opportunity to take uninterrupted 30-minute meal breaks on time;**
2. That [***name of defendant***] **did not impede [***name of plaintiff***] from taking 30-minute meal breaks;**
3. **That [***name of defendant***] did not discourage [***name of plaintiff***] from taking 30-minute meal breaks;**
4. **That [***name of defendant***] relieved [***name of plaintiff***] of all duties during 30-minute meal breaks; and**
5. **That [***name of defendant***] relinquished control over [***name of plaintiff***]'s activities during 30-minute meal breaks.**

If you decide that [*name of defendant***] has proved all of the above for each meal break, then there have been no meal break violations and your decision must be for [***name of defendant***].**

However, if you decide that [*name of defendant***] has not proved all of the above for each meal break, then you must still decide how many workdays [***name of defendant***] did not prove all of the above and you must determine the amount of pay owed.**

[*Name of defendant***] must pay one additional hour of pay at [***name of plaintiff***]'s regular rate of pay for each workday on which [***name of defendant***] did not prove all of the above.**

[The "regular rate of pay" for [*name of plaintiff***] from [***insert beginning date***] to [***insert ending date***] was [***insert applicable formula***]. [***Repeat as necessary for date ranges with different regular rates of pay.***] Multiply the regular rate of pay by the number of workdays for which [***name of***

defendant] **did not prove all of the above.]]**

New December 2022

Directions for Use

Employer records showing noncompliant meal breaks raise a rebuttable presumption of a meal break violation. (See *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 61 [275 Cal.Rptr.3d 422, 481 P.3d 661] ["time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations"].) Note that employers need not record meal breaks during which all operations cease. (See, e.g., Cal. Code Regs., tit. 8, § 11010, subd. 7(A)(1).)

Regular rate of pay includes the employee's base hourly rate of pay and all other forms of non-discretionary compensation earned during the same pay period, including, for example, nondiscretionary bonuses, commissions, and shift differentials. (See *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 [280 Cal.Rptr.3d 783, 489 P.3d 1166] [holding that "the term 'regular rate of compensation' in [Labor Code] section 226.7(c) has the same meaning as 'regular rate of pay' in [Labor Code] section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee"].) The regular rate of pay may be different over different periods of time. The court must determine the method for calculating plaintiff's regular rate of pay. If different regular rates of pay are at issue, define the plaintiff's regular rate of pay for all relevant date ranges.

An employer must pay a premium wage of one hour of pay at the employee's regular rate of compensation for any meal breaks not provided. (Lab. Code, § 226.7(c).) This instruction may need to be modified if there is evidence of an employer's paying premium wages for any meal breaks.

The definition of "regular rate of pay" may be omitted if it is included in another instruction.

Sources and Authority

- Right of Action for Missed Meal and Rest and Recovery Periods. Labor Code section 226.7.
- Meal Periods. Labor Code section 512.
- Meal Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 11.
- Employer Duty to Keep Time Records. Cal. Code Regs., tit. 8, §§ 11010–11030, 11060–11110, 11150, ¶ 11(C), 11040–11050 & 11130–11140, ¶ 11(A), § 11120, ¶ 11(B), § 11160, ¶ 10(D).
- "[W]e hold that time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage." (*Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 61 [275 Cal.Rptr.3d 422, 481 P.3d 661].)

- "The practice of rounding time punches for meal periods is inconsistent with the purpose of the Labor Code provisions and the IWC wage order. The text of Labor Code section 512 and Wage Order No. 4 sets precise time requirements for meal periods. Each meal period must be 'not less than 30 minutes,' and no employee shall work 'more than five hours per day' or 'more than 10 hours per day' without being provided with a meal period. These provisions speak directly to the calculation of time for meal period purposes. [¶] The precision of the time requirements set out in Labor Code section 512 and Wage Order No. 4—'not less than 30 minutes' and 'five hours per day' or '10 hours per day'—is at odds with the imprecise calculations that rounding involves. The regulatory scheme that encompasses the meal period provisions is concerned with small amounts of time. For example, we have 'requir[ed] strict adherence to' the Labor Code's requirement that employees receive two daily 10-minute rest periods and 'scrupulously guarded against encroachments on' these periods. The same vigilance is warranted here. Given the relatively short length of a 30-minute meal period, the potential incursion that might result from rounding is significant." (*Donohue, supra,* 11 Cal.5th at p. 68, internal citations omitted.)
- "Because time records are required to be accurate, it makes sense to apply a rebuttable presumption of liability when records show noncompliant meal periods. If the records are accurate, then the records reflect an employer's true liability; applying the presumption would not adversely affect an employer that has complied with meal period requirements and has maintained accurate records. If the records are incomplete or inaccurate—for example, the records do not clearly indicate whether the employee chose to work during meal periods despite bona fide relief from duty—then the employer can offer evidence to rebut the presumption. It is appropriate to place the burden on the employer to plead and prove, as an affirmative defense, that it genuinely relieved employees from duty during meal periods. 'To place the burden elsewhere would offer an employer an incentive to avoid its recording duty and a potential windfall from the failure to record meal periods.' " (*Donohue, supra,* 11 Cal.5th at p. 76, internal citations omitted.)
- "[Defendant] misunderstands how the rebuttable presumption operates at the summary judgment stage. Applying the presumption does not mean that time records showing missed, short, or delayed meal periods result in 'automatic liability' for employers. If time records show missed, short, or delayed meal periods with no indication of proper compensation, then a rebuttable presumption arises. Employers can rebut the presumption by presenting evidence that employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work. 'Representative testimony, surveys, and statistical analysis,' along with other types of evidence, 'are available as tools to render manageable determinations of the extent of liability.' Altogether, this evidence presented at summary judgment may reveal that there are no triable issues of material fact. The rebuttable presumption does not require employers to police meal periods. Instead, it

requires employers to give employees a mechanism for recording their meal periods and to ensure that employees use the mechanism properly." (*Donohue, supra,* 11 Cal.5th at 77, internal citation omitted.)

- "[W]e hold that the term 'regular rate of compensation' in section 226.7(c) has the same meaning as 'regular rate of pay' in section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee. This interpretation of section 226.7(c) comports with the remedial purpose of the Labor Code and wage orders and with our general guidance that the 'state's labor laws are to be liberally construed in favor of worker protection.' " (*Ferra, supra,* 11 Cal.5th at p. 878.)
- "[W]e construe the Legislature's use of the disjunctive as permitting an additional hour of pay for each work day that either type of break period is violated. We agree with the district court in *Marlo* [*v. United Parcel Service, Inc.*] that allowing an employee to recover one additional hour of pay for each type of violation per work day is not contrary to the 'one additional hour' and 'per work day' wording in subdivision (b). [¶] We further agree with *Marlo* that construing section 226.7, subdivision (b), as permitting one premium payment for each type of break violation is in accordance with and furthers the public policy behind the meal and rest break mandates." (*United Parcel Service Wage & Hour Cases* (2011) 196 Cal.App.4th 57, 69 [125 Cal.Rptr.3d 384].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 390–391

1 Wilcox, California Employment Law, Ch. 2, *Applicability of Rules Governing Hours Worked*, §§ 2.08, 2.09 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 3, *Determining Compensable Hours and Proper Payment Amounts*, § 3.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.14 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4.4, 4.21 (Thomson Reuters)

2767. Meal Break Violations—Pay Owed

For each workday on which [*name of plaintiff*] has proved one or more meal break violations, [*name of defendant*] must pay one additional hour of pay at [*name of plaintiff*]'s regular rate of pay. You must determine the amount of pay owed for the meal break violations that [*name of plaintiff*] has proved.

[The "regular rate of pay" for [*name of plaintiff*] from [*insert beginning date*] to [*insert ending date*] was [*insert applicable formula*]. [*Repeat as necessary for date ranges with different regular rates of pay.*] Multiply the regular rate of pay by the number of workdays for which [*name of plaintiff*] has proved one or more meal break violations.]

New December 2022

Directions for Use

Give this instruction with CACI No. 2765, *Meal Break Violations-Introduction*, and CACI No. 2766A, *Meal Break Violations-Essential Factual Elements*. Do not give this instruction for any meal break claims involving the rebuttable presumption of a violation based on an employer's records. (See CACI No. 2766B, *Meal Breaks Not Provided-Rebuttable Presumption-Employer Records*.)

Regular rate of pay includes the employee's base hourly rate of pay and all other forms of nondiscretionary compensation earned during the same pay period, including, for example, nondiscretionary bonuses, commissions, and shift differentials. (See *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 [280 Cal.Rptr.3d 783, 489 P.3d 1166] [holding that "the term 'regular rate of compensation' in [Labor Code] section 226.7(c) has the same meaning as 'regular rate of pay' in [Labor Code] section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee"].) The regular rate of pay may be different over different periods of time. The court must determine the method for calculating plaintiff's regular rate of pay. If different regular rates of pay are at issue, define the plaintiff's regular rate of pay for all relevant date ranges.

An employer must pay a premium wage of one hour of pay at the employee's regular rate of compensation for any meal breaks not provided. (Lab. Code, § 226.7(c).) This instruction may need to be modified if there is evidence of an employer's paying premium wages for any meal breaks.

The definition of "regular rate of pay" may be omitted if it is included in another instruction.

Sources and Authority

- Right of Action For Missed Meal Period. Labor Code section 226.7.

- Meal Periods. Labor Code section 512.
- "[W]e hold that the term 'regular rate of compensation' in section 226.7(c) has the same meaning as 'regular rate of pay' in section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee. This interpretation of section 226.7(c) comports with the remedial purpose of the Labor Code and wage orders and with our general guidance that the 'state's labor laws are to be liberally construed in favor of worker protection.' " (*Ferra, supra*, 11 Cal.5th at p. 878.)
- "Section 226.7 missed-break premium pay does differ from these examples in that it aims to remedy a legal violation. The law permits an employer to allow an employee to work overtime hours, or to work a split shift, provided the employee is paid extra for it, but the law generally does not permit an employer to deprive an employee of a meal or rest break. But why should this difference matter? That missed-break premium pay serves as a remedy for a legal violation does not change the fact that the premium pay also compensates for labor performed under conditions of hardship. One need not exclude the other." (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 108 [293 Cal.Rptr.3d 599, 509 P.3d 956].)
- "[T]he Legislature requires employers to pay missed-break premium pay on an ongoing, running basis, just like other forms of wages." (*Naranjo, supra,* 13 Cal.5th at p. 110, internal citations omitted.)
- "The employee who remains on duty without a timely break has 'earned' premium pay within any ordinary sense of the word." (*Naranjo, supra,* 13 Cal.5th at p. 115.)
- "[W]e construe the Legislature's use of the disjunctive as permitting an additional hour of pay for each work day that either type of break period is violated. We agree with the district court in *Marlo* [*v. United Parcel Service, Inc.*] that allowing an employee to recover one additional hour of pay for each type of violation per work day is not contrary to the 'one additional hour' and 'per work day' wording in subdivision (b). [¶] We further agree with *Marlo* that construing section 226.7, subdivision (b), as permitting one premium payment for each type of break violation is in accordance with and furthers the public policy behind the meal and rest break mandates." (*United Parcel Service Wage & Hour Cases* (2011) 196 Cal.App.4th 57, 69 [125 Cal.Rptr.3d 384].)
- "[U]nder the law as enacted, 'an employee is entitled to the additional hour of pay *immediately* upon being forced to miss a rest or meal period.' " (*Naranjo, supra*, 13 Cal.5th at p. 115, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 390–391

1 Wilcox, California Employment Law, Ch. 2, *Applicability of Rules Governing Hours Worked*, §§ 2.08, 2.09 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 3, *Determining Compensable Hours and Proper Payment Amounts*, § 3.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.14 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4.1, 4.4, 4.21, 4.74, 4.76 (Thomson Reuters)

2768–2769. Reserved for Future Use

2770. Affirmative Defense—Meal Breaks—Waiver by Mutual Consent

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[*Name of defendant*] claims that there was no meal break violation because [*name of plaintiff*] gave up [his/her/*nonbinary pronoun*] right to a meal break on one or more workdays. This is called "waiver." To succeed on this defense, [*name of defendant*] must prove all of the following:

1. **That [*name of plaintiff*] worked no more than six total hours in a workday; and**
2. **That [*name of plaintiff*] and [*name of defendant*] freely, knowingly, and mutually consented to waiving the meal break of that workday.**

[*or*]

[*Name of defendant*] claims that there was no meal break violation because [*name of plaintiff*] gave up [his/her/*nonbinary pronoun*] right to a second meal break on one or more workdays. This is called "waiver." To succeed on this defense, [*name of defendant*] must prove all of the following:

1. **That [*name of plaintiff*] worked no more than twelve total hours in a workday;**
2. **That [*name of plaintiff*] did not waive [his/her/*nonbinary pronoun*] first meal break of that workday; and**
3. **That [*name of plaintiff*] and [*name of defendant*] freely, knowingly, and mutually consented to waiving the second meal break.**

New December 2022

Directions for Use

This instruction sets forth the affirmative defense of waiver of a meal break by mutual consent. Employees in most industries can waive their first or second meal break but not both. (Lab. Code, § 512(a).) Give only the paragraph of the instruction that applies to the meal break waived under the applicable wage order. (See, e.g., Cal. Code Regs., tit. 8, § 11010, subd. ¶ 11(A) & (B).)

For an instruction on waiver of off-duty meal breaks, see CACI No. 2771, *Affirmative Defense—Meal Breaks—Written Consent to On-Duty Meal Breaks.*

Sources and Authority

- Meal Periods. Labor Code section 512.
- Meal Periods. Cal. Code Regs., tit. 8, §§ 11010–11030, 11060–11110,

11130–11150, ¶ 11, § 11160, ¶ 10, § 11170, ¶ 9.

- "Workday" Defined. Labor Code section 500.
- "An employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. Rather, as the Court of Appeal properly recognized, the assertion is an affirmative defense, and thus the burden is on the employer, as the party asserting waiver, to plead and prove it." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1052–1053 [139 Cal.Rptr.3d 315, 273 P.3d 513], internal citations omitted (conc. opn. of Werdegar, J.), approved in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 74–75 [275 Cal.Rptr.3d 422, 481 P.3d 661].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 390, 391

1 Wilcox, California Employment Law, Ch. 2, *Applicability of Rules Governing Hours Worked*, §§ 2.08, 2.09 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 9, *Wage and Hour Class Claims*, § 9.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.14, 250.34 (Matthew Bender)

California Civil Practice: Employment Litigation, § 4:4 (Thomson Reuters)

2771. Affirmative Defense—Meal Breaks—Written Consent to On-Duty Meal Breaks

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[*Name of defendant*] claims that there was no meal break violation because [*name of plaintiff*] agreed in writing to be on duty during meal breaks. To succeed on this defense, [*name of defendant*] must prove the following:

1. **That [*name of plaintiff*] worked more than [five/six] hours in a workday;**
2. **That the nature of [*name of plaintiff*]'s work prevents [him/her/*nonbinary pronoun*] from being relieved of all duty during meal breaks;**
3. **That [*name of plaintiff*] and [*name of defendant*] freely, knowingly, and mutually consented in writing to on-duty meal breaks during which [he/she/*nonbinary pronoun*] would not be relieved of all duties; [and]**

[4. That [*name of plaintiff*] has not revoked in writing [his/her/*nonbinary pronoun*] written consent; and]

5. **That [*name of defendant*] paid [*name of plaintiff*] at [his/her/*nonbinary pronoun*] regular rate of pay during the on-duty meal breaks.**

New December 2022

Directions for Use

This instruction sets forth an employer's affirmative defense of a written waiver of off-duty meal breaks. Give this instruction only if the defendant claims that the plaintiff freely entered into a written agreement for on-duty meal breaks. (See, e.g., Cal. Code Regs., tit. 8, § 11040, subd. 11(A).)

Persons employed in the motion picture industry are entitled to a meal break after six hours of work (Wage Order 12-2001), rather than the five-hour rule applicable in other industries. Select the appropriate option in element 1 depending on the industry's applicable wage order.

Omit optional element 4 if the plaintiff's revocation of written consent is not at issue.

For an instruction on waiver of meal breaks by mutual consent, see CACI No. 2770, *Affirmative Defense—Meal Breaks—Waiver by Mutual Consent.*

Sources and Authority

- Meal Periods. Labor Code section 512.

- Meal Periods. Cal. Code Regs., tit. 8, §§ 11010–11030, 11060-–11110, 11150, ¶ 11(C), 11040–11050 & 11130–11140, ¶ 11(A), § 11120, ¶ 11(B), § 11160, ¶ 10(D).
- "Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time." (Cal. Code Regs., tit. 8, § 11010, subd. 11(C).)
- "[The on-duty meal period] exception is exceedingly narrow, applying only when (1) 'the nature of the work prevents an employee from being relieved of all duty' and (2) the employer *and* employee have agreed, in writing, to the on-duty meal period. Even then, the employee retains the right to 'revoke the agreement at any time.' These narrow terms undercut the argument that the provision creates, by implication, a broad rest period exception permitting employers to unilaterally require that employees take on-duty rest breaks without receiving additional compensation." (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 266–267 [211 Cal.Rptr.3d 634, 385 P.3d 823], original italics, internal citation omitted.)
- "An on-duty meal period is one in which an employee is not 'relieved of all duty' for the entire 30-minute period." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1035 [139 Cal.Rptr.3d 315, 273 P.3d 513].)
- "[A]bsent a waiver, the statute's plain terms required [the defendant] to provide 'a meal period'—whether off-duty or on-duty—of at least 30 minutes any time an employee worked at least five hours." (*L'Chaim House, Inc. v. Department of Industrial Relations* (2019) 38 Cal.App.5th 141, 149 [250 Cal.Rptr.3d 413].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 390, 391

1 Wilcox, California Employment Law, Ch. 2, *Applicability of Rules Governing Hours Worked*, §§ 2.08, 2.09 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 3, *Determining Compensable Hours and Proper Payment Amounts*, § 3.01 (Matthew Bender)

1 Wilcox, California Employment Law, Ch. 9, *Wage and Hour Class Claims*, § 9.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.14, 250.34 (Matthew Bender)

2772–2774. Reserved for Future Use

2775. Nonpayment of Wages Under Rounding System—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] wages for unpaid work time because [***name of defendant***]'s policy or practice of adjusting employees' recorded time to the nearest [***specify preset increment of time***] failed to compensate [***name of plaintiff***] for all time worked. This practice is often referred to as "rounding."**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **[That [***name of defendant***]'s rounding policy is not fair and neutral on its face];**

   [*or***]**

   [That, over time, [*name of defendant***]'s method of rounding resulted in failure to pay its [***employees/specify subset of employees to which plaintiff belonged***] for all time actually worked];**

2. **That [***name of defendant***]'s method of rounding resulted in lost compensation for [***name of plaintiff***]; and**

3. **The amount of wages owed to [***name of plaintiff***].**

New December 2022

Directions for Use

This instruction is intended for use in cases involving the rounding of time clock entries at the start or end of shifts. Do not use this instruction for cases involving the rounding of time entries in the meal break context, which is unlawful. (See *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 68 [275 Cal.Rptr.3d 422, 481 P.3d 661] ["The practice of rounding time punches for meal periods is inconsistent with the purpose of the Labor Code provisions and the IWC wage order"].)

If the court has determined that the defendant's rounding method was fair and neutral on its face, use only the second option for element 1. (See *AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014, 1028 [234 Cal.Rptr.3d 804]; *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 907 [148 Cal.Rptr.3d 690].) The jury will need to resolve any factual disputes concerning (1) whether the rounding method consistently resulted in failure to pay all employees or a subset of employees to which plaintiff belonged for all hours worked and (2) whether the plaintiff has lost wages over time as a result of the defendant's rounding method.

Sources and Authority

- Use of Time Clocks. 29 C.F.R. § 785.48(b).
- "Nothing in our analysis precludes a trial court from looking at multiple datapoints to determine whether the rounding system at issue is neutral as applied. Such analysis could uncover bias in the system that unfairly singles out certain employees. For example, as the trial court discussed, a system that in practice overcompensates lower paid employees at the expense of higher paid employees could unfairly benefit the employer." (*AHMC Healthcare, Inc., supra,* 24 Cal.App.5th at p. 1028.)
- "Although California employers have long engaged in employee time-rounding, there is no California statute specifically authorizing or prohibiting this practice." (*See's Candy Shops, supra,* 210 Cal.App.4th at p. 901.)
- "Relying on the DOL rounding standard, we have concluded that the rule in California is that an employer is entitled to use the nearest-tenth rounding policy if the rounding policy is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.' " (*See's Candy Shops, supra,* 210 Cal.App.4th at p. 907, internal citations omitted.)
- "Whether a rounding policy will 'result in undercompensation *over time* is a factual' issue. Summary adjudication on a rounding claim may be appropriate where the employer can show the rounding policy does not systematically underpay the employee, even if the employee loses some compensation over time." (*David v. Queen of Valley Medical Center* (2020) 51 Cal.App.5th 653, 664 [264 Cal.Rptr.3d 279], internal citation omitted, original italics.)
- "[T]he regulation does not require that every employee gain or break even over every pay period or set of pay periods analyzed; fluctuations from pay period to pay period are to be expected under a neutral system. We further agree with the court in *See's I* and *See's II* that a system is fair and neutral and does not systematically undercompensate employees where it results in a net surplus of compensated hours and a net economic benefit to employees viewed as a whole." (*AHMC Healthcare, Inc., supra,* 24 Cal.App.5th at pp. 1027–1028.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 434

1 Wilcox, California Employment Law, Ch. 3, *Determining Compensable Hours and Proper Payment Amounts*, § 3.02 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4.1, 4.21 (Thomson Reuters)

2776–2799. Reserved for Future Use

VF-2700. Nonpayment of Wages (Lab. Code, §§ 201, 202, 218)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] perform work for [*name of defendant*]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Does [*name of defendant*] owe [*name of plaintiff*] wages under the terms of the employment?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **What is the amount of unpaid wages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2005, December 2010, December 2016, November 2023, May 2024*

Directions for Use

This verdict form is based on CACI No. 2700, *Nonpayment of Wages—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This verdict form may be augmented for the jury to make any factual findings that are required for the court to calculate the amount of prejudgment interest due for nonpayment of wages. (Lab. Code, § 218.6.)

VF-2701. Nonpayment of Minimum Wage (Lab. Code, § 1194)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] perform work for [*name of defendant*]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of plaintiff*] paid less than the minimum wage by [*name of defendant*] for some or all hours worked?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **How many hours was [*name of plaintiff*] paid less than the minimum wage?**

   _____ hours

4. **What is the amount of wages owed? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised June 2005, December 2010, December 2016, November 2023, May 2024*

Directions for Use

This verdict form is based on CACI No. 2701, *Nonpayment of Minimum Wage—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This verdict form may be augmented for the jury to make any factual findings that are required for the court to calculate the amount of prejudgment interest due for nonpayment of wages. (Lab. Code, § 218.6.)

VF-2702. Nonpayment of Overtime Compensation (Lab. Code, § 1194)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] perform work for [*name of defendant*]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] work overtime hours?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] know, or should [*name of defendant*] have known, that [*name of plaintiff*] had worked overtime hours?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of plaintiff*] paid at a rate lower than the legal overtime compensation rate for any overtime hours that [he/she/*nonbinary pronoun*] worked for [*name of defendant*]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What is the amount of wages owed? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, June 2015, December 2016, November 2023, May 2024*

Directions for Use

This verdict form is based on CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This verdict form may be augmented for the jury to make any factual findings that are required for the court to calculate the amount of prejudgment interest due for nonpayment of wages. (Lab. Code, § 218.6.)

VF-2703. Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] perform work for [*name of defendant*]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] discharge [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] willfully fail to [pay/tender payment of] the full amount of wages earned by [*name of plaintiff*] on [his/her/*nonbinary pronoun*] last day of employment?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **For how many calendar days following [*name of plaintiff*]'s last day of employment did [*name of defendant*] willfully fail to [pay/tender payment of] the full amount of [*name of plaintiff*]'s wages? _____ days.**

   Answer question 5.

5. **What was [*name of plaintiff*]'s daily wage rate at the time [his/her/*nonbinary pronoun*] employment ended? $_____ per day.**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised June 2005, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2704, *Damages—Waiting-Time Penalty for Nonpayment of Wages*. Depending on the facts of the case, other factual scenarios can be substituted in questions 2, 3, and 4, as in elements 2, 3, and 4 in the instruction.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2704. Solicitation of Employee by Misrepresentation (Lab. Code, § 970)

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] make [a] representation(s) to [*name of plaintiff*] about the kind, character, or existence of work?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[Was/Were] [*name of defendant*]'s representation(s) untrue?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] know the representation(s) [was/were] untrue when made?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of defendant*] intend that [*name of plaintiff*] rely on the representation(s)?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [*name of plaintiff*] reasonably rely on [*name of defendant*]'s representation(s) and move or change [his/her/*nonbinary pronoun*] residence for the purpose of working for [name of defendant]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation(s) a substantial factor in causing harm to [*name of*

plaintiff]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2710, *Solicitation of Employee by*

Misrepresentation—Essential Factual Elements. Depending on the facts of the case, other factual scenarios can be substituted in question 1, as in element 1 in the instruction.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2705. Preventing Subsequent Employment by Misrepresentation (Lab. Code, § 1050)

We answer the questions submitted to us as follows:

1. **After [***name of plaintiff***]'s employment with [***name of defendant***] ended, did [***name of defendant***] make [a] representation(s) to [***name of prospective employer***] about [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[Was/Were] [***name of defendant***]'s representation(s) untrue?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] know the representation(s) [was/were] untrue when [he/she/***nonbinary pronoun***/it] made [it/them]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] make the representation(s) with the intent of preventing [***name of plaintiff***] from obtaining employment?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2700, *Preventing Subsequent Employment by Misrepresentation—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual

forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2706. Rest Break Violations (Lab. Code, § 226.7)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] work for [*name of defendant*] on one or more workdays for at least three and one-half hours?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] prove at least one rest break violation?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **On how many workdays did one or more rest break violations occur?**

   _____ workdays

   Answer question 4.

4. **What is the amount of pay owed? $_____**

Signed: _____
Presiding Juror

Dated: _____

[After this verdict form has/After all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

*New December 2022; Revised November 2023**

Directions for Use

This verdict form is based on CACI No. 2760, *Rest Break Violations—Introduction*, CACI No. 2761, *Rest Break Violations—Essential Factual Elements*, and CACI No. 2762, *Rest Break Violations—Pay Owed*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-

3920, *Damages on Multiple Legal Theories*.

The court may determine if prejudgment interest is awardable and, if so, whether it is discretionary or mandatory. (Civ. Code, §§ 3287, 3288.) If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may be augmented for the jury to make any factual findings that are required to calculate the amount of prejudgment interest.

VF-2707. Meal Break Violations (Lab. Code, §§ 226.7, 512)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] work for [*name of defendant*] for one or more workdays for a period lasting longer than five hours?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] prove at least one meal break violation?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **On how many workdays did one or more meal break violations occur?**

   _____ workdays

   Answer question 4.

4. **What is the amount of pay owed? $_____**

Signed: _____
Presiding Juror

Dated: _____

[After this verdict form has/After all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2022; Revised November 2023, May 2024*

Directions for Use

This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, CACI No. 2766A, *Meal Break Violations—Essential Factual Elements*, and CACI No. 2767, *Meal Break Violations—Pay Owed.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-

3920, *Damages on Multiple Legal Theories*.

The court may determine if prejudgment interest is awardable and, if so, whether it is discretionary or mandatory. (Civ. Code, §§ 3287, 3288.) If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may be augmented for the jury to make any factual findings that are required to calculate the amount of prejudgment interest.

VF-2708. Meal Break Violations—Employer Records Showing Noncompliance (Lab. Code, §§ 226.7, 512)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] work for [*name of defendant*] for one or more workdays for a period lasting longer than five hours?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Do [*name of defendant*]'s records show any missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. **How many meal breaks do the records show as missed, less than 30 minutes, or taken too late in a workday?**

   _____ meal breaks

   Answer question 4.

4. **For each meal break included in your answer to question 3, did [*name of defendant*] prove [he/she/*nonbinary pronoun*/it] provided a meal break that complies with the law?**

   _____ Yes _____ No

   If your answer to question 4 is yes, stop here, answer no further questions, and have the presiding juror sign and date this form. If you answered no, then answer question 5.

5. **Considering by workday the meal breaks determined in question 3, for how many workdays did [*name of defendant*] fail to prove that [he/she/*nonbinary pronoun*/it] provided meal breaks that comply with the law?**

   _____ workdays

   Answer question 6.

6. **For the workdays determined in question 5, what is the amount of pay owed?**

$ _____

Signed: _____
Presiding Juror

Dated: _____

[After this verdict form has/After all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New May 2023; Revised November 2023, May 2024

Directions for Use

This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Use this verdict form if the plaintiff's meal break claims involve the rebuttable presumption of a violation based on an employer's records showing missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday. See also verdict form CACI No. VF-2707, *Meal Break Violations*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

The court may determine if prejudgment interest is awardable and, if so, whether it is discretionary or mandatory. (Civ. Code, §§ 3287, 3288.) If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may be augmented for the jury to make any factual findings that are required to calculate the amount of prejudgment interest.

VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records (Lab. Code, §§ 226.7, 512)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] work for [*name of defendant*] for one or more workdays for a period lasting longer than five hours?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] keep [accurate] records of the start and end times for meal breaks?**

   _____ Yes _____ No

   If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. **For how many meal breaks were [accurate] records of the start and end times for meal breaks not kept?**

   _____ meal breaks

   Answer question 4.

4. **For each meal break included in your answer to question 3, did [*name of defendant*] prove [he/she/*nonbinary pronoun*/it] provided a meal break that complies with the law?**

   _____ Yes _____ No

   If your answer to question 4 is yes, stop here, answer no further questions, and have the presiding juror sign and date this form. If you answered no, then answer question 5.

5. **Considering by workday the meal breaks determined in question 3, for how many workdays did [*name of defendant*] fail to prove that [he/she/*nonbi nary pronoun*/it] provided meal breaks that comply with the law?**

   _____ workdays

   Answer question 6.

6. **For the workdays determined in question 5, what is the amount of pay owed?**

   $ _____

Signed: _____
Presiding Juror

Dated: _____

[After this verdict form has/After all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New May 2023; Revised November 2023, May 2024

Directions for Use

This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Use this verdict form if the plaintiff's meal break claims involve the rebuttable presumption of a violation based on an employer's inaccurate or missing records. If only missing records are at issue, omit "accurate" from questions 2 and 3. See also verdict form CACI No. VF-2707, *Meal Break Violations*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

The court may determine if prejudgment interest is awardable and, if so, whether it is discretionary or mandatory. (Civ. Code, §§ 3287, 3288.) If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may be augmented for the jury to make any factual findings that are required to calculate the amount of prejudgment interest.

VF-2710–VF-2799. Reserved for Future Use

WORKERS' COMPENSATION

2800. Employer's Affirmative Defense—Injury Covered by Workers' Compensation

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[*Name of defendant***] claims that [***name of plaintiff***] was [***name of defendant***]'s employee and therefore can only recover under California's Workers' Compensation Act. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] was [***name of defendant***]'s employee;**
2. **That [***name of defendant***] [had workers' compensation insurance [covering [***name of plaintiff***] at the time of injury]/was self-insured for workers' compensation claims [at the time of [***name of plaintiff***]'s injury]];**
3. **That [***name of plaintiff***]'s injury occurred while [he/she/***nonbinary pronoun***] was working, or performing a task for or related to the work [***name of defendant***] hired [him/her/***nonbinary pronoun***] to do; and**
4. **That this [task/work] contributed to causing the injury.**

Any person performing services for another, other than as an independent contractor, is presumed to be an employee.

New September 2003; Revised October 2004, May 2018

Directions for Use

This instruction is intended for use if the plaintiff is suing a defendant claiming to be the plaintiff's employer. This instruction is not intended for use if the plaintiff is suing under an exception to the workers' compensation exclusivity rule.

Element 3 expresses the requirement that the employee be acting in the course of employment at the time of injury. Element 4 expresses what is referred to as "industrial causation"; that the work was a contributing cause of the injury. The two requirements are different, and both must be proved. (See *Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 625 [210 Cal.Rptr.3d 362].) For an instruction asserting that element 3 does not apply, see CACI No. 2805, *Employee Not Within Course of Employment—Employer Conduct Unrelated to Employment*.

For other instructions regarding employment status, such as special employment and independent contractors, see instructions in the Vicarious Responsibility series (CACI Nos. 3700–3726). These instructions may need to be modified to fit this context.

Labor Code section 3351 defines "employee" for purposes of workers' compensation. Labor Code section 3352 sets forth exceptions. This instruction

should not be given if the plaintiff/employee has been determined to fall within a statutory exception.

If appropriate to the facts of the case, see instructions on the going-and-coming rule in the Vicarious Responsibility series. These instructions may need to be modified to fit this context.

Sources and Authority

- Exclusive Remedy. Labor Code section 3602(a).
- Conditions of Compensation. Labor Code section 3600(a).
- If Conditions of Compensation Not Met. Labor Code section 3602(c).
- "Employee" Defined. Labor Code section 3351.
- Presumption of Employment Status. Labor Code section 3357.
- Failure to Secure Payment of Compensation. Labor Code section 3706.
- "[T]he basis for the exclusivity rule in workers' compensation law is the 'presumed "compensation bargain," pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' " (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citation omitted.)
- "Because an employer faced with a civil complaint seeking to enforce a common law remedy which does not state facts indicating coverage by the act bears the burden of pleading and proving 'that the (act) is a bar to the employee's ordinary remedy,' we believe that the burden includes a showing by the employer-defendant, through appropriate pleading and proof, that he had 'secured the payment of compensation' in accordance with the provisions of the act." (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 98, fn. 8 [151 Cal.Rptr. 347, 587 P.2d 1160], internal citations omitted.)
- "A defendant need not plead and prove that it has purchased workers' compensation insurance where the plaintiff alleges facts that otherwise bring the case within the exclusive province of workers' compensation law, and no facts presented in the pleadings or at trial negate the workers' compensation law's application or the employer's insurance coverage." (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 14 [87 Cal.Rptr.2d 554], internal citations omitted.)
- "[T]he fact that an employee has received workers' compensation benefits from some source does not bar the employee's civil action against an uninsured employer. Instead, '[t]he price that must be paid by each employer for immunity from tort liability is the purchase of a workers' compensation policy [and where the employer chooses] not to pay that price . . . it should not be immune from

liability.' " (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 987 [101 Cal.Rptr.2d 325], internal citations omitted.)

- "Under the Workers' Compensation Act, employees are automatically entitled to recover benefits for injuries 'arising out of and in the course of the employment.' 'When the conditions of compensation exist, recovery under the workers' compensation scheme "is the exclusive remedy against an employer for injury or death of an employee." ' " (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 986 [105 Cal.Rptr.2d 88], internal citations omitted.)
- "Unlike many other states, in California workers' compensation provides the exclusive remedy for at least some intentional torts committed by an employer. *Fermino* described a 'tripartite system for classifying injuries arising in the course of employment. First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers' compensation system. Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under section 4553. Third, there are certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought.' " (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 723 [112 Cal.Rptr.2d 195], internal citations omitted.)
- "It has long been established in this jurisdiction that, generally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers' Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application." (*Doney, supra*, 23 Cal.3d at p. 96, internal citations and footnote omitted.)
- "California courts have held worker's compensation proceedings to be the exclusive remedy for certain third party claims deemed collateral to or derivative of the employee's injury. Courts have held that the exclusive jurisdiction provisions bar civil actions against employers by nondependent parents of an employee for the employee's wrongful death, by an employee's spouse for loss of the employee's services or consortium, and for emotional distress suffered by a spouse in witnessing the employee's injuries." (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 997 [68 Cal.Rptr.2d 476, 945 P.2d 781], internal citations omitted.)
- " 'An employer-employee relationship must exist in order to bring the . . . Act into effect. (§ 3600)' However, the coverage of the Act extends beyond those who have entered into 'traditional contract[s] of hire.' '[S]ection 3351 provides broadly that for the purpose of the . . . Act, " 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . .' " Given this 'section's explicit use of the disjunctive,' a contract of hire is not 'a prerequisite' to the existence of an employment relationship. Moreover, under section 3357, '[a]ny

person rendering service for another, other than as an independent contractor, or unless expressly excluded . . . , is presumed to be an employee.' " (*Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1060–1061 [40 Cal.Rptr.2d 116, 892 P.2d 150], internal citations omitted.)

- "Given these broad statutory contours, we believe that an 'employment' relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen's Compensation Act." (*Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777 [100 Cal.Rptr. 377, 494 P.2d 1], internal citations omitted.)
- "[C]ourts generally are more exacting in requiring proof of an employment relationship when such a relationship is asserted as a defense by the employer to a common law action." (*Spradlin v. Cox* (1988) 201 Cal.App.3d 799, 808 [247 Cal.Rptr. 347], internal citation omitted.)
- "The question of whether a person is an employee may be one of fact, of mixed law and fact, or of law only. Where the facts are undisputed, the question is one of law, and the Court of Appeal may independently review those facts to determine the correct answer." (*Barragan v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637, 642 [240 Cal.Rptr. 811], internal citations omitted.)
- "An employee may have more than one employer for purposes of workers' compensation, and, in situations of dual employers, the second or 'special' employer may enjoy the same immunity from a common law negligence action on account of an industrial injury as does the first or 'general' employer. Identifying and analyzing such situations 'is one of the most ancient and complex questions of law in not only compensation but tort law.' " (*Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 578 [239 Cal.Rptr. 578], internal citation omitted.)
- "In determining whether an employee is covered within the compensation system and thus entitled to recover compensation benefits, the 'definitional reach of these covered employment relationships is very broad.' A covered employee is 'every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.' 'Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.' . . . [T]hese provisions mandate a broad and generous interpretation in favor of inclusion in the system. Necessarily the other side of that coin is a presumption against the availability of a tort action where an employment relation exists. One result cannot exist without the other. Further, this result does not depend upon 'informed consent,' but rather on the parties' legal status. . . . [W]here the facts of employment are not disputed, the existence of a covered relationship is a question of law." (*Santa Cruz Poultry, Inc., supra*, 194 Cal.App.3d at pp. 583–584, internal citations omitted.)
- " 'The requirement of . . . section 3600 is twofold. On the one hand, the injury

must occur "in the course of the employment." This concept "ordinarily refers to the time, place, and circumstances under which the injury occurs." Thus " '[a]n employee is in the "course of his employment" when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do.' " And, ipso facto, an employee acts within the course of his employment when " 'performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied.' " ' [¶] 'On the other hand, the statute requires that an injury "arise out of" the employment. . . . It has long been settled that for an injury to "arise out of the employment" it must "occur by reason of a condition or incident of [the] employment . . . ." That is, the employment and the injury must be linked in some causal fashion.' " (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651 [72 Cal.Rptr.2d 217, 951 P.2d 1184], internal citations and footnote omitted.)

- "The requirements that an injury arise out of employment or be proximately caused by employment are sometimes referred to together as the requirement of industrial causation. It is a looser concept of causation than the concept of proximate cause employed in tort law. In general, the industrial causation requirement is satisfied 'if the connection between work and the injury [is] a contributing cause of the injury . . . .' " (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 624 [210 Cal.Rptr.3d 362], internal citation omitted.)
- "For our purposes here, it is important that 'arising out of' and 'in the course of' are two separate requirements. Even if it is conceded that an employee was injured while performing job tasks in the workplace during working hours, the exclusivity rule applies only if it also is shown that the work was a contributing cause of the injury." (*Lee, supra*, 5 Cal.App.5th at p. 625.)
- "The jury could properly make this finding [that conduct was not within scope of employment] by applying special instruction No. 5, the instruction stating that an employer's conduct falls outside the workers' compensation scheme when an employer steps outside of its proper role or engages in conduct unrelated to the employment. This instruction stated the doctrine of *Fermino* correctly." (*Lee, supra*, 5 Cal.App.5th at pp. 628–629.)
- "The concept of 'scope of employment' in tort is more restrictive than the phrase 'arising out of and in the course of employment,' used in workers' compensation." (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1057 [103 Cal.Rptr.2d 790], internal citations omitted.)
- "Whether an employee's injury arose out of and in the course of her employment is generally a question of fact to be determined in light of the circumstances of the particular case. However, where the facts are undisputed, resolution of the question becomes a matter of law." (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal.App.4th 346, 353 [115 Cal.Rptr.2d 503], internal citations omitted.)
- "Injuries sustained while an employee is performing tasks within his or her

employment contract but outside normal work hours are within the course of employment. The rationale is that the employee is still acting in furtherance of the employer's business." (*Wright, supra*, 95 Cal.App.4th at p. 354.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Workers' Compensation, §§ 23–49

Chin et al., California Practice Guide: Employment Litigation, Ch. 15-F, *California Workers' Compensation Act Preemption*, ¶¶ 15:520 et seq., 15:555 (The Rutter Group)

1 Hanna, California Law of Employee Injuries and Workers' Compensation (2d ed.) Ch. 4, §§ 4.03–4.06 (Matthew Bender)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 10, *The Injury*, § 10.09 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.10 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, §§ 10.02, 10.03[3], 10.10 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, §§ 577.310, 577.530 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

2801. Employer's Willful Physical Assault—Essential Factual Elements (Lab. Code, § 3602(b)(1))

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed because [***name of defendant***] assaulted [him/her/***nonbinary pronoun***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***insert one of the following:***]**

   [engaged in physical conduct that a reasonable person would perceive to be a real, present, and apparent threat of bodily harm;]

   [touched [*name of plaintiff***] [or caused [***name of plaintiff***] to be touched] in a harmful or offensive manner];**

2. **That [***name of defendant***] intended to harm [***name of plaintiff***];**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

This instruction is intended for use in cases in which the employer is the defendant and the plaintiff alleges the case falls outside of the workers' compensation exclusivity rule. Use the first bracketed option in element 1 for cases involving assault. Use the second bracketed option for cases involving battery.

Do not use instructions on assault and battery (CACI No. 1300, *Battery—Essential Factual Elements*, and CACI No. 1301, *Assault—Essential Factual Elements*). For an instruction on ratification, see CACI No. 3710, *Ratification.*

Sources and Authority

- Exclusive Remedy: Willful Physical Assault Exception. Labor Code section 3602(b)(1).
- "[T]he 1982 amendments were not intended to provide an exhaustive list of exceptions to the exclusivity rule. They did not, for example, foreclose the recognition of an exception for injuries stemming from wrongful discharges that violated public policy, an issue that neither the Legislature nor the judicial system had confronted in 1982. Section 3602 only applies '[w]here the conditions . . . set forth in section 3600 concur,' and does not purport to resolve the ambiguities in that latter section discussed above, nor to definitively delineate the scope of the compensation bargain that has been the key to construing the meaning of section 3600. Rather, section 3602 merely confirms the judicial

recognition of certain types of employer acts as outside the compensation bargain, even as it reinforces the exclusivity rule by repealing the dual capacity doctrine." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 720 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citation omitted.)

- "[In *Magliulo v. Superior Court*,] [t]he employee sued the employer for assault and battery, and the court rejected the employer's argument that workers' compensation benefits were the exclusive remedy. The court noted that section 3601 allowed lawsuits for assaults by coemployees, and reasoned that '[i]f the employee can recover both compensation and damages caused by an intentional assault by a fellow worker, he should have no less right because the fellow worker happens to be his boss.' " (*Soares v. City of Oakland* (1992) 9 Cal.App.4th 1822, 1826 [12 Cal.Rptr.2d 405], internal citation omitted.)
- "Section 3602(b)(1) was enacted in 1982, 23 years after enactment of section 3601, subdivision (a)(1), to codify the result in *Magliulo v. Superior Court*." (*Soares, supra*, 9 Cal.App.4th at p. 1826, internal citations omitted.)
- "We conclude . . . that 'willful' employer assaults within the meaning of section 3602(b)(1) do not include all common law batteries, but only those batteries that are specifically intended to injure." (*Soares, supra*, 9 Cal.App.4th at pp. 1828–1829.)
- " 'The modern view respecting actionable intentional misconduct by the employer is that it must be alleged and proved that the employer "acted deliberately with the specific intent to injure" the employee.' " (*Arendell v. Auto Parts Club, Inc.* (1994) 29 Cal.App.4th 1261, 1265 [35 Cal.Rptr.2d 83], internal citations omitted.)
- "[B]odily contact is not necessary for a physical assault." (*Herrick v. Quality Hotels, Inns & Resorts, Inc.* (1993) 19 Cal.App.4th 1608, 1617 [24 Cal.Rptr.2d 203].)
- "*Herrick* explained that bodily contact was not necessary for a 'physical assault,' but that physical assault occurred when someone engaged in physical conduct which a reasonable person would perceive to be a real, present and apparent threat of bodily harm." (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 728 [112 Cal.Rptr.2d 195], internal citation omitted.)
- "[W]e conclude that the exception to the exclusivity rule contained in section 3602, subdivision (b)(1), does not authorize a civil action against an employer for injury resulting from the willful assault of a coemployee based on a theory of respondeat superior." (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1489 [82 Cal.Rptr.2d 359].)
- "[C]ourts have also recognized that an employer can be held civilly liable as a joint participant in assaultive conduct committed by its employee pursuant to the doctrine of ratification." (*Fretland, supra*, 69 Cal.App.4th at pp. 1489–1490.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Workers' Compensation, § 49

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-F, *Intentional Interference with Contract or Prospective Economic Advantage*, ¶¶ 5:655, 5:656–5:657, 15:527, 15:566–15:567, 15:570–15:571 (The Rutter Group)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.20 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, §§ 20.12[1][b], 20.41 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, §§ 577.17, 577.314[2] (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

2802. Fraudulent Concealment of Injury—Essential Factual Elements (Lab. Code, § 3602(b)(2))

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/[***name of decedent***]] was harmed because [***name of defendant***] fraudulently concealed the fact that [***name of plaintiff/decedent***] had been injured on the job. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff/decedent***] was injured on the job;**
2. **That [***name of defendant***] knew that [***name of plaintiff/decedent***] had suffered a job-related injury;**
3. **That [***name of defendant***] concealed this knowledge from [***name of plaintiff/decedent***]; and**
4. **That [***name of plaintiff/decedent***]'s injury was made worse as a result of this concealment.**

If [*name of plaintiff***] establishes this claim, [he/she/***nonbinary pronoun***] must prove the total damages caused by the injury. [***Name of defendant***] must prove the damages that [***name of plaintiff/decedent***] would have sustained even if [***name of defendant***] had not concealed the injury. [***Name of plaintiff***] is entitled to recover the difference between the two amounts.**

New September 2003

Directions for Use

This instruction is intended for cases where the employer is the defendant and the plaintiff alleges the case falls outside of the workers' compensation exclusivity rule. This instruction pertains to aggravation of an injury caused by concealment.

Sources and Authority

- Exclusive Remedy: Fraudulent Concealment Exception. Labor Code Section 3602(b)(2).
- "[T]he 1982 amendments were not intended to provide an exhaustive list of exceptions to the exclusivity rule. They did not, for example, foreclose the recognition of an exception for injuries stemming from wrongful discharges that violated public policy, an issue that neither the Legislature nor the judicial system had confronted in 1982. Section 3602 only applies '[w]here the conditions . . . set forth in section 3600 concur,' and does not purport to resolve the ambiguities in that latter section discussed above, nor to definitively delineate the scope of the compensation bargain that has been the key to construing the meaning of section 3600. Rather, section 3602 merely confirms the judicial recognition of certain types of employer acts as outside the compensation

bargain, even as it reinforces the exclusivity rule by repealing the dual capacity doctrine." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 720 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citation omitted.)

- "In general, the Workers' Compensation Act provides an employee with his or her exclusive remedy for a work-related injury. Subject to narrow exceptions, 'where the . . . conditions of compensation concur,' an injured employee cannot maintain a civil action against his or her employer or another employee." (*Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal.App.4th 430 [124 Cal.Rptr.2d 227], internal citation omitted.)
- "[A]n employee seeking to state a cause of action against an employer under section 3602(b)(2) must 'in general terms' plead facts that if found true by the trier of fact, establish the existence of three essential elements: (1) the employer knew that the plaintiff had suffered a work-related injury; (2) the employer concealed that knowledge from the plaintiff; and (3) the injury was aggravated as a result of such concealment." (*Palestini v. General Dynamics Corp.* (2002) 99 Cal.App.4th 80, 89–90 [120 Cal.Rptr.2d 741], internal citation omitted.)
- "While there are no cases defining the term 'fraudulent concealment' as used in the section, its general meaning is not difficult to discern. According to both statute and case law, the failure to disclose facts may constitute fraud if the party with knowledge has a duty to make disclosure. We have no reason to believe that the term 'fraudulent concealment' as used in subdivision (b)(2) was intended to have a meaning other than this." (*Foster v. Xerox Corp.* (1985) 40 Cal.3d 306, 309–310 [219 Cal.Rptr. 485, 707 P.2d 858], internal citations omitted.)
- "An employer's actual knowledge of the existence of an employee's injury connected with the employment is a necessary prerequisite to establishing a claim against the employer for fraudulent concealment under section 3602(b)(2). This principle is based on the rationale that an employer cannot be held liable under section 3602(b)(2) for concealing something of which it had no knowledge." (*Palestini, supra*, 99 Cal.App.4th at p. 93, internal citations omitted.)
- "In order to succeed in their attempt to remove their case from the workers' compensation law, appellants first had to show an 'injury.' They then had to prove that the injury was aggravated by Firestone's fraudulent concealment of the existence of the injury and its connection with the employment." (*Santiago v. Firestone Tire & Rubber Co.* (1990) 224 Cal.App.3d 1318, 1330 [274 Cal.Rptr. 576], internal citation omitted.)
- "The Supreme Court in *Johns-Manville* recognized that the aggravation of an injury that results when an employer fraudulently conceals the injury's cause is a harm distinct from the injury itself. For this reason, aggravation that results when an employer fraudulently conceals an injury's cause remains actionable even though the injured party has recovered worker's compensation benefits for the injury itself." (*Aerojet General Corp. v. Superior Court* (1986) 177 Cal.App.3d 950, 956 [223 Cal.Rptr. 249], internal citation omitted.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Workers' Compensation, §§ 50, 51

Chin et al., California Practice Guide: Employment Litigation, Ch. 15-F, *California Workers' Compensation Act Preemption*, ¶¶ 15:526.1, 15:570, 15:570.5–15:570.6, 15:590 (The Rutter Group)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.20 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.12[1][c] (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.11[1][d] (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, §§ 577.314[3], 577.525 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

2803. Employer's Defective Product—Essential Factual Elements (Lab. Code, § 3602(b)(3))

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed by a defective product manufactured by [*name of defendant*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That the [*product*] was manufactured by [*name of defendant*];**
2. **That the [*product*] was [sold/leased/transferred for valuable consideration] to an independent third person;**
3. **That the third person then provided the [*product*] for [*name of plaintiff*]'s use;**
4. **That the [*product*] was defective in design or manufacture;**
5. **That [*name of plaintiff*] was harmed; and**
6. **That the [*product*] was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

This instruction is intended for use in cases where the employer is the defendant and the plaintiff alleges that the case falls outside of the workers' compensation exclusivity rule. See the Products Liability series (CACI Nos. 1200–1243) for instructions on product defect.

Sources and Authority

- Exclusive Remedy: Defective Product Exception. Labor Code section 3602(b)(3).
- "[T]he 1982 amendments were not intended to provide an exhaustive list of exceptions to the exclusivity rule. They did not, for example, foreclose the recognition of an exception for injuries stemming from wrongful discharges that violated public policy, an issue that neither the Legislature nor the judicial system had confronted in 1982. Section 3602 only applies '[w]here the conditions . . . set forth in section 3600 concur,' and does not purport to resolve the ambiguities in that latter section discussed above, nor to definitively delineate the scope of the compensation bargain that has been the key to construing the meaning of section 3600. Rather, section 3602 merely confirms the judicial recognition of certain types of employer acts as outside the compensation bargain, even as it reinforces the exclusivity rule by repealing the dual capacity doctrine." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 720 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citation omitted.)
- "The language 'provided for the employee's use' indicates the product must be

given or furnished to the employee in order for the employee to accomplish some task." (*Behrens v. Fayette Manufacturing Co.* (1992) 4 Cal.App.4th 1567, 1574 [7 Cal.Rptr.2d 264].)

- "Our interpretation is in accord with that of commentators who have noted that the exception of subdivision (b)(3) requires the employee to come into contact with the defective product as a consumer." (*Behrens, supra*, 4 Cal.App.4th at p. 1574, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Workers' Compensation, § 69

Chin et al., California Practice Guide: Employment Litigation, Ch. 15-F, *California Workers' Compensation Act Preemption*, ¶ 15:571 (The Rutter Group)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.20 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.12[1][d] (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.11[1][e] (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.314[4] (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

2804. Removal or Noninstallation of Power Press Guards—Essential Factual Elements (Lab. Code, § 4558)

A "power press" is a machine that forms materials with a die in the manufacture of other products. A "die" is a tool that imparts shape to material by pressing against or through the material. A "guard" is any device that keeps a worker's hands or other parts of the body outside the point of operation.

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed because [***name of defendant***] [removed/failed to install] guards on a power press. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [employer/supervisor];**
2. **That [***name of plaintiff***] was injured while operating a power press;**
3. **That [***name of defendant***] gave an affirmative instruction to [remove/not install] the guards before [***name of plaintiff***]'s injury;**
4. **That when [***name of defendant***] did so, [he/she/***nonbinary pronoun***/it] knew that the lack of guards would create a probability of serious injury or death;**
5. **That the power press's [designer/fabricator/assembler] [designed the press with guards/installed guards on the press/required guards be attached/specified that guards be attached] and directly or indirectly conveyed this information to [***name of defendant***]; and**
6. **That [***name of defendant***]'s [removal/failure to install] the guards was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2011

Directions for Use

This instruction is for use if the plaintiff alleges that the claim for injury or death falls outside of the workers' compensation exclusivity rule because the employer removed or failed to install power press guards. (See Lab. Code § 4558.)

Sources and Authority

- Exclusive Remedy: Power-Press Guard Exception. Labor Code section 4558.
- "The obvious legislative intent and purpose in section 4558 is to protect workers from employers who wilfully remove or fail to install appropriate guards on

large power tools. Many of these power tools are run by large mechanical motors or hydraulically. . . . These sorts of machines are difficult to stop while they are in their sequence of operation. Without guards, workers are susceptible to extremely serious injuries. For this reason, the Legislature passed section 4558, subdivision (b), which subjects employers to legal liability for removing guards from powerful machinery where the manufacturer has designed the machine to have a protective guard while in operation." (*LeFiell Manufacturing Co. v. Superior Court* (2014) 228 Cal.App.4th 883, 892 [175 Cal.Rptr.3d 894].)

- "A cause of action under section 4558 includes the following elements: (a) that the injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press; and (b) that this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death." (*Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1516 [285 Cal.Rptr. 385].)
- "A power press is 'any material-forming machine that utilizes a die which is designed for use in the manufacture of other products.' 'This definition entails four elements. The power press itself is a machine. It is a machine that forms materials. The formation of materials is effectuated with a die. Finally, the materials being formed with the die are being formed in the manufacture of other products.' " (*LeFiell, supra*, 228 Cal.App.4th at p. 893.)
- "The meaning of the term 'point of operation guard' in section 4558 is a legal question." (*LeFiell, supra*, 228 Cal.App.4th at p. 893.)
- "[T]he type of injury excluded from the workers' compensation system in section 4558 arises from the inherent danger to hands and other body parts at the point in which the die shapes the material in the absence of guards or safety devices." (*LeFiell, supra*, 228 Cal.App.4th at p. 897.)
- "Limiting the definition of 'point of operation guard' to the area where the die forms the material on a power press is consistent with the legislative purpose in enacting section 4558." (*LeFiell, supra*, 228 Cal.App.4th at p. 895.)
- "From the plain language of section 4558, it is clear that an exception to the exclusivity of workers' compensation only arises for a power press injury where the employer has been expressly informed by the manufacturer that a point of operation guard is required, where the employer then affirmatively removes or fails to install such guard, and where the employer does so under conditions known by the employer to create a probability of serious injury or death. Absent facts which would establish the employer's knowledge or action regarding the absence of a point of operation guard on a power press, the incident would not come within the exception of section 4558, and an employee would not be entitled to bring 'an action at law for damages' arising from the power press injury. If such action cannot be brought on its own where the facts fail to establish all the elements of the power press exception under section 4558, it follows that individual causes of action against an employer which do not meet

the requirements of section 4558 cannot be bootstrapped onto a civil action for damages which is properly brought under section 4558." (*Award Metals, Inc. v. Superior Court* (1991) 228 Cal.App.3d 1128, 1134 [279 Cal.Rptr. 459].)

- "In all its pertinent uses, then, the term 'die' refers to a tool that imparts shape to material by pressing or impacting against or through the material, that is, by punching, stamping or extruding; in none of its uses does the term refer to a tool that imparts shape by cutting along the material in the manner of a blade." (*Rosales v. Depuy Ace Medical Co.* (2000) 22 Cal.4th 279, 285 [92 Cal.Rptr.2d 465, 991 P.2d 1256].)
- "[U]nder subdivisions (a)(2) and (c), liability for 'failure to install' a point of operation guard under section 4558 must be predicated upon evidence that the 'manufacturer' either provided or required such a device, which was not installed by the employer." (*Flowmaster, Inc. v. Superior Court* (1993) 16 Cal.App.4th 1019, 1027 [20 Cal.Rptr.2d 666].)
- "We find that the term guard, as used in section 4558, is meant to include the myriad apparatus which are available to accomplish the purpose of keeping the hands of workers outside the point of operation whenever the ram is capable of descending. Because we find that the term guard is not a specific legal term of art, we hold that the trial court properly provided the jury with a dictionary definition of the term guard to explain its meaning under section 4558." (*Bingham v. CTS Corp.* (1991) 231 Cal.App.3d 56, 65 [282 Cal.Rptr. 161], internal citation omitted; cf. *Gonzalez v. Seal Methods, Inc.* (2014) 223 Cal.App.4th 405, 410 [166 Cal.Rptr.3d 895] [point of operation guard does not include unattached device, such as a safety block, that the worker moves into and out of the point of operation].)
- "Physical removal, for the purpose of liability under section 4558, means to render a safeguarding apparatus, whether a device or point of operation guard, dysfunctional or unavailable for use by the operator for the particular task assigned." (*Bingham, supra*, 231 Cal.App.3d at p. 68.)
- "Nothing in the language, history or objectives underlying section 4558 convinces us that the Legislature intended that section 4558 would immunize employers who design, manufacture and install their own power presses without point of operation guards. A manufacturer is defined broadly in section 4558 as a 'designer, fabricator, or assembler of a power press.' An 'employer' is not excluded from the definition of a manufacturer, nor would doing so promote the objectives of the statute." (*Flowmaster, Inc., supra*, 16 Cal.App.4th at pp. 1029–1030, internal citation omitted.)
- "The element of knowledge requires 'actual awareness' by the employer—rather than merely constructive knowledge—that a point of operation guard has either been provided for or is required to prevent the probability of serious injury or death." (*Flowmaster, Inc., supra*, 16 Cal.App.4th at pp. 1031–1032, internal citation and footnote omitted.)
- "Liability under section 4558 can only be imposed if the employer fails to use or

removes a safety device required by the manufacturer of the press. Essentially, the culpable conduct is the employer's ignoring of the manufacturer's safety directive . . . . 'From the plain language of section 4558, it is clear that an exception to the exclusivity of workers' compensation only arises for a power press injury where the employer has been expressly informed by the manufacturer that a point of operation guard is required, where the employer then affirmatively removes or fails to install such guard, and where the employer does so under conditions known by the employer to create a probability of serious injury or death.' " (*Aguilera v. Henry Soss & Co.* (1996) 42 Cal.App.4th 1724, 1730 [50 Cal.Rptr.2d 477], internal citation omitted.)

- "As defined in the statute, 'specifically authorized' requires an 'affirmative instruction' by the employer, as distinguished from mere acquiescence in or ratification of an act or omission." (*Mora v. Hollywood Bed & Spring* (2008) 164 Cal.App.4th 1061, 1068 [79 Cal.Rptr.3d 640].)
- "Specific authorization demands evidence of an affirmative instruction or other wilful acts on the part of the employer despite actual knowledge of the probability of serious harm." (*Flowmaster, Inc., supra*, 16 Cal.App.4th at p. 1032, internal citation and footnote omitted.)
- "[I]mputation solely because of an agency relationship cannot bring an employer within the reach of section 4558. Only an employer who directly authorized by an affirmative instruction the removal or failure to install a guard may be sued at law under section 4558." (*Watters Associates v. Superior Court* (1990) 218 Cal.App.3d 1322, 1325 [267 Cal.Rptr. 696].)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Workers' Compensation, §§ 55–57, 108

Chin et al., California Practice Guide: Employment Litigation, Ch. 13-I, *Collateral (Non-OSHA) Actions Relating To Occupational Safety And Health*, ¶ 13:953 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 15-F, *California Workers' Compensation Act Preemption*, ¶ 15:572 (The Rutter Group)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.20 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.12[1][e] (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.11[1][f] (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.314[5] (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine,* §§ 239.24, 239.41 (Matthew Bender)

2805. Employee Not Within Course of Employment—Employer Conduct Unrelated to Employment

A claim is not barred by workers' compensation if the employer engages in conduct unrelated to the employment or steps outside of its proper role.

New November 2017; Revised May 2020

Directions for Use

This instruction presents the so-called *Fermino* exception to the exclusivity of workers' compensation. (See *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701 [30 Cal.Rptr.2d 18, 872 P.2d 559].) Its purpose is to rebut element 3 of CACI No. 2800, *Employer's Affirmative Defense—Injury Covered by Workers' Compensation.* Per element 3, the injury falls within the exclusive remedy of workers' compensation if it occurred while the employee was performing the work that the employee was required to do. The *Fermino* exception changes the focus from what the employee was doing when injured to what the employer was doing that may have caused the injury. The exclusive remedy does not apply if the employer caused the injury through conduct unrelated to the work. (*Id.,* 7 Cal.4th at p. 717.)

Sources and Authority

- "[N]ormal employer actions causing injury would not fall outside the scope of the exclusivity rule merely by attributing to the employer a sinister intention. Conversely, . . . actions by employers that have no proper place in the employment relationship may not be made into a 'normal' part of the employment relationship merely by means of artful terminology. Indeed, virtually any action by an employer can be characterized as a 'normal part of employment' if raised to the proper level of abstraction." (*Fermino, supra,* 7 Cal.4th at p. 717 [30 Cal.Rptr.2d 18, 872 P.2d 559].)
- "[C]ertain types of injurious employer misconduct remain outside this bargain. There are some instances in which, although the injury arose in the course of employment, the employer engaging in that conduct ' "stepped out of [its] proper role[]" ' or engaged in conduct of ' "questionable relationship to the employment." ' " (*Fermino, supra,* 7 Cal.App.4th at p. 708.)
- "[CACI No. 2800] was correctly given, however, because the evidence was able to support a finding that the work was not a contributing cause of the injury. [¶] The jury could properly make this finding by applying special instruction No. 5, the instruction stating that an employer's conduct falls outside the workers' compensation scheme when an employer steps outside of its proper role or engages in conduct unrelated to the employment. This instruction stated the doctrine of *Fermino* correctly. If the jury found that carrying out the mock robbery was not within the employer's proper role, it could also find that

unwittingly participating in the mock robbery as a victim was not part of the employee's work." (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 628–629 [210 Cal.Rptr.3d 362].)

- "The jury could properly find the injury did not arise out of the employee's work because it was caused by such employer action and therefore the conditions of compensation did not exist. To hold that the jury must first find the injury to be within the conditions of compensation and then find it also to be within the *Fermino* exception, instead of simply finding that the conditions of compensation were not met in the first place in light of *Fermino,* would be elevating form over substance." (*Lee, supra,* 5 Cal.App.5th at p. 629.)
- "[T]he exclusive remedy provisions are not applicable under certain circumstances, sometimes variously identified as 'conduct where the employer or insurer stepped out of their proper roles' [citations], or 'conduct of an employer having a "questionable" relationship to the employment' [citations], but which may be essentially defined as not stemming from a risk reasonably encompassed within the compensation bargain." (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 97 [221 Cal.Rptr.3d 668].)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Workers' Compensation, § 62

Chin et al., California Practice Guide: Employment Litigation, Ch. 15-F, *California Workers' Compensation Act Preemption—Preemption Defenses*, ¶ 15:526 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 20, *Workers' Compensation*, § 20.13 (Matthew Bender)

Hanna, California Law of Employee Injuries and Workers' Compensation, Ch. 11, *Actions Against the Employer Under State Law and Third-Party Tort Actions*, § 11.05 (Matthew Bender)

52 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.315 (Matthew Bender)

20 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine*, § 239.39 (Matthew Bender)

California Workers' Compensation Law and Practice, Ch. 2, *Jurisdiction*, § 2:122 (James Publishing)

2806–2809. Reserved for Future Use

2810. Coemployee's Affirmative Defense—Injury Covered by Workers' Compensation

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[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] is not responsible for any harm that [***name of plaintiff***] may have suffered because [he/she/***nonbinary pronoun***] was [***name of defendant***]'s coemployee and therefore can recover only under California's Workers' Compensation Act. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] were [***name of employer***]'s employees;**
2. **That [***name of employer***] [had workers' compensation insurance [covering [***name of plaintiff***] at the time of injury]/was self-insured for workers' compensation claims [at the time of [***name of plaintiff***]'s injury]]; and**
3. **That [***name of defendant***] was acting in the scope of [his/her/***nonbinary pronoun***] employment at the time [***name of plaintiff***] claims [he/she/***nonbinary pronoun***] was harmed.**

New September 2003; Revised October 2004, May 2020

Directions for Use

This instruction is intended for use if a coemployee is the defendant and that coemployee claims that the case falls within the workers' compensation exclusivity rule. For instructions on scope of employment see instructions in the Vicarious Liability series (CACI Nos. 3700–3726). Scope of employment in this instruction is the same as in the context of respondeat superior. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 740 [1 Cal.Rptr.2d 543, 819 P.2d 1].) See instructions in the Vicarious Responsibility series regarding the definition of "scope of employment."

Sources and Authority

- Exclusive Remedy. Labor Code section 3601.
- "Employee" Defined. Labor Code section 3351.
- Presumption of Employment Status. Labor Code section 3357.
- "CACI No. 2810, which the trial court gave to the jury, is intended for use when a coemployee defendant asserts the exclusivity rule as a defense. It has three elements: (1) the plaintiff and the coemployee were employees of the employer; (2) the employer had a workers' compensation insurance policy covering the plaintiff at the time of injury; and (3) the coemployee was acting in the scope of his or her employment at the time of injury." (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 633 [210 Cal.Rptr.3d 362].)

- "Labor Code section 3601 affords coemployees the benefit of the exclusivity rule only '[w]here the conditions of compensation set forth in Section 3600 concur . . . .' Those conditions, as has been mentioned, include the requirement of industrial causation." (*Lee, supra*, 5 Cal.App.5th at p. 634, internal citation omitted.)
- "[A] coemployee's conduct is within the scope of his or her employment if it could be imputed to the employer under the doctrine of respondeat superior. If the coemployee was not 'engaged in any active service for the employer,' the coemployee was not acting within the scope of employment." (*Hendy, supra*, 54 Cal.3d at p. 740, internal citation omitted.)
- "[G]enerally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers' Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application." (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 96 [151 Cal.Rptr. 347, 587 P.2d 1160].)
- "In general, if an employer condones what courts have described as 'horseplay' among its employees, an employee who engages in it is within the scope of employment under section 3601, subdivision (a), and is thus immune from suit, unless exceptions apply." (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1006 [111 Cal.Rptr.2d 564, 30 P.3d 57], internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Workers' Compensation, §§ 73, 74

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-F, *Intentional Interference with Contract or Prospective Economic Advantage*, ¶ 5:624 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶ 12:192 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 13-I, *Collateral (Non-OSHA) Actions Relating to Occupational Safety and Health*, ¶ 13:951 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 15-F, *California Workers' Compensation Act Preemption*, ¶¶ 15:546, 15:569, 15:632 (The Rutter Group)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.22 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.43 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.13 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*,

§ 577.316 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

2811. Co-Employee's Willful and Unprovoked Physical Act of Aggression—Essential Factual Elements (Lab. Code, § 3601(a)(1))

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed because [***name of defendant***] assaulted [him/her/***nonbinary pronoun***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***insert one of the following:***]**

   [engaged in physical conduct that a reasonable person would perceive to be a real, present and apparent threat of bodily harm;]

   [touched [*name of plaintiff***] [or caused [***name of plaintiff***] to be touched] in a harmful or offensive manner;]**

   [*insert other act of physical aggression***];**

2. **That [***name of defendant***]'s conduct was unprovoked;**

3. **That [***name of defendant***] intended to harm [***name of plaintiff***];**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

This instruction is intended for use in cases where a co-employee is the defendant and the plaintiff alleges that the case falls outside of the workers' compensation exclusivity rule. If this instruction is used, do not use standard tort instructions on assault and battery.

Sources and Authority

- Exclusive Remedy: Exception for Coemployee's Willful and Unprovoked Physical Act. Labor Code section 3601(a)(1).
- "As relevant here, a civil suit is permissible when an employee proximately causes another employee's injury or death by a 'willful and unprovoked physical act of aggression' or by intoxication. If an employee brings a lawsuit against a coemployee based on either of these exceptions, the employer is not 'held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee . . . .' This provision is consistent with the view that a coemployee is immune from suit to the extent necessary to prevent an end-run against the employer under the exclusivity rule. 'It is self-evident that Labor Code section 3601 did not establish or create a new right or cause of action in

the employee but severely limited a preexisting right to freely sue a fellow employee for damages.' " (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1002 [111 Cal.Rptr.2d 564, 30 P.3d 57], internal citations and footnotes omitted.)

- "[W]e conclude an 'unprovoked physical act of aggression' is unprovoked conduct intended to convey an actual, present, and apparent threat of bodily injury. A 'threat,' of course, is commonly understood as 'an expression of intention to inflict evil, injury, or damage' and as '[a] communicated intent to inflict harm or loss on another . . . .' Thus, 'unprovoked physical act of aggression' logically contemplates intended injurious conduct. By adding the term 'willful,' the Legislature has underscored the need for an intent to bring about the consequences of that expression, i.e., an intent to inflict injury or harm." (*Torres, supra*, 26 Cal.4th at p. 1005, internal citations omitted.)
- "As with other mental states, plaintiffs may rely on circumstantial evidence to prove the intent to injure." (*Torres, supra*, 26 Cal.4th at p. 1009.)
- "[T]o invoke civil liability under section 3601, subdivision (a)(1), a physical act causing a reasonable fear of harm must be pleaded and proved, but the resulting harm need not also be physical." (*Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219, 225 [191 Cal.Rptr. 696].)
- "We agree that conduct constituting a common law assault may be actionable under section 3601(a)(1), provided that the conduct was intended to injure . . . ." (*Soares v. City of Oakland* (1992) 9 Cal.App.4th 1822, 1829 [12 Cal.Rptr.2d 405].)
- "In general, if an employer condones what courts have described as 'horseplay' among its employees, an employee who engages in it is within the scope of employment under section 3601, subdivision (a), and is thus immune from suit, unless exceptions apply." (*Torres, supra*, 26 Cal.4th at p. 1006, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Workers' Compensation, §§ 73, 74

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-F, *Intentional Interference with Contract or Prospective Economic Advantage*, ¶ 5:624 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 13-I, *Collateral (Non-OSHA) Actions Relating to Occupational Safety and Health*, ¶¶ 13:951, 13:962 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 15-F, *California Workers' Compensation Act Preemption*, ¶¶ 15:546, 15:569, 15:632 (The Rutter Group)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.22 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.43

(Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.13 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.316 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

2812. Injury Caused by Co-Employee's Intoxication—Essential Factual Elements (Lab. Code, § 3601(a)(2))

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed because [*name of defendant*] was intoxicated. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [*insert description of injury-producing conduct*];**
2. **That [*name of defendant*] was intoxicated;**
3. **That [*name of plaintiff*] was harmed; and**
4. **That [*name of defendant*]'s intoxication was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

This instruction is intended for use in cases where a co-employee is the defendant and the plaintiff alleges that the case falls outside of the workers' compensation exclusivity rule.

Sources and Authority

- Exclusive Remedy: Exception for Act of Intoxicated Coemployee. Labor Code section 3601(a)(2).
- "As relevant here, a civil suit is permissible when an employee proximately causes another employee's injury or death by a 'willful and unprovoked physical act of aggression' or by intoxication. If an employee brings a lawsuit against a coemployee based on either of these exceptions, the employer is not 'held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee . . . .' This provision is consistent with the view that a coemployee is immune from suit to the extent necessary to prevent an end-run against the employer under the exclusivity rule. 'It is self-evident that Labor Code section 3601 did not establish or create a new right or cause of action in the employee but severely limited a preexisting right to freely sue a fellow employee for damages.' " (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1002 [111 Cal.Rptr.2d 564, 30 P.3d 57], internal citations and footnotes omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 67, 68

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-F, *Intentional Interference with Contract or Prospective Economic Advantage*, ¶ 5:624

(The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 13-I, *Collateral (Non-OSHA) Actions Relating to Occupational Safety and Health*, ¶¶ 13:951, 13:962 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 15-F, *California Workers' Compensation Act Preemption*, ¶¶ 15:546, 15:568–15:569, 15:632 (The Rutter Group)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.22 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.43 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.13 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

2813–2899. Reserved for Future Use

VF-2800. Employer's Willful Physical Assault (Lab. Code, § 3602(b)(1))

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] touch [*name of plaintiff*] in a harmful or offensive manner?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] intend to harm [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

   Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2801, *Employer's Willful Physical Assault—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the plaintiff alleges that defendant engaged in conduct other than that which is described in question 1, then the question may be modified by choosing one of the other options stated in element 1 of CACI No. 2801.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories.*

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest.* This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2801. Fraudulent Concealment of Injury (Lab. Code, § 3602(b)(2))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff/decedent*] injured on the job?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] know [*name of plaintiff/decedent*] had suffered a job-related injury?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] conceal this knowledge from [*name of plaintiff/decedent*]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of plaintiff/decedent*]'s injury made worse as a result of this concealment?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s total damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Answer question 6.

6. What are the damages that [*name of plaintiff/decedent*] would have sustained if [*name of defendant*] had not concealed the injury?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Answer question 7.

7. Subtract the total amount in question 6 from the total amount in question 5. This is the amount [*name of plaintiff*] is entitled to recover. $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2802, *Fraudulent Concealment of Injury—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in questions 5 and 6, and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2802. Employer's Defective Product (Lab. Code, § 3602(b)(3))

We answer the questions submitted to us as follows:

1. **Was the [*product*] manufactured by [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was the [*product*] [sold/leased/transferred for valuable consideration] to an independent third person?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did the third person then provide the [*product*] for [*name of plaintiff*]'s use?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the [*product*] defective in design or manufacture?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was the [*product*] a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2803, *Employer's Defective Product—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2803. Removal or Noninstallation of Power Press Guards (Lab. Code, § 4558)

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] [*name of plaintiff*]'s [employer/supervisor]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of plaintiff*] injured while operating a power press?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] give an affirmative instruction to [remove/not install] the guards before [*name of plaintiff*]'s injury?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **When [*name of defendant*] did so, did [he/she/*nonbinary pronoun*/it] actually know that the lack of guards would create a probability of serious injury or death?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did the power press's [designer/fabricator/assembler] [design the press with guards/install guards on the press/require guards be attached/specify that guards be attached] and directly or indirectly convey this information to [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of defendant*]'s [removal/failure to install] the guards a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2011, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2804, *Removal or Noninstallation of Power Press Guards—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2804. Co-Employee's Willful and Unprovoked Physical Act of Aggression (Lab. Code, § 3601(a)(1))

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] touch [*name of plaintiff*] in a harmful or offensive manner?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of defendant*]'s conduct unprovoked?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] intend to harm [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant]

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2811, *Co-Employee's Willful and Unprovoked Physical Act of Aggression—Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the plaintiff alleges that the defendant engaged in conduct other than that described in question 1, then the question may be modified by choosing one of the other options stated in element 1 of CACI No. 2811.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories.*

If the jury is given the discretion under Civil Code section 3288 to award

prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2805. Injury Caused by Co-Employee's Intoxication (Lab. Code, § 3601(a)(2))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff*] harmed?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s harm?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of defendant*] intoxicated?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s intoxication a substantial factor in causing [*name of plaintiff*]'s harm?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 2812, *Injury Caused by Co-Employee's Intoxication—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*.

This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2806–VF-2899. Reserved for Future Use

FEDERAL EMPLOYERS' LIABILITY ACT

2900. FELA—Essential Factual Elements

[*Name of plaintiff***] claims that while [he/she/***nonbinary pronoun***/[***name of decedent***]] was employed by [***name of defendant***], [[he/she/***nonbinary pronoun***] was harmed by/[his/her/***nonbinary pronoun***] death was caused by] [***name of defendant***]'s negligence. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff/decedent***] was employed by [***name of defendant***];**
2. **That [***name of defendant***] was a common carrier by railroad;**
3. **That [***name of defendant***] was engaged in interstate commerce;**
4. **That [***name of plaintiff/decedent***]'s job duties furthered, or in any way substantially affected, interstate commerce;**
5. **That [***name of plaintiff/decedent***] was acting within the scope of [his/her/***nonbinary pronoun***] employment at the time of the incident;**
6. **That [***name of defendant***] was negligent;**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s negligence was a cause of [***name of plaintiff/decedent***]'s [harm/death].**

["Interstate commerce" is commercial activity that crosses more than one country or state, such as the movement of goods from one state to another.]

New September 2003; Revised June 2011, December 2011

Directions for Use

If the plaintiff is bringing a negligence claim under the Federal Employers' Liability Act (FELA) and a claim under the Federal Safety Appliance Act (SAA) or the Boiler Inspection Act (BIA), the court may wish to add an introductory instruction that would alert the jury to the difference between the two claims.

Sources and Authority

- Federal Employers' Liability Act. Title 45 United States Code section 51.
- "While injured employees in California generally are entitled to workers' compensation benefits regardless of whether the employer was at fault, those benefits are not available to *railroad* employees who suffer on-the-job injuries. Instead, their right of recovery is governed by FELA, which permits recovery only if the employer acted negligently." (*Fair v. BNSF Railway Co.* (2015) 238

Cal.App.4th 269, 275 [189 Cal.Rptr.3d 150], original italics, internal citations omitted.)

- The FELA is "liberally construed" to further Congress's remedial goal of protecting railroad workers. (*Consolidated Rail Corp. v. Gottshall* (1994) 512 U.S. 532, 543 [114 S.Ct. 2396, 129 L.Ed.2d 427].)
- "The elements of a FELA case are: (1) the injury occurred while the plaintiff was working within the scope of his or her employment with the railroad; (2) the employment was in furtherance of the railroad's interstate transportation business; (3) the employer railroad was negligent; and (4) the employer's negligence played some part in causing the injury for which compensation is sought under the Act." (*Monarch v. Southern Pacific Transportation Co.* (1999) 70 Cal.App.4th 1197, 1210, fn. 10 [83 Cal.Rptr.2d 247], internal citations omitted.)
- "That FELA is to be liberally construed . . . does not mean that it is a workers' compensation statute. We have insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.' " (*Consolidated Rail Corp., supra,* 512 U.S. at p. 543, internal citations omitted.)
- "We note that under the Federal Employers' Liability Act of 1908 an injured railroad employee may bring a cause of action without proof of negligence based on failure of the SAA-mandated safety appliances to function. When such strict liability does not apply, i.e., the injury does not result from defective equipment covered by the SAA, the employee must establish common law negligence." (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1170, fn. 4 [86 Cal.Rptr.2d 832, 980 P.2d 386], internal citations omitted.)
- "The standard under FELA is a relaxed one; to prove that a railroad breached its duty, a 'plaintiff must show circumstances which a reasonable person would foresee as creating a potential for harm [and] then show that this breach played any part, even the slightest, in producing the injury.' 'It is well established that the quantum of evidence required to establish liability in an FELA case is much less than in an ordinary negligence action.' If the negligence of the employer 'played any part, however small, in the injury,' the employer is liable." (*Fair, supra*, 238 Cal.App.4th at pp. 275–276, internal citation omitted.)
- "The test for coverage under the amendment is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation." (*Reed v. Pennsylvania Railroad Co.* (1956) 351 U.S. 502, 505 [76 S.Ct. 958, 100 L.Ed. 1366].)
- "Where more than one inference can be drawn from the evidence, the question whether an employee was, at the time of receiving the injury sued for, engaged in interstate commerce, is for the jury." (*Sullivan v. Matt* (1955) 130 Cal.App.2d 134, 139 [278 P.2d 499], internal citations omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 15-F, *California Workers' Compensation Act Preemption*, ¶¶ 15:485–15:488, 15:495 (The Rutter Group)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 3, *Removing a State Court Case to Federal Court*, 3.14

2901. Negligence—Duty of Railroad

A railroad must use reasonable care under the circumstances to provide its employees with a reasonably safe place to work and with reasonably safe and suitable tools, machinery, and appliances. The reasonableness of care depends on the danger associated with the workplace or the equipment. The failure to use reasonable care is negligence. A railroad is not negligent if, using reasonable care, it could not reasonably have foreseen that the particular condition could cause injury.

[*Name of defendant***] is responsible for the negligence of any of its officers, agents, or employees.**

New September 2003

Directions for Use

For a definition of the term "negligence," see CACI No. 401, *Basic Standard of Care*.

Sources and Authority

- "The plaintiff must make out a prima facie case of negligence on the part of the employer, including the element of reasonable foreseeability. . . . 'To recover, the plaintiff must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury. The defendant's duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances.' " (*Albert v. Southern Pacific Transportation Co.* (1994) 30 Cal.App.4th 529, 534 [35 Cal.Rptr.2d 777], internal citations omitted.)
- "Absent foreseeability, negligence is not established under FELA and without a showing of negligence, recovery is not permitted." (*Albert, supra,* 30 Cal.App.4th at p. 536, internal citation omitted.) But note that foreseeability is not required for claims arising from the Federal Safety Appliance Act (49 U.S.C. § 20301 et seq.), or the Boiler Inspection Act (49 U.S.C. § 20701).
- "Although a railroad's duty to use reasonable care in furnishing employees a safe place to work is not stated explicitly in the statute, it has become an integral part of the FELA. Under the FELA, that duty becomes 'more imperative' as the risk to an employee increases. The duty is a 'continuing one' and requires a jury to weigh a myriad of factors—including the nature of a task, its hazards and efforts—in determining whether an employer furnished an employee with a reasonably safe place to work. This continuous duty to provide a safe place to work is broader than the general duty to use reasonable care. Other courts in FELA actions have held that failure to instruct a jury regarding an employer's duty to provide a reasonably safe place to work is reversible error. We agree that

when the issue is properly raised and an instruction is requested, the FELA requires jury instructions on the duty to provide a reasonably safe place to work." (*Ragsdell v. Southern Pacific Transportation Co.* (9th Cir. 1982) 688 F.2d 1281, 1283, internal citations omitted.)

- "The test of negligence in supplying the employee a safe place to work is 'whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger.' " (*Mortensen v. Southern Pacific Co.* (1966) 245 Cal.App.2d 241, 244 [53 Cal.Rptr. 851], internal citations omitted.)
- The duty to use reasonable care "is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet, in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery.' " (*Bailey v. Central Vermont Ry., Inc.* (1943) 319 U.S. 350, 353 [63 S.Ct. 1062, 87 L.Ed. 1444], internal citation omitted.)
- "The employer is not the insurer of the safety of its employees and the test of the employer's liability to an injured employee is whether ordinary care was used by the employer in regard to the risk." (*Baez v. Southern Pacific Co.* (1962) 210 Cal.App.2d 714, 717 [26 Cal.Rptr. 899], internal citation omitted.)
- The U.S. Supreme Court has held that an independent contractor is an "agent" for purposes of establishing an employer's liability under the FELA if the contractor performs "operational activities" of the employer. (*Sinkler v. Missouri Pacific Railroad Co.* (1958) 356 U.S. 326, 331–332 [78 S.Ct. 758, 2 L.Ed.2d 799].)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

2902. Negligence—Assignment of Employees

[*Name of defendant***] was negligent if**

[it assigned [*name of plaintiff/decedent***] to a task that it knew or should have known [he/she/***nonbinary pronoun***] was not medically fit to perform.]**

[it failed to assign a sufficient number of employees to safely perform the task that [*name of plaintiff/decedent***] was assigned to at the time of the incident.]**

New September 2003

Directions for Use

Read only the alternative that applies to the facts of the case.

Sources and Authority

- "The court correctly instructed the jury as to defendant's liability for assigning an employee to a job for which he is medically unfit. In this regard the jury was told that 'Under the Federal Employers' Liability Act, the word "injury" may include sickness, and it is negligence for a railroad company to assign a sick employee, of whose illness it knew or should have known, to tasks for which he is, by reason of his condition, unfitted, and the employee may recover damages from the railroad if such assignment plays any part in proximately worsening or aggravating such condition.' " (*Waller v. Southern Pacific Co.* (1967) 66 Cal.2d 201, 214 [57 Cal.Rptr. 353, 424 P.2d 937].)
- It is not necessary to include as an element that the defendant must have "forced" the plaintiff to perform the injurious task. (*Waller, supra,* 66 Cal.2d at p. 214.)
- "The employer is under the nondelegable obligation of providing sufficient help for the particular task." (*Southern Ry. Co. v. Welch* (6th Cir. 1957) 247 F.2d 340, 341, internal citation omitted.)
- "As a corollary to this duty to maintain safe working conditions, the carrier is required to provide its employee with sufficient help in the performance of the work assigned to him. Where the failure to provide sufficient help proximately causes injury to the employee, the carrier is liable for negligence under the provisions of the FELA." (*Yawn v. Southern Ry. Co.* (5th Cir. 1979) 591 F.2d 312, 315, internal citations omitted.)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

2903. Causation—Negligence

[*Name of defendant*]'s negligence, if any, was a cause of [[*name of plaintiff*]'s harm/[*name of decedent*]'s death] if it played any part, no matter how small, in bringing about the [harm/death], even if other factors also contributed to the [harm/death].

New September 2003

Directions for Use

For an instruction on concurrent cause, see CACI No. 431, *Causation: Multiple Causes*.

Sources and Authority

- Federal Employers' Liability Act. Title 45 United States Code section 51.
- "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (*Rogers v. Missouri Pacific Railroad Co.* (1957) 352 U.S. 500, 506 [77 S.Ct. 443, 1 L.Ed.2d 493].)
- "In sum, the understanding of *Rogers* we here affirm 'has been accepted as settled law for several decades.' 'Congress has had [more than 50] years in which it could have corrected our decision in [*Rogers*] if it disagreed with it, and has not chosen to do so.' Countless judges have instructed countless juries in language drawn from *Rogers*. To discard or restrict the *Rogers* instruction now would ill serve the goals of 'stability' and 'predictability' that the doctrine of statutory stare decisis aims to ensure." (*CSX Transp., Inc. v. McBride* (2011) 564 U.S. 685, 699 [131 S.Ct. 2630, 180 L.Ed.2d 637], internal citations omitted.)
- "The standard under FELA is a relaxed one; to prove that a railroad breached its duty, a 'plaintiff must show circumstances which a reasonable person would foresee as creating a potential for harm [and] then show that this breach played any part, even the slightest, in producing the injury.' 'It is well established that the quantum of evidence required to establish liability in an FELA case is much less than in an ordinary negligence action.' If the negligence of the employer 'played any part, however small, in the injury,' the employer is liable." (*Fair v. BNSF Railway Co.* (2015) 238 Cal.App.4th 269, 275–276 [189 Cal.Rptr.3d 150], internal citation omitted.)
- "The common law concept of proximate cause . . . has not been adopted as the causation test in F.E.L.A. cases. Causation in an F.E.L.A. case exists even if there is a plurality of causes, including the negligence of the defendant or of a third person. The negligence of the employer need not be the sole cause or even a substantial cause of the ensuing injury." (*Parker v. Atchison, Topeka and Santa*

Fe Ry. Co. (1968) 263 Cal.App.2d 675, 678 [70 Cal.Rptr. 8].)

- "Although the burden upon the plaintiff in proving causation in an F.E.L.A. case can be weighed neither in pounds nor ounces, it is a substantially lighter burden that that imposed upon him by [the common-law jury instruction]." (*Parker, supra,* 263 Cal.App.2d at p. 678.)
- "[T]he same standard of causation applies to railroad negligence under Section 1 as to plaintiff contributory negligence under Section 3." (*Norfolk Southern Ry. v. Sorrell* (2007) 549 U.S. 158, 171 [127 S.Ct. 799, 166 L.Ed.2d 638].)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Workers' Compensation, § 129

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

2904. Comparative Fault

[*Name of defendant***] claims that [***name of plaintiff/decedent***] was negligent and that [his/her/***nonbinary pronoun***] negligence contributed to [his/her/***nonbinary pronoun***] own [harm/death]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [***name of plaintiff/decedent***] was negligent; and**
2. **That [***name of plaintiff/decedent***]'s negligence was a cause of [his/her/***nonbinary pronoun***] [harm/death].**

[*Name of plaintiff/decedent***]'s negligence, if any, was a cause of [his/her/***nonbinary pronoun***] own [harm/death] if it played any part, no matter how small, in bringing about [his/her/***nonbinary pronoun***] [harm/death], even if other factors also contributed to [his/her/***nonbinary pronoun***] [harm/death].**

If you decide that [*name of defendant***] was negligent but also decide that [***name of plaintiff/decedent***]'s negligence contributed to the harm, then you must determine the percentage of negligence that you attribute to [***name of plaintiff/decedent***].**

New September 2003; Revised December 2009

Directions for Use

This instruction does not apply if the claim is based on a violation of the Federal Safety Appliance Act or the Boiler Inspection Act.

For a definition of the term "negligence," see CACI No. 401, *Basic Standard of Care*.

Sources and Authority

- Contributory Negligence Under the FELA. Title 45 United States Code section 53.
- "The FELA provides that defense of contributory negligence is not available to an employer to defeat an employee's claim for injury, but only to diminish the amount of damages in proportion to the amount of negligence attributable to the employee. The burden of proving contributory negligence is on the defendant." (*Torres v. Southern Pacific Co.* (1968) 260 Cal.App.2d 757, 763 [67 Cal.Rptr. 428], internal citations omitted.)
- "Neither assumption of the risk nor the contributory negligence of the employee bars recovery, if the injury was at least in part the result of the employer's negligence." (*Fair v. BNSF Railway Co.* (2015) 238 Cal.App.4th 269, 276 [189 Cal.Rptr.3d 150].)
- "[T]he same standard of causation applies to railroad negligence under Section 1

as to plaintiff contributory negligence under Section 3." (*Norfolk Southern Ry. v. Sorrell* (2007) 549 U.S. 158, 171 [127 S.Ct. 799, 166 L.Ed.2d 638].)

- "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (*Rogers v. Missouri Pacific Railroad Co.* (1957) 352 U.S. 500, 506 [77 S.Ct. 443, 1 L.Ed.2d 493].)
- "In sum, the understanding of *Rogers* we here affirm 'has been accepted as settled law for several decades.' 'Congress has had [more than 50] years in which it could have corrected our decision in [*Rogers*] if it disagreed with it, and has not chosen to do so.' Countless judges have instructed countless juries in language drawn from *Rogers*. To discard or restrict the *Rogers* instruction now would ill serve the goals of 'stability' and 'predictability' that the doctrine of statutory stare decisis aims to ensure." (*CSX Transp., Inc. v. McBride* (2011) 564 U.S. 685, 699 [131 S.Ct. 2630, 180 L.Ed.2d 637], internal citations omitted.)
- "The common law concept of proximate cause . . . has not been adopted as the causation test in F.E.L.A. cases. Causation in an F.E.L.A. case exists even if there is a plurality of causes, including the negligence of the defendant or of a third person. The negligence of the employer need not be the sole cause or even a substantial cause of the ensuing injury." (*Parker v. Atchison, Topeka and Santa Fe Ry. Co.* (1968) 263 Cal.App.2d 675, 678 [70 Cal.Rptr. 8].)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Workers' Compensation, § 131

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.42 (Matthew Bender)

2905. Compliance With Employer's Requests or Directions

[*Name of plaintiff/decedent***] was not negligent simply because [he/she/***nonbinary pronoun***], at the request or direction of [***name of defendant***], worked at a dangerous job, or in a dangerous place, or under dangerous conditions.**

New September 2003

Sources and Authority

- "In *Joyce v. Atlantic Richfield Co*., 651 F.2d 676, 683 (10th Cir. 1981), this court held that when the evidence could support either contributory negligence or assumption of the risk, instructions which only define contributory negligence are not sufficient to prevent the jury from applying assumption of the risk. The court held the jury instructions should also include the following admonition: 'You may not find contributory negligence on the part of the plaintiff, however, simply because he acceded to the request or direction of the responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.' The same instruction has been held sufficient by other circuits." (*Sauer v. Burlington Northern Railroad Co.* (10th Cir. 1996) 106 F.3d 1490, 1493, internal citation omitted.)
- "[I]f no evidence of impermissible assumption of risk has reached the jury, a correct instruction on contributory negligence will do. However, if, either because of evidence introduced at trial or because of statements made by counsel in opening or closing arguments, there is a risk that the implied consent theory of assumption of the risk seeped its way into the case, the jury should be instructed that it 'may not find contributory negligence on the part of the plaintiff . . . simply because he acceded to the request or direction of the responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.' " (*Fashauer v. New Jersey Transit Rail Operations, Inc.* (3d Cir. 1995) 57 F.3d 1269, 1280.)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

2906–2919. Reserved for Future Use

2920. Federal Safety Appliance Act or Boiler Inspection Act—Essential Factual Elements

[*Name of plaintiff***] [also] claims that while [he/she/***nonbinary pronoun***/[***name of decedent***]] was employed by [***name of defendant***], [[he/she/***nonbinary pronoun***] was harmed by/[his/her/***nonbinary pronoun***] death was caused by] [***name of defendant***]'s [***describe violation of Federal Safety Appliance Act/Boiler Inspection Act***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff/decedent***] was employed by [***name of defendant***];**
2. **That [***name of defendant***] was a common carrier by railroad;**
3. **That [***name of plaintiff/decedent***] was acting within the scope of [his/her/***nonbinary pronoun***] employment at the time of the incident;**
4. **That [***name of defendant***] was engaged in interstate commerce;**
5. **That [***name of plaintiff/decedent***]'s job duties furthered, or in any way substantially affected, interstate commerce;**
6. **That [***name of defendant***] [***describe violation of Federal Safety Appliance Act/Boiler Inspection Act***];**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s conduct was a cause of [[***name of plaintiff***]'s harm/[***name of decedent***]'s death].**

[Interstate commerce is commercial activity that crosses more than one country or state, such as the movement of goods from one state to another.]

[*Name of defendant***] is responsible for harm caused by [***describe conduct that violated the FSA/BIA***] even if it was not negligent. If you find that [***name of defendant***] is responsible for [***name of plaintiff/decedent***]'s [harm/death], [***name of plaintiff***]'s recovery, if any, must not be reduced because of [***name of plaintiff/decedent***]'s own conduct.**

New September 2003; Revised December 2009, June 2011

Directions for Use

The statutory violation should be paraphrased in this instruction where indicated. Separate instructions may need to be drafted detailing the statutory requirements of the specific violation as alleged and any applicable defenses. (See 49 U.S.C. §§ 20301 et seq., 20501 et seq., and 20701.)

If the plaintiff is bringing a negligence claim under the Federal Employers' Liability Act (FELA) and a claim under the Federal Safety Appliance Act (SAA) or the Boiler Inspection Act (BIA), the court may wish to add an introductory instruction that would alert the jury to the difference between the two claims.

Do not give a comparative fault instruction if the case is brought under this theory.

Sources and Authority

- Federal Employers' Liability Act. Title 45 United States Code section 51.
- Contributory Negligence Under the FELA. Title 45 United States Code section 53.
- Assumption of Risk Under the FELA. Title 45 United States Code section 54.
- FELA Regulations Deemed to Be Statutes. Title 45 United States Code section 54a.
- Railroad Safety Requirements. Title 49 United States Code section 20302(a).
- Installation of Railroad Signal System. Title 49 United States Code section 20502(b).
- Use of Locomotive or Tender. Title 49 United States Code section 20701.
- "We note that under the Federal Employers' Liability Act of 1908 an injured railroad employee may bring a cause of action without proof of negligence based on failure of the SAA-mandated safety appliances to function. When such strict liability does not apply, i.e., the injury does not result from defective equipment covered by the SAA, the employee must establish common law negligence. The Supreme Court has also recognized that the SAA imposes a duty on railroads extending to nonemployee travelers at railway/highway crossings, who must bring a common law tort action in state court (absent diversity) and must prove negligence." (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1170, fn. 4 [86 Cal.Rptr.2d 832, 980 P.2d 386], internal citations omitted.)
- "[An] FSAA violation is per se negligence in a FELA suit. In other words, the injured employee has to show only that the railroad violated the FSAA, and the railroad is strictly liable for any injury resulting from the violation." (*Phillips v. CSX Transportation Co.* (4th Cir. 1999) 190 F.3d 285, 288, original italics.)
- " 'The BIA and the SAA are regarded as amendments to the FELA. The BIA supplements the FELA to provide additional public protection and facilitate employee recovery. . . . [T]he BIA imposes on the carrier an absolute duty to maintain the locomotive, and all its parts and appurtenances, in proper condition, and safe to operate without unnecessary peril to life or limb.' " (*Fontaine v. National Railroad Passenger Corp.* (1997) 54 Cal.App.4th 1519, 1525 [63 Cal.Rptr.2d 644], internal citation omitted.)
- "[N]either contributory negligence nor assumption of the risk is a defense to a BIA violation which has contributed to the cause of an injury." (*Fontaine, supra,* 54 Cal.App.4th at p. 1525.)

- "Where an inefficient brake causes an injury the carrier in interstate commerce under the Safety Appliance Act cannot escape liability, and proof of negligence on the part of the railroad is unnecessary." (*Leet v. Union Pacific Railroad Co.* (1943) 60 Cal.App.2d 814, 817 [142 P.2d 37].)
- "Proof of a BIA violation is enough to establish negligence as a matter of law, and neither contributory negligence nor assumption of risk can be raised as a defense." (*Law v. General Motors Corp.* (9th Cir. 1997) 114 F.3d 908, 912, internal citations omitted.)
- "The purpose in enacting the BIA was to protect train service employees and the traveling public from defective locomotive boilers and equipment. '[I]t has been held consistently that the [BIA] supplements the [FELA] by imposing on interstate railroads "an absolute and continuing duty" to provide safe equipment.' In addition to the civil penalty, a person harmed by violation of the BIA is given recourse to sue under FELA, which applies only to railroad employees injured while engaged in interstate commerce. FELA provides the exclusive remedy for recovery of damages against a railroad by its employees. FELA liability is expressly limited to common carriers." (*Viad Corp. v. Superior Court* (1997) 55 Cal.App.4th 330, 335 [64 Cal.Rptr.2d 136], internal citations omitted, disapproved on other grounds in *Scheiding v. General Motors Corp.* (2000) 22 Cal.4th 471, 484, fn. 6 [93 Cal.Rptr.2d 342, 993 P.2d 996].)
- "The test for coverage under the amendment is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation." (*Reed v. Pennsylvania Railroad Co.* (1956) 351 U.S. 502, 505 [76 S.Ct. 958, 100 L.Ed. 1366].)
- "Where more than one inference can be drawn from the evidence, the question whether an employee was, at the time of receiving the injury sued for, engaged in interstate commerce, is for the jury." (*Sullivan v. Matt* (1955) 130 Cal.App.2d 134, 139 [278 P.2d 499], internal citations omitted.)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.45 (Matthew Bender)

2921. Causation Under FSAA or BIA

If you decide that [*name of defendant***] [***describe violation of the Federal Safety Appliance Act/Boiler Inspection Act***], then this is a cause of harm if it played any part, no matter how small, in bringing about the [harm/death], even if other factors also contributed to the [harm/death].**

New September 2003

Sources and Authority

- "Actions alleging a violation of the BIA are brought under the FELA. The standard of causation required in a BIA case is the same as the standard of causation required in a FELA negligence case." (*Summers v. Missouri Pacific Railroad System* (10th Cir. 1997) 132 F.3d 599, 606, internal citations omitted.)
- "Proximate cause, as traditionally understood, is not required to establish causation under either the FELA or the BIA. 'Under the FELA [but not the BIA], an employee is entitled to recover damages if the employer's negligence played any part in producing the injury, no matter how slight.' " (*Fontaine v. National Railroad Passenger Corp.* (1997) 54 Cal.App.4th 1519, 1525 [63 Cal.Rptr.2d 644], internal citations omitted.)
- Liability under the BIA is established if defendant's violation of the BIA "played any part, no matter how small, in bringing about or actually causing, the injury" to the plaintiff . . . "without any requirement of a showing of negligence on the part of the defendant." (*Oglesby v. Southern Pacific Transportation Co.* (9th Cir. 1993) 6 F.3d 603, 606–609.)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.45 (Matthew Bender)

2922. Statute of Limitations—Special Verdict Form or Interrogatory

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[*Name of plaintiff***] must prove that [he/she/***nonbinary pronoun***] did not know, and could not reasonably have known, before [***date three years before action was commenced***],**

1. **That [he/she/***nonbinary pronoun***] had been harmed; and**
2. **That the harm was potentially caused by [his/her/***nonbinary pronoun***] work with [***name of defendant***].**

You will be asked a question about this on a special [verdict form/interrogatory].

New September 2003

Sources and Authority

- FELA: Statute of Limitations. 45 U.S.C. section 56.
- "Compliance with the three-year statute of limitations is a condition precedent for recovery in a FELA action. In cases of latent or progressive injuries . . . the 'discovery rule' directs that the cause of action does not commence to run until the plaintiff knew or should have known of the injury and its cause." (*Monarch v. Southern Pacific Transportation Co.* (1999) 70 Cal.App.4th 1197, 1203 [83 Cal.Rptr.2d 247], internal citations omitted.)
- "The burden is therefore on the claimant to allege and to prove that his cause of action was commenced within the three-year period." (*Emmons v. Southern Pacific Transportation Co.* (5th Cir. 1983) 701 F.2d 1112, 1118, internal citations omitted.)
- "Under the discovery rule, the test is an objective inquiry into whether the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause. Constructive rather than actual knowledge of the fact of causation triggers a duty to investigate the possible causes of injury. Thus, in accordance with the objective test, 'definite knowledge' that the injury is work related is not necessary in order for the cause of action to accrue. Once the plaintiff believes or suspects that the 'potential cause of his injury' is work related, an affirmative duty to investigate is imposed." (*Monarch, supra,* 70 Cal.App.4th at p. 1203.)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.41 (Matthew Bender)

[[*Name of plaintiff***] claims [he/she/***nonbinary pronoun***/[***name of decedent***]] was [***name of defendant***]'s employee at the time of the incident even though [he/she/***nonbinary pronoun***] was primarily employed by [***name of primary employer***].]**

[*or*]

[[*Name of plaintiff***] claims [he/she/***nonbinary pronoun***/[***name of decedent***]] was employed by both [***name of defendant***] and [***name of primary employer***] at the time of the incident.]**

In deciding whether [*name of plaintiff/decedent***] was [***name of defendant***]'s employee, the most important factor is whether [***name of defendant***] had the right to control the work of [***name of plaintiff/decedent***], rather than just the right to specify the result. It does not matter whether [***name of defendant***] exercised the right to control. Sharing information or coordinating efforts between employees of two companies, by itself, is not enough to establish the right to control.**

In addition to the right of control, you must also consider all the circumstances in deciding whether [*name of plaintiff/decedent***] was [***name of defendant***]'s employee. The following factors, if true, may show that [***name of plaintiff/decedent***] was the employee of [***name of defendant***]:**

(a) [*Name of defendant***] supplied the equipment, tools, and place of work;**

(b) [*Name of plaintiff/decedent***] was paid by the hour rather than by the job;**

(c) The work being done by [*name of plaintiff/decedent***] was part of the regular business of [***name of defendant***];**

(d) [*Name of defendant***] had the right to end its relationship with [***name of plaintiff/decedent***];**

(e) The work being done by [*name of plaintiff/decedent***] was [his/her/***nonbinary pronoun***] only occupation or business;**

(f) The kind of work performed by [*name of plaintiff/decedent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) The kind of work performed by [*name of plaintiff/decedent***] does not require specialized or professional skill;**

(h) The services performed by [*name of plaintiff/decedent***] were to be performed over a long period of time;**

(i) [*Name of defendant***] and [***name of plaintiff/decedent***] acted as if they**

had an employer-employee relationship;

(j) [*Name of plaintiff/decedent***]'s duties to [***name of defendant***] were only for its benefit;**

(k) [*Name of plaintiff/decedent***] consented to the employment with [***name of defendant***].**

New September 2003; Revised June 2013

Directions for Use

Read the first bracketed paragraph for cases raising the borrowed-servant theory. Read the second bracketed paragraph for cases involving dual employment.

Secondary factors (a)–(k) come from the Restatement Second of Agency, section 220.

Sources and Authority

- "Under common-law principles, there are basically three methods by which a plaintiff can establish his 'employment' with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. Second, he could be deemed to be acting for two masters simultaneously. Finally, he could be a subservant of a company that was in turn a servant of the railroad." (*Kelley v. Southern Pacific Co.* (1974) 419 U.S. 318, 324 [95 S.Ct. 472, 42 L.Ed.2d 498], internal citations omitted.)
- "When the nominal employer furnishes a third party with ' "men to do the work and places them under his exclusive control in the performance of it, [then] those men become *pro hac vice* the servants of him to whom they are furnished," ' under the loaned servant doctrine." (*Collins v. Union Pacific Railroad Co.* (2012) 207 Cal.App.4th 867, 879 [143 Cal.Rptr.3d 849], original italics.)
- "An employee may at the same time be under a general and a special employer, and where, either by the terms of a contract or during the course of its performance, the employee of an independent contractor comes under the control and direction of the other party to the contract, a dual employment relation is held to exist." (*Collins, supra*, 207 Cal.App.4th at p. 877.)
- "[A] finding of agency is not tantamount to a finding of a master-servant relationship." (*Kelley, supra*, 419 U.S. at p. 325.)
- "In this case . . . the evidence of contacts between Southern Pacific employees and PMT employees may indicate, not direction or control, but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation. The informal contacts between the two groups must assume a supervisory character before the PMT employees can

be deemed *pro hac vice* employees of the railroad." (*Kelley, supra,* 419 U.S. at p. 330.)

- "The determination of whether a worker is a borrowed servant is accomplished by ascertaining who has the power to control and direct the servants in the performance of their work, distinguishing between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking. There is thus a distinction between 'authoritative direction and control' by a railroad, and the 'minimum cooperation necessary to carry out a coordinated undertaking' which does not amount to control or supervision. The control need not be exercised; it is sufficient if the right to direct the details of the work is present. (*Collins, supra*, 207 Cal.App.4th at p. 879.)
- "The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will not suffice." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492 [162 Cal.Rptr. 320, 606 P.2d 355] [not a FELA case].)
- "The question of whether a special employment relationship exists is generally a question of fact reserved for the jury." (*Collins, supra*, 207 Cal.App.4th at p. 878.)
- Contract terms are not conclusive evidence of the existence of the right to control. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 176 [151 Cal.Rptr. 671, 588 P.2d 811] [not a FELA case].)
- Restatement Second of Agency, section 220 provides:

    (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

    (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

        (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

        (b) whether or not the one employed is engaged in a distinct occupation or business;

        (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

        (d) the skill required in the particular occupation;

        (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

- "Section 220 (1) of the Restatement defines a servant as 'a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.' In § 220 (2), the Restatement recites various factors that are helpful in applying that definition. While that section is directed primarily at determining whether a particular bilateral arrangement is properly characterized as a master-servant or independent contractor relationship, it can also be instructive in analyzing the three-party relationship between two employers and a worker." (*Kelley, supra*, 419 U.S. at p. 324.)
- " 'Following common law tradition, California decisions . . . uniformly declare that "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. . . ." [Citations.] [¶] However, the courts have long recognized that the "control" test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the "most important" or "most significant" consideration, the authorities also endorse several "secondary" indicia of the nature of a service relationship.' Those 'secondary indicia' 'have been derived principally from the Restatement Second of Agency.' They generally ' "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." ' " (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 301 [111 Cal.Rptr.3d 787] [not a FELA case], internal citation omitted.)
- "In 2006 the Restatement (Second) of Agency was superseded by the Restatement (Third) of Agency, which uses 'employer' and 'employee' rather than 'master' and 'servant,' Restatement (Third) of Agency, § 2.04, comment a, and defines an employee simply as a type of agent subject to a principal's control. *Id.*, § 7.07(3)(a)." (*Schmidt v. Burlington Northern & Santa Fe Ry.* (9th Cir. 2010) 605 F.3d 686, 690 fn. 3.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 179–182

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for*

Employee's Torts, § 248.15 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.33 (Matthew Bender)

2924. Status as Defendant's Employee—Subservant Company

[*Name of plaintiff***] claims [he/she/***nonbinary pronoun***/[***name of decedent***]] was [***name of defendant***]'s employee because [he/she/***nonbinary pronoun***] was employed by [***name of primary employer***], a company that was controlled by [***name of defendant***]. To succeed on this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] controlled or had the right to control the daily operations of [***name of primary employer***];**
2. **That [***name of defendant***] controlled or had the right to control the physical conduct of [***name of primary employer***]'s employees in the course of the work during which [***name of plaintiff/decedent***] was [injured/killed]; and**
3. **That [***name of plaintiff/decedent***] was performing services for the benefit of [***name of defendant***] at the time of [injury/death].**

New September 2003; Revised June 2011

Directions for Use

For factors that may apply to determine whether the employer has a right to control, see CACI No. 2923, *Borrowed Servant/Dual Employee*. These factors are taken from section 220 of the Restatement Second of Agency. The factors were not included in the Restatement Third of Agency.

Sources and Authority

- "In the *Kelley* case, the Supreme Court recognized that if a second company could be shown to be a conventional common-law servant, the 'control or right to control' test would be met." (*Bradsher v. Missouri Pacific Railroad* (8th Cir. 1982) 679 F.2d 1253, 1257–1258, internal citation omitted.)
- "To prove WFE was [defendant]'s servant, [plaintiff] must establish [defendant] controlled or had the right to control the physical conduct of WFE's employees in the course of the work during which the injury allegedly occurred. The subservant theory presupposes the existence of two separate entities in a master-servant relationship. A plaintiff can proceed under this theory by showing his employer was the common-law servant of the defendant railroad such that the railroad controlled or had the right to control the employer's daily operations. A plaintiff must also show he was 'employed to perform services in the affairs of [the defendant railroad] and . . . with respect to the physical conduct in the performance of the services [was] subject to [that railroad's] control or right to control.' For [plaintiff] to succeed under the subservant theory, he must show [defendant] controlled or had the right to control his physical conduct on the job. It is not enough for him to merely show WFE was the railroad's agent, or that

he was acting to fulfill the railroad's obligations; [defendant]'s generalized oversight of [plaintiff], without physical control or the right to exercise physical control of his daily work is insufficient." (*Schmidt v. Burlington Northern & Santa Fe Ry.* (9th Cir. 2010) 605 F.3d 686, 689–690, internal citations omitted.)

- "Where the evidence of control is in dispute, the case should go to the jury." (*Vanskike v. ACF Industries, Inc.* (8th Cir. 1981) 665 F.2d 188, 198, internal citations omitted.)
- "In this case . . . the evidence of contacts between Southern Pacific employees and PMT employees may indicate, not direction or control, but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation. The informal contacts between the two groups must assume a supervisory character before the PMT employees can be deemed pro hac vice employees of the railroad." (*Kelley v. Southern Pacific Co.* (1974) 419 U.S. 318, 330 [95 S.Ct. 472, 42 L.Ed.2d 498].)
- Restatement Second of Agency, section 220(1), defines a servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Section 220(2) lists various factors that are helpful in applying this definition:
  - (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
  - (b) whether or not the one employed is engaged in a distinct occupation or business;
  - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
  - (d) the skill required in the particular occupation;
  - (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
  - (f) the length of time for which the person is employed;
  - (g) the method of payment, whether by the time or by the job;
  - (h) whether or not the work is a part of the regular business of the employer;
  - (i) whether or not the parties believe they are creating the relation of master and servant; and
  - (j) whether the principal is or is not in business.
- "While [section 220] is directed primarily at determining whether a particular bilateral arrangement is properly characterized as a master-servant or independent contractor relationship, it can also be instructive in analyzing the three-party relationship between two employers and a worker." (*Kelley v.*

Southern Pacific Co. (1974) 419 U.S. 318, 324 [95 S.Ct. 472, 42 L.Ed.2d 498].)

- "In 2006 the Restatement (Second) of Agency was superseded by the Restatement (Third) of Agency, which uses 'employer' and 'employee' rather than 'master' and 'servant,' Restatement (Third) of Agency, § 2.04, comment a, and defines an employee simply as a type of agent subject to a principal's control. Id., § 7.07(3)(a)." (*Schmidt*, *supra*, 605 F.3d at p. 690, fn. 3.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Workers' Compensation, § 126

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.33 (Matthew Bender)

2925. Status of Defendant as Common Carrier

[*Name of plaintiff*] claims that [*name of defendant*] was a common carrier by railroad. To prove this, [*name of plaintiff*] must show that [*name of defendant*] was in the business of transporting [the property of] the general public by rail.

New September 2003

Sources and Authority

- FELA: "Common Carrier" Defined. 45 U.S.C. section 57.
- "A common carrier has been defined generally as one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession as to the service offered or performed." (*Kelly v. General Electric Co.* (E.D.Pa. 1953) 110 F.Supp. 4, 6.)
- "According to these cases various considerations are of prime importance in determining whether a particular entity is a common carrier. First—actual performance of rail service, second—the service being performed is part of the total rail service contracted for by a member of the public, third—the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a railroad or by a contractual relationship with a railroad, and hence such entity is deemed to be holding itself out to the public, and fourth—remuneration for the services performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad." (*Lone Star Steel Co. v. McGee* (5th Cir. 1967) 380 F.2d 640, 647.)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

2926. Scope of Employment

[*Name of plaintiff***] must prove that [he/she/***nonbinary pronoun***/[***name of decedent***]] was acting within the scope of [his/her/***nonbinary pronoun***] employment at the time of the incident.**

Conduct is within the scope of employment if:

(a) It is reasonably related to the kinds of tasks that the employee was hired to perform; or

(b) It is reasonably foreseeable in light of the employer's business or the employee's job responsibilities.

New September 2003

Directions for Use

See other instructions that further define the concept of scope of employment in the Vicarious Responsibility instructions (CACI No. 3720 et seq.).

Sources and Authority

- "FELA's limitation of a railroad's liability to injuries occurring 'while [the person] is employed by' the railroad means that it must generally be determined whether the employee was injured while she was acting within the scope of her employment. 'Normally, whether an employee is acting within the scope of employment is a question to be resolved by the jury from all the surrounding circumstances,' for 'in negligence actions brought under the FELA, . . . the role of the jury is significantly greater . . . than in common law negligence actions . . . .' Indeed, " 'trial by jury is part of the remedy.' " " (*Goldwater v. Metro-North Commuter Railroad* (2d Cir. 1996) 101 F.3d 296, 298, internal citations omitted.)
- "The scope of employment under FELA is broadly construed by the federal courts—and has been for more than 80 years. In the seminal FELA case of *Erie Railroad Company v. Winfield* (1917) 244 U.S. 170 [37 S.Ct. 556, 61 L.Ed. 1057], the Supreme Court held that an employee who leaves the railroad carrier's yard 'at the close of his day's work' is engaged in a 'necessary incident of his day's work,' and thus is 'but discharging a duty of his employment.' " (*Ponce v. Northeast Illinois Regional Commuter Railroad Corp.* (N.D. Ill. 2000) 103 F.Supp.2d 1051, 1056, internal citations omitted.)
- "Railroad employment has been broadly interpreted to extend not only to acts required by the employer, but also to those acts necessarily incidental to the employment. [¶] This circuit and others have nevertheless held that even 'given its most liberal interpretation, the Act cannot be extended to cover activities not necessarily incident to or an integral part of employment in interstate commerce. It obviously does not cover activities undertaken by an employee for a private

purpose and having no causal relationship with his employment.' " (*Feichko v. Denver & Rio Grande Western Railroad Co.* (10th Cir. 2000) 213 F.3d 586, 592, internal citations omitted.)

- Restatement Second of Agency, section 229, provides:

  (1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

  (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

  (a) whether or not the act is one commonly done by such servants;

  (b) the time, place and purpose of the act;

  (c) the previous relations between the master and the servant;

  (d) the extent to which the business of the master is apportioned between different servants;

  (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

  (f) whether or not the master has reason to expect that such an act will be done;

  (g) the similarity in quality of the act done to the act authorized;

  (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

  (i) the extent of departure from the normal method of accomplishing an authorized result; and

  (j) whether or not the act is seriously criminal.

- "The Restatement at § 229 sets forth intelligent factors for a factfinder to consider in determining whether this has happened. We emphasize that no one factor is dispositive; establishing one or more factors is not equivalent to establishing scope of employment." (*Wilson v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (7th Cir. 1988) 841 F.2d 1347, 1355.)
- "[A]s a general rule, courts have held that an employee injured while commuting to and from work is not covered by FELA." (*Ponce, supra,* 103 F.Supp.2d at p. 1057.) However, FELA may apply if the injury occurs on the employer's work site "while the employee is attempting to report to or leave the job within a reasonable time of his or her shift, and is exposed to risks not confronted by the public generally." (*Ibid.*)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

2927–2939. Reserved for Future Use

2940. Income Tax Effects of Award

[*Name of plaintiff*] will not be required to pay any federal or state income taxes on any amount that you award.

[When calculating lost earnings, if any, you should use after-tax earnings.]

New September 2003

Directions for Use

The Eighth Circuit Model Jury Instructions state that the bracketed sentence should be given if there is evidence of both gross and net earnings and there is any danger that the jury may be confused as to the proper measure of damages.

Sources and Authority

- If requested, the jury must be instructed that the verdict will not be subject to income taxes. (*Norfolk & W. Ry. Co. v. Liepelt* (1980) 444 U.S. 490, 498 [100 S.Ct. 755, 62 L.Ed.2d 689].) Further, the Supreme Court in the *Liepelt* case stated that the jury should base its award on the "after-tax" value of lost earnings in determining lost earnings. (*Id.* at p. 493.)

2941. Introduction to Damages for Personal Injury

If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

[*Name of plaintiff***] must prove the amount of [his/her/***nonbinary pronoun***] damages. However, [***name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

New September 2003

Directions for Use

See the Damages series (CACI No. 3900 et seq.) for instructions on specific items of damages and other topics involving damages, such as the concept of present cash value, mitigation of damages, and the effect of preexisting conditions. Care should be taken to verify that the wording of these instructions is consistent with federal law regarding damages under the FELA.

Sources and Authority

- Federal Employers' Liability Act. 45 U.S.C. section 51.
- "[I]t is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of 'substance' determined by federal law." (*St. Louis Southwestern Railway Co. v. Dickerson* (1985) 470 U.S. 409, 411 [105 S.Ct. 1347, 84 L.Ed.2d 303], internal citation omitted.)
- "A FELA plaintiff is entitled to recover for all past, present and probable future harm attributable to the defendant's tortious conduct, including pain and suffering and mental anguish." (*Marchica v. Long Island Railroad Co.* (2d Cir. 1994) 31 F.3d 1197, 1207.)
- "A FELA plaintiff, upon proof of employer liability, may recover damages for loss of earnings, medical expenses and pain and suffering. The burden rests upon the plaintiff to establish by sufficient evidence a factual basis for the amount of damages sought." (*Williams v. Missouri Pacific Railroad Co.* (10th Cir. 1993) 11 F.3d 132, 135, internal citations omitted.)
- "The Act was not intended to supersede or pre-empt the common law in railroad employee injury cases, but merely to modify it in . . . specific particulars. Thus, the Act contains no provisions regulating the measure of damages recoverable in an action to which the FELA applies, and courts have since held that the absence

in the Act of specific provisions governing the measure of damages in FELA actions does not affect their availability as before the Act." (*Hall v. Minnesota Transfer Railway Co.* (D.Minn. 1971) 322 F.Supp. 92, 94.)

- "The seaman may thus recover for all of his pecuniary damages including such damages as the cost of employing someone else to perform those domestic services that he would otherwise have been able to render but is now incapable of doing." (*Cruz v. Hendy International Co.* (5th Cir. 1981) 638 F.2d 719, 723 [Jones Act case], overruled on other grounds in *Miles v. Apex Marine Corp.* (1990) 498 U.S. 19, 32–33 [111 S.Ct. 317, 112 L.Ed.2d 275].)
- "Although our decision in *Jones & Laughlin* makes clear that no single method for determining present value is mandated by federal law and that the method of calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest, it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damages award is error." (*St. Louis Southwestern Railway, supra,* 470 U.S. at p. 412.)
- "Damages for the injury of loss of earning capacity may be recovered in a FELA action. 'Earning capacity means the potential for earning money in the future . . . .' The appropriate measure is the present value of the total amount of future earnings." (*Bissett v. Burlington Northern Railroad Co.* (8th Cir. 1992) 969 F.2d 727, 731, internal citations omitted.)
- "[W]e see no reason, and defendant has presented us with no reason, to create in FELA cases an exception to the general rule that the defendant has the burden of proving that the plaintiff could, with reasonable effort, have mitigated his damages." (*Jones v. Consolidated Rail Corp.* (6th Cir. 1986) 800 F.2d 590, 594.)
- "The federal and state courts have held with virtual unanimity over more than seven decades that prejudgment interest is not available under the FELA." (*Monessen Southwestern Railway Co. v. Morgan* (1988) 486 U.S. 330, 338 [108 S.Ct. 1837, 100 L.Ed.2d 349].)
- "We therefore reaffirm the conclusion . . . that punitive damages are unavailable under the FELA." (*Wildman v. Burlington Northern Railroad Co.* (9th Cir. 1987) 825 F.2d 1392, 1395, internal citation omitted.)
- "We have held specifically that the spouse of an injured railroad employee may not sue for loss of consortium under FELA." (*Kelsaw v. Union Pacific Railroad Co.* (9th Cir. 1982) 686 F.2d 819, 820, internal citation omitted.)
- 45 U.S.C. section 55 provides: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this [chapter], shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this [chapter], such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

- "While at first glance the language of this provision seems broad enough to completely abrogate the common law collateral source rule, courts have limited the scope of the provision by focusing on the requirement that the covered payments be made 'on account of the injury.' Thus, the cases draw a distinction between payments emanating from a fringe benefit such as a retirement fund or a general hospital and medical insurance plan, and payments which the employer has undertaken voluntarily to indemnify itself against possible liabilities under the FELA." (*Clark v. Burlington Northern, Inc.* (8th Cir. 1984) 726 F.2d 448, 450, internal citation omitted.)
- "A benefit may be exempt from setoff under the collateral source rule even though the employer is the sole source of the fund. The important consideration is the character of the benefits received, rather than whether the source is actually independent of the employer. Medical expenses paid for by insurance are exempt from setoff regardless of whether the employer paid one hundred percent of the insurance premiums. Courts have also ruled private disability retirement plans established by a collective bargaining agreement and covering both job-related and non-job-related illness and injury are exempt from setoff." (*Clark, supra,* 726 F.2d at pp. 450–451, footnote and internal citations omitted.)
- "Generally, a tortfeasor need not pay twice for the damage caused, but he should not be allowed to set off compensation from a 'collateral source' against the amount he owes on account of his tort." (*Russo v. Matson Navigation Co.* (9th Cir. 1973) 486 F.2d 1018, 1020.)
- "It is well established in this circuit that the purpose and nature of the insurance benefits are controlling. Here, the purpose of the insurance coverage, as expressly described in the collective bargaining agreement, is to indemnify the employer against FELA liability. It follows that setoff should be allowed and that the benefits in this case should not be regarded as a collateral source." (*Folkestad v. Burlington Northern, Inc.* (9th Cir. 1987) 813 F.2d 1377, 1383.)
- "The mechanics of handling the setoff provided by the plan may be dealt with either by the Court instructing the jury that the amount of benefits provided by the GA-23000 contract must be set off against any damages awarded or by the Court as a matter of law reducing damages awarded by the jury." (*Brice v. National Railroad Passenger Corp.* (D. Md. 1987) 664 F.Supp. 220, 224.)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, §§ 485.43, 485.44 (Matthew Bender)

2942. Damages for Death of Employee

If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***] claim against [***name of defendant***] for the death of [***name of decedent***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for this loss. This compensation is called "damages."**

[*Name of plaintiff***] must prove the amount of [his/her/***nonbinary pronoun***] damages. However, [***name of plaintiff***] does not have to prove the exact amount of these damages. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **The reasonable value of money, goods, and services that [***name of decedent***] would have provided [***name of plaintiff***] during either the life expectancy that [***name of decedent***] had before [his/her/***nonbinary pronoun***] death or the life expectancy of [***name of plaintiff***], whichever is shorter;**
2. **[The monetary value of [***name of minor child***]'s loss of any care, attention, instruction, training, advice, and guidance from [***name of decedent***];]**
3. **Any pain and suffering that [***name of decedent***] experienced as a result of [his/her/***nonbinary pronoun***] injuries; and**
4. **The reasonable expense of medical care and supplies reasonably needed by and actually provided to [***name of decedent***].**

Do not include in your award any compensation for [*name of plaintiff***]'s grief, sorrow, or mental anguish or the loss of [***name of decedent***]'s society or companionship.**

In deciding a person's life expectancy, consider, among other factors, that person's health, habits, activities, lifestyle, and occupation. Life expectancy tables are evidence of a person's life expectancy but are not conclusive.

Any award you make for the value of any money and services that you decide [*name of decedent***] would have provided [***name of plaintiff***] in the future should be reduced to present value. Any award you make for the value of any money and services you decide [***name of decedent***] would have provided [***name of plaintiff***] between the date of [his/her/***nonbinary pronoun***] death on [***date of death***] and the present should not be reduced to present value.**

[In computing damages, consider the losses suffered by all plaintiffs and

return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003; Revised December 2011

Directions for Use

The list of damages is optional and is intended to include those items of damage for which recovery is commonly sought in the ordinary FELA case. This list is not intended to exclude any item of damages that is supported in evidence and the authorities. There must be evidence to support each item listed.

The items of damage set forth in items number 3 and 4 are recoverable by the personal representative on behalf of the spouse, children, or parents of the decedent, if supported by the evidence.

See also CACI No. 3904A, *Present Cash Value*, CACI No. 3904B, *Use of Present-Value Tables*, and CACI No. 3932, *Life Expectancy*.

Sources and Authority

- Federal Employers' Liability Act. Title 45 United States Code section 51.
- Contracts Waiving FELA Liability Are Void. Title 45 United States Code section 55.
- FELA Right of Action Survives. Title 45 United States Code section 59.
- "[I]t is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of 'substance' determined by federal law." (*St. Louis Southwestern Railway Co. v. Dickerson* (1985) 470 U.S. 409, 411 [105 S.Ct. 1347, 84 L.Ed.2d 303], internal citation omitted.)
- "The elements which make up the total damage resulting to a minor child from a parent's death may be materially different from a parent's examination where the beneficiary is a spouse or collateral dependent relative; but in every instance the award must be based upon money values, the amount of which can be ascertained only upon a view of the peculiar facts presented." (*Norfolk & Western Railroad Co. v. Holbrook* (1915) 235 U.S. 625, 629 [35 S.Ct. 143, 59 L.Ed. 392], internal citations omitted.)
- "In the present case there was testimony concerning the personal qualities of the deceased and the interest which he took in his family. It was proper, therefore, to charge that the jury might take into consideration the care, attention, instruction, training, advice, and guidance which the evidence showed he reasonably might have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed." (*Norfolk & Western Railroad Co., supra,* 235 U.S. at p. 629.)
- " 'In the absence of evidence that an adult child is either dependent upon or had any reasonable grounds for expecting any pecuniary benefit from a continuance of the decedent's life, a recovery on behalf of such child is excluded.' " (*Kozar*

v. Chesapeake & Ohio Railway Co. (6th Cir. 1971) 449 F.2d 1238, 1243, internal citation omitted.)

- "[T]he conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived." (*St. Louis, I.M. & S. Railway Co. v. Craft* (1915) 237 U.S. 648, 658 [35 S.Ct. 704, 59 L.Ed. 1160].)
- "Funeral expenses . . . may not be included in damages awarded in FELA actions." (*Dubose v. Kansas City Southern Railway Co.* (5th Cir. 1984) 729 F.2d 1026, 1033.)
- "In a wrongful-death action under the FELA, the measure of recovery is 'the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received . . . .' The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies." (*Norfolk & W. Ry. Co. v. Liepelt* (1980) 444 U.S. 490, 493–494 [100 S.Ct. 755, 62 L.Ed.2d 689], internal citation omitted.)
- "[T]he damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries." (*Michigan Central Railroad Co. v. Vreeland* (1913) 227 U.S. 59, 70 [33 S.Ct. 192, 57 L.Ed. 417].)
- "The seaman may thus recover for all of his pecuniary damages including such damages as the cost of employing someone else to perform those domestic services that he would otherwise have been able to render but is now incapable of doing." (*Cruz v. Hendy International Co.* (5th Cir. 1981) 638 F.2d 719, 723 [Jones Act case], overruled on other grounds in *Miles v. Apex Marine Corp.* (1990) 498 U.S. 19, 32–33 [111 S.Ct. 317, 112 L.Ed.2d 275].)
- "While at first glance the language of this provision seems broad enough to completely abrogate the common law collateral source rule, courts have limited the scope of the provision by focusing on the requirement that the covered payments be made 'on account of the injury.' Thus, the cases draw a distinction between payments emanating from a fringe benefit such as a retirement fund or a general hospital and medical insurance plan, and payments which the employer has undertaken voluntarily to indemnify itself against possible liabilities under the FELA." (*Clark v. Burlington Northern, Inc.* (8th Cir. 1984) 726 F.2d 448, 450, internal citation omitted.)
- "A benefit may be exempt from setoff under the collateral source rule even though the employer is the sole source of the fund. The important consideration

is the character of the benefits received, rather than whether the source is actually independent of the employer. Medical expenses paid for by insurance are exempt from setoff regardless of whether the employer paid one hundred percent of the insurance premiums. Courts have also ruled private disability retirement plans established by a collective bargaining agreement and covering both job-related and non-job-related illness and injury are exempt from setoff." (*Clark, supra,* 726 F.2d at pp. 450–451, footnote and internal citations omitted.)

- "Generally, a tortfeasor need not pay twice for the damage caused, but he should not be allowed to set off compensation from a 'collateral source' against the amount he owes on account of his tort." (*Russo v. Matson Navigation Co.* (9th Cir. 1973) 486 F.2d 1018, 1020.)
- "It is well established in this circuit that the purpose and nature of the insurance benefits are controlling. Here, the purpose of the insurance coverage, as expressly described in the collective bargaining agreement, is to indemnify the employer against FELA liability. It follows that setoff should be allowed and that the benefits in this case should not be regarded as a collateral source." (*Folkestad v. Burlington Northern, Inc.* (9th Cir. 1987) 813 F.2d 1377, 1383.)
- "The mechanics of handling the setoff provided by the plan may be dealt with either by the Court instructing the jury that the amount of benefits provided by the GA-23000 contract must be set off against any damages awarded or by the Court as a matter of law reducing damages awarded by the jury." (*Brice v. National Railroad Passenger Corp.* (D. Md. 1987) 664 F.Supp. 220, 224.)

Secondary Sources

2 Hanna, California Law of Employee Injuries and Workers' Compensation, Ch. 21, *Jurisdiction*, § 21.01[3] (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, §§ 485.36, 485.43, 485.44 (Matthew Bender)

2943–2999. Reserved for Future Use

VF-2900. FELA—Negligence—Plaintiff's Negligence at Issue

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff/decedent*] employed by [*name of defendant*]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of defendant*] a common carrier by railroad?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of defendant*] engaged in interstate commerce?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of plaintiff/decedent*]'s job duties further, or in any way substantially affect, interstate commerce?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of plaintiff/decedent*] acting within the scope of [his/her/*nonbinary pronoun*] employment at the time of the incident?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [*name of defendant*] negligent?**

   _____ Yes _____ No

   If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of plaintiff*] harmed?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [*name of defendant*]'s negligence a cause of [*name of plaintiff/decedent*]'s [harm/death]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s total damages? Do not reduce the damages based on the fault, if any, of [*name of plaintiff/decedent*].

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past loss, including [physical pain/mental suffering:] $_____]

[d. Future loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

If [*name of plaintiff*] has proved any damages, then answer question 10. If [*name of plaintiff*] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

10. Was [*name of plaintiff/decedent*] negligent?

_____ Yes _____ No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

11. Was [*name of plaintiff/decedent*]'s negligence a cause of [his/her/*nonbinary pronoun*] harm?

_____ Yes _____ No

If your answer to question 11 is yes, then answer question 12. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

12. What percentage of responsibility for [*name of plaintiff*]'s harm do you assign to:

[*Name of defendant*]: _____%
[*Name of plaintiff/decedent*]: _____%

TOTAL: 100 %

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This form is based on CACI No. 2900, *FELA—Essential Factual Elements,* and CACI No. 2904, *Comparative Fault.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-

3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2901. Federal Safety Appliance Act or Boiler Inspection Act

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff/decedent*] employed by [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of defendant*] a common carrier by railroad?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of defendant*] engaged in interstate commerce?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of plaintiff/decedent*]'s job duties further, or in any way substantially affect, interstate commerce?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of plaintiff/decedent*] acting within the scope of [his/her/*nonbinary pronoun*] employment at the time of the incident?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Did [*name of defendant*] [*describe violation of Federal Safety Appliance Act/Boiler Inspection Act*]?**

   _____ **Yes** _____ **No**

   If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have

the presiding juror sign and date this form.

7. Was [*name of plaintiff*] harmed?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [*name of defendant*]'s conduct a cause of [[*name of plaintiff*]'s harm/[*name of decedent*]'s death]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past loss, including [physical pain/mental suffering:] $_____]

[d. Future loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This form is based on CACI No. 2920, *Essential Factual Elements—Federal Safety Appliance Act or Boiler Inspection Act*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2902–VF-2999. Reserved for Future Use

CIVIL RIGHTS

3000. Violation of Federal Civil Rights—In General—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her/***nonbinary pronoun***] civil rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [intentionally/[***other applicable state of mind***]] [***insert wrongful act***];**
2. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties;**
3. **That [***name of defendant***]'s conduct violated [***name of plaintiff***]'s right [***insert right, e.g., "of privacy"***];**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s [***insert wrongful act***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

In element 1, the standard is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involve conduct carried out with "deliberate indifference," and Fourth Amendment claims do not necessarily involve intentional conduct. The "official duties" referred to in element 2 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be a jury issue, so it has been omitted to shorten the wording of element 2. This instruction is intended for claims not covered by any of the following more specific instructions regarding the elements that the plaintiff must prove.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.
- "42 United States Code section 1983 . . . was enacted 'to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.' " (*Modacure v. B&B Vehicle Processing, Inc.* (2018) 30 Cal.App.5th 690, 693 [241 Cal.Rptr.3d 761].)
- "A § 1983 claim creates a species of tort liability, with damages determined 'according to principles derived from the common law of torts.' " (*Mendez v. Cty. of L.A.* (9th Cir. 2018) 897 F.3d 1067, 1074.)
- "A claim under 42 United States Code section 1983 may be based on a showing

that the defendant, acting under color of state law, deprived the plaintiff of a federally protected right." (*Modacure, supra*, 30 Cal.App.5th at p. 694.)

- "As we have said many times, § 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " (*Graham v. Connor* (1989) 490 U.S. 386, 393–394 [109 S.Ct. 1865, 104 L.Ed.2d 443], internal citation omitted.)
- "Section 1983 does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials." (*Jones v. Williams* (9th Cir. 2002) 297 F.3d 930, 934.)
- "By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 890 [104 Cal.Rptr.3d 352].)
- "Section 1983 can also be used to enforce federal statutes. For a statutory provision to be privately enforceable, however, it must create an individual right." (*Henry A. v. Willden* (9th Cir. 2012) 678 F.3d 991, 1005, internal citation omitted.)
- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)
- "[S]tates are not 'persons' subject to suit under section 1983." (*Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 654 [242 Cal.Rptr.3d 757].)
- "The jury was properly instructed on [plaintiff]'s burden of proof and the particular elements of the section 1983 claim. (CACI No. 3000.)" (*King v. State of California* (2015) 242 Cal.App.4th 265, 280 [195 Cal.Rptr.3d 286].)
- " 'State courts look to federal law to determine what conduct will support an action under section 1983. The first inquiry in any section 1983 suit is to identify the precise constitutional violation with which the defendant is charged.' " (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 203 [73 Cal.Rptr.2d 571], internal citations omitted.)
- " 'Qualified immunity is an affirmative defense against section 1983 claims. Its purpose is to shield public officials "from undue interference with their duties and from potentially disabling threats of liability." The defense provides immunity from suit, not merely from liability. Its purpose is to spare defendants the burden of going forward with trial.' Because it is an immunity from suit, not just a mere defense to liability, it is important to resolve immunity questions at the earliest possible stage in litigation. Immunity should ordinarily be resolved by the court, not a jury." (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 342 [54 Cal.Rptr.2d 772], internal citations omitted.)
- "[D]efendants cannot be held liable for a constitutional violation under 42 U.S.C.

§ 1983 unless they were integral participants in the unlawful conduct. We have held that defendants can be liable for 'integral participation' even if the actions of each defendant do not 'rise to the level of a constitutional violation.' " (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1241, internal citation omitted.)

- "Constitutional torts employ the same measure of damages as common law torts and are not augmented 'based on the abstract "value" or "importance" of constitutional rights . . . .' Plaintiffs have the burden of proving compensatory damages in section 1983 cases, and the amount of damages depends 'largely upon the credibility of the plaintiffs' testimony concerning their injuries.' " (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 321 [103 Cal.Rptr.2d 339], internal citations omitted.)
- "[E]ntitlement to compensatory damages in a civil rights action is not a matter of discretion: 'Compensatory damages . . . are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.' " (*Hazle v. Crofoot* (9th Cir. 2013) 727 F.3d 983, 992.)
- "[T]he state defendants' explanation of the jury's zero-damages award as allocating all of [plaintiff]'s injury to absent persons reflects the erroneous view that not only could zero damages be awarded to [plaintiff], but that [plaintiff]'s damages were capable of apportionment. [Plaintiff] independently challenges the jury instruction and verdict form that allowed the jury to decide this question, contending that the district judge should have concluded, as a matter of law, that [plaintiff] was entitled to compensatory damages and that defendants were jointly and severally liable for his injuries. He is correct. The district judge erred in putting the question of apportionment to the jury in the first place, because the question of whether an injury is capable of apportionment is a legal one to be decided by the judge, not the jury." (*Hazle, supra*, 727 F.3d at pp. 994–995.)
- "An individual acts under color of state law when he or she exercises power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " (*Naffe v. Frey* (9th Cir. 2015) 789 F.3d 1030, 1036.)
- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)
- "A state employee who is off duty nevertheless acts under color of state law when (1) the employee 'purport[s] to or pretend[s] to act under color of law,' (2)

his 'pretense of acting in the performance of his duties . . . had the purpose and effect of influencing the behavior of others,' and (3) the harm inflicted on plaintiff 'related in some meaningful way either to the officer's governmental status or to the performance of his duties.' " (*Naffe, supra*, 789 F.3d at p. 1037, internal citations omitted.)

- " 'While generally not applicable to private parties, a § 1983 action can lie against a private party when "he is a willful participant in joint action with the State or its agents." ' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 396 [218 Cal.Rptr.3d 38].)
- "Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity." (*Manhattan Cmty. Access Corp. v. Halleck* (2019) — U.S. — [139 S.Ct. 1921, 1928, 204 L.Ed.2d 405], internal citations omitted.)
- "[P]rivate parties ordinarily are not subject to suit under [section 1983], unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)
- "Under the Court's cases, a private entity may qualify as a state actor when it exercises 'powers traditionally exclusively reserved to the State.' It is not enough that the federal, state, or local government exercised the function in the past, or still does. And it is not enough that the function serves the public good or the public interest in some way. Rather, to qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function." (*Manhattan Cmty. Access Corp., supra*, — U.S. — [139 S.Ct. at p. 1928], original italics.)
- "The Ninth Circuit has articulated four tests for determining whether a private person acted under color of law: (1) the public function test, (2) the joint action test, (3) the government nexus test, and (4) the government coercion or compulsion test. 'Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists.' ' "[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." ' " (*Julian, supra,* 11 Cal.App.5th at p. 396.)
- "Because § 1983 'was designed to secure private rights against government

encroachment,' tribal members can use it to vindicate their 'individual rights,' but not the tribe's "communal rights.' " (*Chemehuevi Indian Tribe v. McMahon* (9th Cir. 2019) 934 F.3d 1076, 1082, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892 et seq.

2 Civil Rights Actions, Ch. 7, *Deprivation of Rights Under Color of State Law—General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶¶ 7.05–7.07, Ch. 17, *Deprivation of Rights Under Color of State Law—General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶ 17.02 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes,* § 113.14 (Matthew Bender)

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers and Responsive Motions Under Rule 12*, 8.40

3001. Local Government Liability—Policy or Custom—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was deprived of [his/her/***nonbinary pronoun***] civil rights as a result of an official [policy/custom] of the [***name of local governmental entity***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That the [***name of local governmental entity***] had an official [policy/custom] [***specify policy or custom***];**
2. **That [***name of officer or employee***] was an [officer/employee/[***other***]] of [***name of local governmental entity***];**
3. **That [***name of officer or employee***] [intentionally/[***insert other applicable state of mind***]] [***insert conduct allegedly violating plaintiff's civil rights***];**
4. **That [***name of officer or employee***]'s conduct violated [***name of plaintiff***]'s right [***specify right***];**
5. **That [***name of officer or employee***] acted because of this official [policy/custom].**

New September 2003; Revised December 2010; Renumbered from CACI No. 3007 and Revised December 2012

Directions for Use

Give this instruction and CACI No. 3002, *"Official Policy or Custom" Explained*, if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the entity's official policy or custom. First give CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*, and the instructions on the particular constitutional violation alleged.

In element 3, a constitutional violation is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involving failure to provide a prisoner with proper medical care require "deliberate indifference." (See *Hudson v. McMillian* (1992) 503 U.S. 1, 5 [112 S.Ct. 995, 117 L.Ed.2d 156].) And Fourth Amendment claims require an "unreasonable" search or seizure. (See *Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834.)

For other theories of liability against a local governmental entity, see CACI No. 3003, *Local Government Liability—Failure to Train—Essential Factual Elements*, and CACI No. 3004, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

Sources and Authority

- "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." (*Monell v. Dept. of Social Services of New York* (1978) 436 U.S. 658, 694 [98 S.Ct. 2018, 56 L.Ed.2d 611].)
- Local governmental entities " 'can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted. . . .' " Local governmental entities also can be sued " 'for constitutional deprivations visited pursuant to governmental "custom." ' " In addition, " '[t]he plaintiff must . . . demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1147 [119 Cal.Rptr.2d 709, 45 P.3d 1171], internal citations omitted.)
- "Entity liability may arise in one of two forms. The municipality may itself have directed the deprivation of federal rights through an express government policy. This was the situation in *Monell,* where there was an explicit policy requiring pregnant government employees to take unpaid leaves of absence before such leaves were medically required. . . . Alternatively, the municipality may have in place a custom or practice so widespread in usage as to constitute the functional equivalent of an express policy." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)
- " '[I]n order to successfully maintain an action under 42 United States Code section 1983 against governmental defendants for the tortious conduct of employees under federal law, it is necessary to establish that the conduct occurred in execution of a government's policy or custom promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*Newton v. County of Napa* (1990) 217 Cal.App.3d 1551, 1564 [266 Cal.Rptr. 682], internal citations omitted.)
- "*Monell* provides that a governmental entity may only be held liable where the entity causes a constitutional violation. To establish *Monell* liability, ' "a plaintiff must 'identify the challenged policy, [practice, or custom,] attribute it to the [county] itself, and show a causal link between the execution of the policy, [practice, or custom,] and the injury suffered.' " [Citation.] In addition, plaintiffs must "present scienter-like evidence of indifference on the part of a particular policymaker or policymakers." [Citation.] The requirement of producing scienter-like evidence on the part of an official with policymaking authority is consistent with the conclusion that "absent the conscious decision or deliberate indifference of some natural person, a [governmental entity], as an abstract entity, cannot be deemed to have engaged in a constitutional violation by virtue of a policy, a

custom or failure to train." [Citation.] "[I]n the absence of any unconstitutional statute or rule, it is plaintiffs' burden to articulate a factual basis that demonstrates considerably more proof than a single incident." ' " (*Arista v. County of Riverside* (2018) 29 Cal.App.5th 1051, 1064 [241 Cal.Rptr.3d 437].)

- "Under *Monell*, a local government body can be held liable under § 1983 for policies of inaction as well as policies of action. A policy of action is one in which the government body itself violates someone's constitutional rights, or instructs its employees to do so; a policy of inaction is based on a government body's 'failure to implement procedural safeguards to prevent constitutional violations.' " (*Jackson v. Barnes* (9th Cir. 2014) 749 F.3d 755, 763], internal citations omitted.)
- "Normally, the question of whether a policy or custom exists would be a jury question. However, when there are no genuine issues of material fact and the plaintiff has failed to establish a prima facie case, disposition by summary judgment is appropriate." (*Trevino v. Gates* (9th Cir. 1996) 99 F.3d 911, 920.)
- "A triable issue exists as to whether the root of the unconstitutional behavior exhibited in [plaintiff]'s case lies in the unofficial operating procedure of [defendant] County or in the errant acts of individual social workers, and this question should go to a jury." (*Kirkpatrick v. County of Washoe* (9th Cir. 2015) 792 F.3d 1184, 1201.)
- "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate, supra,* 86 Cal.App.4th at p. 328.)
- "To meet this [*Monell*] requirement, the plaintiff must show both causation-in-fact and proximate causation." (*Gravelet-Blondin v. Shelton* (9th Cir. 2013) 728 F.3d 1086, 1096.)
- "Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]'s injuries. [Plaintiff]'s recovery, if any, based upon a *Monell* claim would be limited to nominal damages." (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)
- "Local governmental bodies such as cities and counties are considered 'persons' subject to suit under section 1983. States and their instrumentalities, on the other hand, are not." (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1101 [100 Cal.Rptr.2d 289], internal citations omitted.)
- "A municipality can be sued under section 1983 for 'constitutional deprivations visited pursuant to governmental "custom." ' However, 'Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, . . . a municipality

cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.' " (*Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1118 [190 Cal.Rptr.3d 97], original italics, internal citation omitted.)

- "A local governmental unit is liable only if the alleged deprivation of rights 'implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers,' or when the injury is in 'execution of a [local] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1171 [80 Cal.Rptr.2d 860], internal citations omitted.)
- "A municipality's policy or custom resulting in constitutional injury may be actionable even though the individual public servants are shielded by good faith immunity." (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 568 [195 Cal.Rptr. 268], internal citations omitted.)
- "No punitive damages can be awarded against a public entity." (*Choate, supra,* 86 Cal.App.4th at p. 328, internal citation omitted.)
- "[T]he requirements of *Monell* do apply to suits against private entities under § 1983. . . . [W]e see no basis in the reasoning underlying *Monell* to distinguish between municipalities and private entities acting under color of state law." (*Tsao v. Desert Palace, Inc.* (9th Cir. 2012) 698 F.3d 1128, 1139, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892 et seq.

17A Moore's Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 123.23 (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03[2][a] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes,* § 113.14 (Matthew Bender)

3002. "Official Policy or Custom" Explained (42 U.S.C. § 1983)

"Official [policy/custom]" means: [*insert one of the following:***]**

[A rule or regulation approved by the [city/county]'s legislative body;] [or]

[A policy statement or decision that is officially made by the [city/county]'s lawmaking officer or policymaking official;] [or]

[A custom that is a permanent, widespread, or well-settled practice of the [city/county];] [or]

[An act or omission approved by the [city/county]'s lawmaking officer or policymaking official.]

New September 2003; Revised June 2012; Renumbered from CACI No. 3008 December 2012

Directions for Use

These definitions are selected examples of official policy drawn from the cited cases. The instruction may need to be adapted to the facts of a particular case. The court may need to instruct the jury regarding the legal definition of "policymakers."

In some cases, it may be necessary to include additional provisions addressing factors that may indicate an official custom in the absence of a formal policy. The Ninth Circuit has held that in some cases the plaintiff is entitled to have the jury instructed that evidence of governmental inaction—specifically, failure to investigate and discipline employees in the face of widespread constitutional violations—can support an inference that an unconstitutional custom or practice has been unofficially adopted. (*Hunter v. County of Sacramento* (9th Cir. 2011) 652 F.3d 1225, 1234, fn. 8.)

Sources and Authority

- "The [entity] may not be held liable for acts of [employees] unless 'the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers' or if the constitutional deprivation was 'visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.' " (*Redman v. County of San Diego* (9th Cir. 1991) 942 F.2d 1435, 1443–1444, internal citation omitted.)
- "[A]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of

law." (*Bd. of the County Comm'rs v. Brown* (1997) 520 U.S. 397, 404 [117 S.Ct. 1382, 137 L.Ed.2d 626].)

- "The custom or policy must be a 'deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.' " (*Castro v. County of Los Angeles* (9th Cir. 2016) 833 F.3d 1060, 1075 (en banc).)
- "While a rule or regulation promulgated, adopted, or ratified by a local governmental entity's legislative body unquestionably satisfies *Monell's* policy requirement, a 'policy' within the meaning of § 1983 is not limited to official legislative action. Indeed, a decision properly made by a local governmental entity's authorized decisionmaker—i.e., an official who 'possesses final authority to establish [local government] policy with respect to the [challenged] action'—may constitute official policy. 'Authority to make municipal policy may be granted directly by legislative enactment or may be delegated by an official who possesses such authority, and of course whether an official had final policymaking authority is a question of state law.' " (*Thompson v. City of Los Angeles* (9th Cir. 1989) 885 F.2d 1439, 1443, internal citations and footnote omitted.)
- "[A] plaintiff can show a custom or practice of violating a written policy; otherwise an entity, no matter how flagrant its actual routine practices, always could avoid liability by pointing to a pristine set of policies." (*Castro, supra,* 833 F.3d at p. 1075 fn. 10.)
- "Appellants need not show evidence of a policy or deficient training; evidence of an informal practice or custom will suffice." (*Nehad v. Browder* (9th Cir. 2019) 929 F.3d 1125, 1141.)
- "As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." (*Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 737 [109 S.Ct. 2702, 105 L.Ed.2d 598].)
- "[I]t is settled that whether an official is a policymaker for a county is dependent on an analysis of state law, not fact." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 352 [70 Cal.Rptr.2d 823, 949 P.2d 920], internal citations omitted.)
- "Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." (*Jett, supra*, 491 U.S. at p. 737, internal citations omitted.)
- "*Gibson v. County of Washoe* [(9th Cir. 2002) 290 F.3d 1175, 1186] discussed two types of policies: those that result in the municipality itself violating

someone's constitutional rights or instructing its employees to do so, and those that result, through omission, in municipal responsibility 'for a constitutional violation committed by one of its employees, even though the municipality's policies were facially constitutional, the municipality did not direct the employee to take the unconstitutional action, and the municipality did not have the state of mind required to prove the underlying violation.' We have referred to these two types of policies as policies of action and inaction." (*Tsao v. Desert Palace, Inc.* (9th Cir. 2012) 698 F.3d 1128, 1143, internal citations omitted.)

- "A policy of inaction or omission may be based on failure to implement procedural safeguards to prevent constitutional violations. To establish that there is a policy based on a failure to preserve constitutional rights, a plaintiff must show, in addition to a constitutional violation, 'that this policy "amounts to deliberate indifference" to the plaintiff's constitutional right[,]' and that the policy caused the violation, 'in the sense that the [municipality] could have prevented the violation with an appropriate policy.' " (*Tsao, supra*, 698 F.3d at p. 1143, internal citations omitted.)
- "To show deliberate indifference, [plaintiff] must demonstrate 'that [defendant] was on actual or constructive notice that its omission would likely result in a constitutional violation.' " (*Tsao, supra*, 698 F.3d at p. 1145.)
- "[P]laintiff may prove . . . deliberate indifference, through evidence of a 'failure to investigate and discipline employees in the face of widespread constitutional violations.' Thus, it is sufficient under our case law to prove a 'custom' of encouraging excessive force to provide evidence that personnel have been permitted to use force with impunity." (*Rodriguez v. County of Los Angeles* (9th Cir. 2018) 891 F.3d 776, 803, internal citations omitted.)
- "Discussing liability of a municipality under the federal Civil Rights Act based on 'custom,' the California Court of Appeal for the Fifth Appellate District recently noted, 'If the plaintiff seeks to show he was injured by governmental "custom," he must show that the governmental entity's "custom" was "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." ' " (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 569, fn. 11 [195 Cal.Rptr. 268], internal citations omitted.)
- "The federal courts have recognized that local elected officials and appointed department heads can make official policy or create official custom sufficient to impose liability under section 1983 on their governmental employers." (*Bach, supra*, 147 Cal.App.3d at p. 570, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 890 et seq.

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers and Responsive Motions Under Rule 12*, 8.40

3003. Local Government Liability—Failure to Train—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was deprived of [his/her/***nonbinary pronoun***] civil rights as a result of [***name of local governmental entity***]'s failure to train its [officers/employees]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of local governmental entity***]'s training program was not adequate to train its [officers/employees];**
2. **That [***name of local governmental entity***] knew because of a pattern of similar violations[, or it should have been obvious to it,] that the inadequate training program was likely to result in a deprivation of the right [***specify right violated***];**
3. **That [***name of officer or employee***] violated [***name of plaintiff***]'s right [***specify right***]; and**
4. **That the failure to provide adequate training was the cause of the deprivation of [***name of plaintiff***]'s right [***specify right***].**

New September 2003; Revised December 2010, December 2011; Renumbered from CACI No. 3009 December 2012

Directions for Use

Give this instruction if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the entity's failure to adequately train its officers or employees. First give CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*, and the instructions on the particular constitutional violation alleged.

The inadequate training must amount to a deliberate indifference to constitutional rights. (*Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1249, overruled en banc on other grounds in *Castro v. County of L.A.* (9th Cir. 2016) 833 F.3d 1060, 1070.) Element 2 expresses this deliberate-indifference standard. Deliberate indifference requires proof of a pattern of violations in all but a few very rare situations in which the unconstitutional consequences of failing to train are patently obvious. (See *Connick v. Thompson* (2011) 563 U.S. 51, 63 [131 S.Ct. 1350, 179 L.Ed.2d 417].) Delete the bracketed language in element 2 unless the facts present the possibility of liability based on patently obvious violations.

For other theories of liability against a local governmental entity, see CACI No. 3001, *Local Government Liability—Policy or Custom—Essential Factual Elements*, and CACI No. 3004, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.
- "We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition in *Monell* and *Polk County v. Dodson*, that a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.' Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." (*City of Canton v. Harris* (1989) 489 U.S. 378, 388–389 [109 S.Ct. 1197, 103 L.Ed.2d 412], internal citations and footnote omitted.)
- "In *Canton*, the Court left open the possibility that, 'in a narrow range of circumstances,' a pattern of similar violations might not be necessary to show deliberate indifference. The Court posed the hypothetical example of a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force. Given the known frequency with which police attempt to arrest fleeing felons and the 'predictability that an officer lacking specific tools to handle that situation will violate citizens' rights,' the Court theorized that a city's decision not to train the officers about constitutional limits on the use of deadly force could reflect the city's deliberate indifference to the 'highly predictable consequence,' namely, violations of constitutional rights. The Court sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." (*Connick, supra*, 131 S.Ct. at p. 1361], internal citations omitted.)
- "To impose liability on a local government for failure to adequately train its employees, the government's omission must amount to 'deliberate indifference' to a constitutional right. This standard is met when 'the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.' For example, if police activities in arresting fleeing felons 'so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers,' then the city's failure to train may constitute 'deliberate indifference.' " (*Clouthier, supra*, 591 F.3d at p. 1249, internal citations omitted.)
- "It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective." (*Farmer v. Brennan* (1994) 511 U.S. 825, 841 [114 S.Ct. 1970, 128 L.Ed.2d 811].)
- "The ninth cause of action was for 'Failure to Train.' The elements of such

cause of action are well established, and include that the City 'knew because of a pattern of similar violations that the inadequate training was likely to result in a deprivation' of some right of plaintiffs. Put otherwise, the inadequate training must amount to a deliberate indifference to constitutional rights. Such deliberate indifference requires proof of a pattern of violations (except in those few very rare situations in which the unconstitutional consequences of failing to train are patently obvious)." (*Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, 597 [180 Cal.Rptr.3d 10], footnote and internal citations omitted.)

- " 'The issue in a case like this one . . . is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." ' Furthermore, the inadequacy in the city's training program must be closely related to the 'ultimate injury,' such that the injury would have been avoided had the employee been trained under a program that was not deficient in the identified respect." (*Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 526 [27 Cal.Rptr.2d 433], internal citations omitted.)
- "Where the proper response . . . is obvious to all without training or supervision, then the failure to train or supervise is generally not 'so likely' to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise." (*Flores v. County of L.A.* (9th Cir. 2014) 758 F.3d 1154, 1160 [no need to train officers not to sexually assault persons with whom they come in contact].)
- "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)
- "Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]'s injuries. [Plaintiff]'s recovery, if any, based upon a *Monell* claim would be limited to nominal damages." (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 897

17A Moore's Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 123.23 (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3004. Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was deprived of [his/her/***nonbinary pronoun***] civil rights as a result of [***specify alleged unconstitutional conduct, e.g., being denied a parade permit because of the political message of the parade***]. [***Name of official***] is the person responsible for establishing final policy with respect to [***specify subject matter, e.g., granting parade permits***] for [***name of local governmental entity***].**

To establish that [*name of local governmental entity***] is responsible for this deprivation, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***]'s right [***specify right violated***] was violated;**
2. **That [***name of official***] was the person who [either] [actually [made the decision/committed the acts]/ [or] later personally ratified the [decision/acts]] that led to the deprivation of [***name of plaintiff***]'s civil rights;**
3. **That [***name of official***]'s [acts/decision] [was/were] a conscious and deliberate choice to follow a course of action from among various alternatives; and**
4. **That [***name of official***] [[made the decision/committed the acts]/ [or] approved the [decision/acts]] with knowledge of [***specify facts constituting the alleged unlawful conduct***].**

[[*Name of official***] "ratified" the decision if [he/she/***nonbinary pronoun***] knew the unlawful reason for the decision and personally approved it after it had been made.]**

New December 2010; Renumbered from CACI No. 3010 December 2012

Directions for Use

Give this instruction if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the acts of an official with final policymaking authority. First give CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*, and the instructions on the particular constitutional violation alleged.

Liability may be based on either the official's personal acts or policy decision that led to the violation or the official's subsequent ratification of the acts or decision of another. (See *Gillette v. Delmore* (9th Cir. 1992) 979 F.2d 1342, 1346–1347.) If both

theories are alleged in the alternative, include "either" in element 1. Include the last paragraph if ratification is alleged.

For other theories of liability against a local governmental entity, see CACI No. 3001, *Local Government Liability—Policy or Custom—Essential Factual Elements*, and CACI No. 3003, *Local Government Liability—Failure to Train—Essential Factual Elements*.

The court determines whether a person is an official policymaker under state law. (See *Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 737 [109 S.Ct. 2702, 105 L.Ed.2d 598].)

Sources and Authority

- "[A] local government may be held liable under § 1983 when 'the individual who committed the constitutional tort was an official with final policy-making authority' or such an official 'ratified a subordinate's unconstitutional decision or action and the basis for it.' 'If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.' 'There must, however, be evidence of a conscious, affirmative choice' on the part of the authorized policymaker. A local government can be held liable under § 1983 'only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." ' " (*Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1250, overruled en banc on other grounds in *Castro v. County of L.A.* (9th Cir. 2016) 833 F.3d 1060, 1070, internal citations omitted.)
- "Two terms ago, . . . we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. . . . First, a majority of the Court agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, 'that is, acts which the municipality has officially sanctioned or ordered.' Second, only those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability. Third, whether a particular official has 'final policymaking authority' is a question of state law. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business." (*St. Louis v. Praprotnik* (1988) 485 U.S. 112, 123 [108 S.Ct. 915, 99 L.Ed.2d 107], internal citations omitted.)
- "[A] municipality may be liable for an 'isolated constitutional violation when the person causing the violation has final policymaking authority.' " (*Garmon v. County of L.A.* (9th Cir. 2016) 828 F.3d 837, 846, internal citation omitted.) "As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial

judge *before* the case is submitted to the jury." (*Jett, supra*, 491 U.S. at p. 737, original italics.)

- "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him." (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73 [104 Cal.Rptr. 57, 500 P.2d 1401].)
- "[R]atification requires, among other things, knowledge of the alleged constitutional violation." (*Christie v. Iopa* (9th Cir. 1999) 176 F.3d 1231, 1239, internal citations omitted.)
- "[A] policymaker's mere refusal to overrule a subordinate's completed act does not constitute approval." (*Christie, supra*, 176 F.3d at p. 1239.)
- "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)
- "Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]'s injuries. [Plaintiff]'s recovery, if any, based upon a *Monell* claim would be limited to nominal damages." (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 905

17A Moore's Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 123.23 (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03[2][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.12 (Matthew Bender)

3005. Supervisor Liability for Acts of Subordinates (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of supervisor defendant*] is personally liable for [his/her/*nonbinary pronoun*] harm. In order to establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of supervisor defendant*] knew, or in the exercise of reasonable diligence should have known, of [*name of subordinate employee defendant*]'s wrongful conduct;**
2. **That [*name of supervisor defendant*] knew that the wrongful conduct created a substantial risk of harm to [*name of plaintiff*];**
3. **That [*name of supervisor defendant*] disregarded that risk by [expressly approving/impliedly approving/ [or] failing to take adequate action to prevent] the wrongful conduct; and**
4. **That [*name of supervisor defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New April 2007; Renumbered from CACI No. 3013 December 2010; Revised December 2011; Renumbered from CACI No. 3017 December 2012; Revised June 2013

Directions for Use

Read this instruction in cases in which a supervisor is alleged to be personally liable for the violation of the plaintiff's civil rights under Title 42 United States Code section 1983.

For certain constitutional violations, deliberate indifference based on knowledge and acquiescence is insufficient to establish the supervisor's liability. The supervisor must act with the purpose necessary to establish the underlying violation. (*Ashcroft v. Iqbal* (2009) 556 U.S. 662, 676–677 [129 S.Ct. 1937, 173 L.Ed.2d 868] [for claim of invidious discrimination in violation of the First and Fifth Amendments, plaintiff must plead and prove that defendant acted with discriminatory purpose].) In such a case, element 3 requires not only express approval, but also discriminatory purpose. The United States Supreme Court has found constitutional torts to require specific intent in three situations: (1) due process claims for injuries caused by a high-speed chase (See *County of Sacramento v. Lewis* (1998) 523 U.S. 833, 836 [118 S.Ct. 1708, 140 L.Ed.2d 1043].); (2) Eighth Amendment claims for injuries suffered during the response to a prison disturbance (See *Whitley v. Albers* (1986) 475 U.S. 312, 320–321 [106 S.Ct. 1078, 89 L.Ed.2d 251].); and (3) invidious discrimination under the equal protection clause and the First Amendment free exercise clause. (See *Ashcroft v. Iqbal*, *supra*, 556 U.S. at pp. 676–677.)

The Ninth Circuit has held that deliberate indifference based on knowledge and

acquiescence is still sufficient to support supervisor liability if the underlying constitutional violation does not require purposeful discrimination. (*OSU Student Alliance v. Ray* (9th Cir. 2012) 699 F.3d 1053, 1070–1075 [knowing acquiescence is sufficient to establish supervisor liability for free-speech violations because intent to discriminate is not required]; see also *Starr v. Baca* (9th Cir. 2011) 652 F.3d 1202, 1207 [same for 8th Amendment violation for cruel and unusual punishment].)

Sources and Authority

- "A 'supervisory official may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates. . . . [T]hat liability is not premised upon *respondeat superior* but upon "a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict." ' " (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 209 [73 Cal.Rptr.2d 571], internal citations omitted.)
- "[W]hen a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action or inaction, not held vicariously liable for the culpable action or inaction of his or her subordinates." (*Starr*, *supra*, 652 F.3d at p. 1207.)
- "To establish supervisory liability under section 1983, [plaintiff] was required to prove: (1) the supervisor had actual or constructive knowledge of [defendant's] wrongful conduct; (2) the supervisor's response '" was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices' " '; and (3) the existence of an 'affirmative causal link' between the supervisor's inaction and [plaintiff's] injuries." (*Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1279–1280 [48 Cal.Rptr.3d 715], internal citations omitted.)
- "A supervisor is liable under § 1983 for a subordinate's constitutional violations 'if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.' [Defendants] testified that they were mere observers who stayed at the end of the [plaintiffs'] driveway. But based on the [plaintiffs'] version of the facts, which we must accept as true in this appeal, we draw the inference that [defendants] tacitly endorsed the other Sheriff's officers' actions by failing to intervene. . . . On this appeal we do not weigh the evidence to determine whether [defendants'] stated reasons for not intervening are plausible." (*Maxwell v. County of San Diego* (9th Cir. 2013) 708 F.3d 1075, 1086, internal citation omitted.)
- "A supervisory official is liable under § 1983 so long as 'there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.' 'The requisite causal connection can be established . . . by setting in motion a series of acts by others or by knowingly refus[ing] to terminate a series of acts by others, which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional injury.' Thus, a supervisor may 'be liable in his individual capacity for his own culpable action

or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others.' " (*Rodriguez v. County of L.A.* (9th Cir. 2018) 891 F.3d 776, 798, internal citations omitted.)

- "[T]he claim that a supervisory official knew of unconstitutional conditions and 'culpable actions of his subordinates' but failed to act amounts to 'acquiescence in the unconstitutional conduct of his subordinates' and is 'sufficient to state a claim of supervisory liability.' " (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1243.)
- " '[A] plaintiff must show the supervisor breached a duty to plaintiff which was the proximate cause of the injury. The law clearly allows actions against supervisors under section 1983 as long as a sufficient causal connection is present and the plaintiff was deprived under color of law of a federally secured right.' " (*Starr, supra,* 652 F.3d at p. 1207, internal citation omitted.)
- "Respondent . . . argues that, under a theory of 'supervisory liability,' petitioners can be liable for 'knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees.' That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of 'supervisory liability' is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of a clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities." (*Ashcroft v. Iqbal*, *supra*, 556 U.S. at p. 677, internal citations omitted.)
- "The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. Under extant precedent purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.' It instead involves a decisionmaker's undertaking a course of action "because of," not merely "in spite of," [the action's] adverse effects upon an identifiable group.' " (*Ashcroft v. Iqbal, supra*, 556 U.S. at pp. 676–677, internal citations omitted.)
- "*Iqbal* . . . holds that a plaintiff does not state invidious racial discrimination claims against supervisory defendants by pleading that the supervisors knowingly acquiesced in discrimination perpetrated by subordinates, but this holding was based on the elements of invidious discrimination in particular, not on some

blanket requirement that applies equally to all constitutional tort claims. *Iqbal* makes crystal clear that constitutional tort claims against supervisory defendants turn on the requirements of the particular claim—and, more specifically, on the state of mind required by the particular claim—not on a generally applicable concept of supervisory liability. 'The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.' Allegations that the [defendants] knowingly acquiesced in their subordinates' discrimination did not suffice to state invidious racial discrimination claims against them, because such claims require specific intent—something that knowing acquiescence does not establish. On the other hand, because Eighth Amendment claims for cruel and unusual punishment generally require only deliberate indifference (not specific intent), a Sheriff is liable for prisoner abuse perpetrated by his subordinates if he knowingly turns a blind eye to the abuse. The Sheriff need not act with the purpose that the prisoner be abused. Put simply, constitutional tort liability after *Iqbal* depends primarily on the requisite mental state for the violation alleged." (*OSU Student Alliance, supra*, 699 F.3d at p. 1071, internal citations omitted.)

- " '[S]upervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy "itself is a repudiation of constitutional rights" and is the "moving force of a constitutional violation." ' " (*Crowley v. Bannister* (9th Cir. 2013) 734 F.3d 967, 977.)
- "When a supervisory official advances or manages a policy that instructs its adherents to violate constitutional rights, then the official specifically intends for such violations to occur. Claims against such supervisory officials, therefore, do not fail on the state of mind requirement, be it intent, knowledge, or deliberate indifference. *Iqbal* itself supports this holding. There, the Court rejected the invidious discrimination claims against [supervisory defendants] because the complaint failed to show that those defendants advanced a policy of purposeful discrimination (as opposed to a policy geared simply toward detaining individuals with a 'suspected link to the [terrorist] attacks'), not because it found that the complaint had to allege that the supervisors intended to discriminate against [plaintiff] in particular. Advancing a policy that requires subordinates to commit constitutional violations is always enough for § 1983 liability, no matter what the required mental state, so long as the policy proximately causes the harm—that is, so long as the plaintiff's constitutional injury in fact occurs pursuant to the policy." (*OSU Student Alliance, supra*, 699 F.3d at p. 1076.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 413

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 8

2 Civil Rights Actions, Ch. 7, *Deprivation of Rights Under Color of State Law—General Principles*, ¶ 7.10 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.20[4][a] (Matthew Bender)

3006–3019. Reserved for Future Use

3020. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] used excessive force in [arresting/detaining] [him/her/*nonbinary pronoun*] in violation of the Fourth Amendment to the United States Constitution. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] used force in [arresting/detaining] [*name of plaintiff*];**
2. **That the force used by [*name of defendant*] was excessive;**
3. **That [*name of defendant*] was acting or purporting to act in the performance of [his/her/*nonbinary pronoun*] official duties;**
4. **That [*name of plaintiff*] was harmed; and**
5. **That [*name of defendant*]'s use of excessive force was a substantial factor in causing [*name of plaintiff*]'s harm.**

Under the Fourth Amendment, force is excessive if it is not reasonably necessary under the circumstances. In deciding whether force is reasonably necessary or excessive, you should determine, based on all of the facts and circumstances, what force a reasonable law enforcement officer on the scene would have used under the same or similar circumstances. You should consider the following:

(a) Whether [*name of plaintiff*] reasonably appeared to pose an immediate threat to the safety of [*name of defendant*] or others;

(b) The seriousness of the crime at issue [or other circumstances known to [*name of defendant*] at the time force was applied];

(c) Whether [*name of plaintiff*] was actively [resisting [arrest/detention]/ [or] attempting to avoid [arrest/detention] by flight];

(d) The amount of time [*name of defendant*] had to determine the type and amount of force that reasonably appeared necessary, and any changing circumstances during that time period[; and/.]

[(e) The type and amount of force used[; and/.]]

(f) [*Specify other factors particular to the case*].]

New September 2003; Revised June 2012; Renumbered from CACI No. 3001 December 2012; Revised June 2015, June 2016, May 2020, November 2020

Directions for Use

The Fourth Amendment's "objective reasonableness" standard applies to all claims of excessive force against law enforcement officers in the course of making an arrest, investigatory stop, or other seizure brought under Title 42 United States Code section 1983, whether deadly or not. (*Scott v. Harris* (2007) 550 U.S. 372, 381–385 [127 S.Ct. 1769, 167 L.Ed.2d 686].)

The "official duties" referred to in element 3 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

Factors (a), (b), and (c) are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 673 F.3d 864, 872.) Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given, and whether it should have been apparent to officers that the person they used force against was emotionally disturbed. (*Id.*) These and other additional factors may be added if appropriate to the facts of the case.

Claims of excessive force brought by pretrial detainees are governed by the Fourteenth Amendment's Due Process Clause and are also analyzed under an objective reasonableness standard. (*Kingsley v. Hendrickson* (2015) 576 U.S. 389 [135 S.Ct. 2466, 2473, 192 L.Ed.2d 416].) Modify the instruction for use in a case brought by a pretrial detainee involving the use of excessive force after arrest, but before conviction. For an instruction on an excessive force claim brought by a convicted prisoner, see CACI No. 3042, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force*.

The legality or illegality of the use of deadly force under state law is not relevant to the constitutional question. (Cf. *People v. McKay* (2002) 27 Cal.4th 601, 610 [117 Cal.Rptr.2d 236, 41 P.3d 59] ["[T]he [United States Supreme Court] has repeatedly emphasized that the Fourth Amendment inquiry does not depend on whether the challenged police conduct was authorized by state law"]; see also Pen. Code, § 835a.)

For instructions for use in a negligence claim under California common law based on the same event and facts, see CACI No. 440, *Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*, and CACI No. 441, *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*. For an instruction for use alleging excessive force as a battery, see CACI No. 1305A, *Battery by Law Enforcement Officer (Nondeadly Force)—Essential Factual Elements*, and CACI No. 1305B, *Battery by Peace Officer (Deadly Force)—Essential Factual Elements*.

Sources and Authority

- "In addressing an excessive force claim brought under § 1983, analysis begins

by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." (*Graham, supra,* 490 U.S. at p. 395, internal citations and footnote omitted.)

- "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person." (*Graham, supra,* 490 U.S. at p. 394.)
- "In deciding whether the force deliberately used is, constitutionally speaking, 'excessive,' should courts use an objective standard only, or instead a subjective standard that takes into account a defendant's state of mind? It is with respect to *this* question that we hold that courts must use an objective standard." (*Kingsley, supra,* 576 U.S. at p. 396, original italics.)
- "[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (*Graham, supra,* 490 U.S. at p. 395.)
- "The question in this case is whether a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting. The answer is yes: The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person." (*Torres v. Madrid* (2021) ___ U.S. ___ [141 S.Ct. 989, 993–994, 209 L.Ed.2d 190].)
- " 'The intrusiveness of a seizure by means of deadly force is unmatched.' 'The use of deadly force implicates the highest level of Fourth Amendment interests both because the suspect has a "fundamental interest in his own life" and because such force "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." ' " (*Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1031.)
- "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham, supra,* 490 U.S. at p. 396.)
- "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' . . . its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citation omitted.)

- "The most important of these [factors from *Graham*, above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553].)
- "[The *Graham*] factors, however, are not exclusive. We 'examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." ' Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." (*Glenn, supra,* 673 F.3d at p. 872, internal citations omitted.)
- "With respect to the possibility of less intrusive force, officers need not employ the least intrusive means available[,] so long as they act within a range of reasonable conduct." (*Estate of Lopez v. Gelhaus* (9th Cir. 2017) 871 F.3d 998, 1006.)
- "Although officers are not required to use the least intrusive degree of force available, 'the availability of alternative methods of capturing or subduing a suspect may be a factor to consider.' " (*Vos, supra,* 892 F.3d at p. 1033, internal citation omitted.)
- "Courts 'also consider, under the totality of the circumstances, the quantum of force used to arrest the plaintiff, the availability of alternative methods of capturing or detaining the suspect, and the plaintiff's mental and emotional state.' " (*Brooks v. Clark County* (9th Cir. 2016) 828 F.3d 910, 920.)
- "Because the reasonableness standard 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.' " (*Torres v. City of Madera* (9th Cir. 2011) 648 F.3d 1119, 1125.)
- "Justice Stevens incorrectly declares [the 'objective reasonableness' standard under *Graham*] to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.' At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, the reasonableness of [defendant]'s actions—or, in Justice Stevens' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,' is a pure question of law." (*Scott, supra,* 550 U.S. at p. 381, fn. 8, original italics, internal citations omitted.)
- "Because there are no genuine issues of material fact and 'the relevant set of facts' has been determined, the reasonableness of the use of force is 'a pure question of law.' " (*Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1256 (en banc).)
- "In assessing the objective reasonableness of a particular use of force, we

consider: (1) 'the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted,' (2) 'the government's interest in the use of force,' and (3) the balance between 'the gravity of the intrusion on the individual' and 'the government's need for that intrusion.' " (*Lowry, supra,* 858 F.3d at p. 1256.)

- "To be sure, the reasonableness inquiry in the context of excessive force balances 'intrusion[s] on the individual's Fourth Amendment interests' against the government's interests. But in weighing the evidence in favor of the officers, rather than the [plaintiffs], the district court unfairly tipped the reasonableness inquiry in the officers' favor." (*Sandoval v. Las Vegas Metro. Police Dep't* (9th Cir. 2014) 756 F.3d 1154, 1167, internal citation omitted.)
- "The district court found that [plaintiff] stated a claim for excessive use of force, but that governmental interests in officer safety, investigating a possible crime, and controlling an interaction with a potential domestic abuser outweighed the intrusion upon [plaintiff]'s rights. In reaching this conclusion, the court improperly 'weigh[ed] conflicting evidence with respect to . . . disputed material fact[s].' " (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 880.)
- "The Fourth Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under tort law, and negligent acts do not incur constitutional liability." (*Hayes v. County of San Diego* 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].)
- "[S]tate negligence law, which considers the totality of the circumstances surrounding any use of deadly force, is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used." (*Hayes, supra,* 57 Cal.4th at p. 639, internal citations omitted.)
- "While a Fourth Amendment violation cannot be established 'based merely on bad tactics that result in a deadly confrontation that could have been avoided,' the events leading up to the shooting, including the officers tactics, are encompassed in the facts and circumstances for the reasonableness analysis." (*Vos, supra,* 892 F.3d at p. 1034, internal citations omitted.)
- "We are cognizant of the Supreme Court's command to evaluate an officer's actions 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' We also recognize the reality that 'police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.' This does not mean, however, that a Fourth Amendment violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim's conduct. Nor does it mean that we can base our analysis on what officers actually felt or believed during an incident. Rather, we must ask if the officers' conduct is ' "objectively reasonable" in light of the facts and circumstances confronting them' without regard for an officer's subjective intentions." (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 831, internal citations omitted.)

- "The following considerations may bear on the reasonableness (or unreasonableness) of the force used: 'the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.' The most important factor is whether the suspect posed an immediate threat. This analysis is not static, and the reasonableness of force may change as the circumstances evolve." (*Hyde v. City of Willcox* (9th Cir. 2022) 23 F.4th 863, 870, internal citations omitted.)
- "Deadly force is permissible only 'if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.' " (*A. K. H. v. City of Tustin* (9th Cir. 2016) 837 F.3d 1005, 1011.)
- "[A]n officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force '[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.' " (*Wilkinson v. Torres* (9th Cir. 2010) 610 F.3d 546, 550, internal citations omitted.)
- "It is clearly established law that shooting a fleeing suspect in the back violates the suspect's Fourth Amendment rights. 'Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.' " (*Foster v. City of Indio* (9th Cir. 2018) 908 F.3d 1204, 1211.)
- " '[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.' But terminating a threat doesn't necessarily mean terminating the suspect. If the suspect is on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting." (*Zion v. County of Orange* (9th Cir. 2017) 874 F.3d 1072, 1076, internal citation omitted.)
- "Resistance, or the reasonable perception of resistance, does not entitle police officers to use any amount of force to restrain a suspect. Rather, police officers who confront actual (or perceived) resistance are only permitted to use an amount of force that is reasonable to overcome that resistance." (*Barnard v. Theobald* (9th Cir. 2013) 721 F.3d 1069, 1076, internal citations omitted.)
- "[T]he fact that the 'suspect was armed with a deadly weapon' does *not* render the officers' response per se reasonable under the Fourth Amendment. [¶] This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious

verbal threat might create an immediate threat." (*George v. Morris* (9th Cir. 2013) 724 F.3d 1191, 1200, original italics, internal citations omitted.)

- "Two cases published about three years before the April 2016 incident, *Hayes v. County of San Diego* and *George v. Morris*, made 'clear to a reasonable officer' that a police officer may not use deadly force against a non-threatening individual, even if the individual is armed, and even if the situation is volatile." (*Estate of Aguirre v. County of Riverside* (9th Cir. 2022) 29 F.4th 624, 629.)
- " '[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.' Here, whether objective factors supported [defendant]'s supposed subjective fear is not a question that can be answered as a matter of law based upon the limited evidence in the record, especially given that on summary judgment that evidence must be construed in the light most favorable to [plaintiff], the non-moving party. Rather, whether [defendant]'s claim that he feared a broccoli-based assault is credible and reasonable presents a genuine question of material fact that must be resolved not by a court ruling on a motion for summary judgment but by a jury in its capacity as the trier of fact." (*Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1163–1164.)
- "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." (*Fetters v. County of Los Angeles* (2016) 243 Cal.App.4th 825, 838 [196 Cal.Rptr.3d 848].)
- "Where . . . 'an officer's particular use of force is based on a mistake of fact, we ask whether a reasonable officer would have or *should* have accurately perceived that fact.' '[W]hether the mistake was an *honest* one is not the concern, only whether it was a *reasonable* one.' " (*Nehad v. Browder* (9th Cir. 2019) 929 F.3d 1125, 1133, original italics, internal citation and footnote omitted.)
- "Although *Graham* does not specifically identify as a relevant factor whether the suspect poses a threat to *himself*, we assume that the officers could have used some reasonable level of force to try to prevent [decedent] from taking a suicidal act. But we are aware of no published cases holding it reasonable to use a *significant* amount of force to try to stop someone from attempting suicide. Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this one the 'solution' could be worse than the problem." (*Glenn, supra,* 673 F.3d at p. 872.)
- "This Court has 'refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.' The Court has, however, 'found that even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a

mentally ill individual.' A reasonable jury could conclude, based upon the information available to [defendant officer] at the time, that there were sufficient indications of mental illness to diminish the governmental interest in using deadly force." (*Hughes v. Kisela* (9th Cir. 2016) 841 F.3d 1081, 1086.)

- "Whether an officer warned a suspect that failure to comply with the officer's commands would result in the use of force is another relevant factor in an excessive force analysis." (*Nehad, supra,* 929 F.3d at p. 1137.)
- "By contrast, if the officer warned the offender that he would employ force, but the suspect refused to comply, the government has an increased interest in the use of force." (*Marquez v. City of Phoenix* (9th Cir. 2012) 693 F.3d 1167, 1175, internal citation omitted.)
- "[P]reshooting conduct is included in the totality of circumstances surrounding an officer's use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct. But in a case like this one, where the preshooting conduct did not cause the plaintiff any injury independent of the injury resulting from the shooting, the reasonableness of the officers' preshooting conduct should not be considered in isolation. Rather, it should be considered in relation to the question whether the officers' ultimate use of deadly force was reasonable." (*Hayes, supra,* 57 Cal.4th at p. 632, internal citation omitted.)
- "Sometimes, however, officers themselves may 'unnecessarily creat[e] [their] own sense of urgency.' Reasonable triers of fact can, taking the totality of the circumstances into account, conclude that an officer's poor judgment or lack of preparedness caused him or her to act unreasonably, 'with undue haste.' " (*Nehad, supra,* 929 F.3d at p. 1135, internal citation and footnote omitted.)
- "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied." (*Nelson v. City of Davis* (9th Cir. 2012) 685 F.3d 867, 875.)
- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)
- "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff

must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." (*Heck v. Humphrey* (1994) 512 U.S. 477, 486–487 [114 S.Ct. 2364, 129 L.Ed.2d 383], footnotes and internal citation omitted.)

- "*Heck* requires the reviewing court to answer three questions: (1) Was there an underlying conviction or sentence relating to the section 1983 claim? (2) Would a 'judgment in favor of the plaintiff [in the section 1983 action] "necessarily imply" . . . the invalidity of the prior conviction or sentence?' (3) 'If so, was the prior conviction or sentence already invalidated or otherwise favorably terminated?' " (*Fetters, supra*, 243 Cal.App.4th at p. 834.)
- "The *Heck* inquiry does not require a court to consider whether the section 1983 claim would establish beyond all doubt the invalidity of the criminal outcome; rather, a court need only 'consider whether a judgment in favor of the plaintiff would necessarily *imply* the invalidity of his conviction or sentence.' " (*Fetters, supra*, 243 Cal.App.4th at p. 841, original italics.)
- "[A] dismissal under section 1203.4 does not invalidate a conviction for purposes of removing the *Heck* bar preventing a plaintiff from bringing a civil action." (*Baranchik v. Fizulich* (2017) 10 Cal.App.5th 1210, 1224 [217 Cal.Rptr.3d 423].)
- "[Plaintiff]'s section 1983 claim *is* barred to the extent it alleges that [the arresting officer] lacked justification to arrest him or to respond with reasonable force to his resistance. The use of deadly force in this situation, though, requires a separate analysis. 'For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' " (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 899 [76 Cal.Rptr.3d 787, 183 P.3d 471], original italics.)
- "Plaintiffs contend that the use of force is unlawful because the arrest itself is unlawful. But that is not so. We have expressly held that claims for false arrest

and excessive force are analytically distinct." (*Sharp v. County of Orange* (9th Cir. 2017) 871 F.3d 901, 916.)

- "[T]he district court effectively required the jury to presume that the arrest *was* constitutionally lawful, and so not to consider facts concerning the basis for the arrest. Doing so removed critical factual questions that were within the jury's province to decide. For instance, by taking from the jury the question whether [officer]'s arrest of [plaintiff] for resisting or obstructing a police officer was lawful, the district judge implied simultaneously that [plaintiff] was in fact resisting or failing to obey the police officer's lawful instructions. Presuming such resistance could certainly have influenced the jury's assessment of 'the need for force,' as well as its consideration of the other *Graham* factors, including 'whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight. By erroneously granting judgment as a matter of law on [plaintiff]'s unlawful arrest claim, the district court impermissibly truncated the jury's consideration of [plaintiff]'s excessive force claim." (*Velazquez v. City of Long Beach* (9th Cir. 2015) 793 F.3d 1010, 1027, original italics.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 902

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶¶ 10.00–10.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3021. Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully arrested [him/her/***nonbinary pronoun***] because [he/she/***nonbinary pronoun***] did not have a warrant. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] arrested [***name of plaintiff***] without a warrant [and without probable cause];**
2. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties;**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] was arrested without probable cause. But in order for me to do so, you must first decide:**

[*List all factual disputes that must be resolved by the jury.***]]**

New April 2009; Revised December 2009; Renumbered from CACI No. 3014 December 2012, June 2016

Directions for Use

Give this instruction in a false arrest case brought under title 42 United States Code section 1983. For an instruction for false arrest under California law, see CACI No. 1401, *False Arrest Without Warrant by Peace Officer—Essential Factual Elements*.

The ultimate determination of whether the arresting officer had probable cause (element 1) is to be made by the court as a matter of law. (*Hunter v. Bryant* (1991) 502 U.S. 224, 227–228 [112 S.Ct. 534, 116 L.Ed.2d 589].) However, in exercising this role, the court does not sit as the trier of fact. It is still the province of the jury to determine the facts on conflicting evidence as to what the arresting officer knew at the time. (See *Velazquez v. City of Long Beach* (9th Cir. 2015) 793 F.3d 1010, 1018–1023; see also *King v. State of California* (2015) 242 Cal.App.4th 265, 289 [195 Cal.Rptr.3d 286].) Include "without probable cause" in element 1 and the last optional paragraph if the jury will be asked to find facts with regard to probable cause.

The "official duties" referred to in element 2 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 2.

Sources and Authority

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)
- " 'A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification.' 'Probable cause exists if the arresting officers "had knowledge and reasonably trustworthy information of facts and circumstances sufficient to lead a prudent person to believe that [the arrestee] had committed or was committing a crime." ' " (*Gravelet-Blondin v. Shelton* (9th Cir. 2013) 728 F.3d 1086, 1097–1098.)
- "The Court of Appeals' confusion is evident from its statement that 'whether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.' This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." (*Hunter, supra*, 502 U.S. at pp. 227–228, internal citations omitted.)
- "The mere existence of some evidence that could suggest self-defense does not negate probable cause. [Plaintiff]'s claim of self-defense apparently created doubt in the minds of the jurors, but probable cause can well exist (and often does) even though ultimately, a jury is not persuaded that there is proof beyond a reasonable doubt." (*Yousefian v. City of Glendale* (9th Cir. 2015) 779 F.3d 1010, 1014.)
- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." 'By contrast, an officer who is' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)
- "Although the plaintiff bears the burden of proof on the issue of unlawful arrest,

she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of production falls on the defendant." (*Dubner v. City & County of San Francisco* (9th Cir. 2001) 266 F.3d 959, 965.)

- "There is no bright-line rule to establish whether an investigatory stop has risen to the level of an arrest. Instead, this difference is ascertained in light of the ' "totality of the circumstances." ' This is a highly fact-specific inquiry that considers the intrusiveness of the methods used in light of whether these methods were 'reasonable *given the specific circumstances*.' " (*Green v. City & County of San Francisco* (9th Cir. 2014) 751 F.3d 1039, 1047, original italics, internal citations omitted.)
- "Because stopping an automobile and detaining its occupants, 'even if only for a brief period and for a limited purpose,' constitutes a 'seizure' under the Fourth Amendment, an official must have individualized 'reasonable suspicion' of unlawful conduct to carry out such a stop." (*Tarabochia v. Adkins* (9th Cir. 2014) 766 F.3d 1115, 1121, internal citation omitted.)
- " '[Q]ualified immunity is a question of law, not a question of fact. [Citation.] But Defendants are only entitled to qualified immunity as a matter of law if, taking the facts in the light most favorable to [the plaintiff], they violated no clearly established constitutional right. The court must deny the motion for judgment as a matter of law if reasonable jurors could believe that Defendants violated [the plaintiff's] constitutional right, and the right at issue was clearly established.' 'The availability of qualified immunity after a trial is a legal question informed by the jury's findings of fact, but ultimately committed to the court's judgment.' " '[D]eference to the jury's view of the facts persists throughout each prong of the qualified immunity inquiry.' " '[T]he jury's view of the facts must govern our analysis once litigation has ended with a jury's verdict.' 'Where, as here, the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability.' " (*King, supra*, 242 Cal.App.4th at p. 289, internal citations omitted.)
- "[Plaintiff] did have a constitutional right under the Fourth Amendment to be free from involuntary detention without probable cause. Therefore, the issue is whether the undisputed facts demonstrated that a reasonable officer would have believed there was probable cause to detain [plaintiff] under [Welfare and Institutions Code] section 5150." (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 387 [218 Cal.Rptr.3d 38].)
- "[I]f what the policeman knew prior to the arrest is genuinely in dispute, and if a reasonable officer's perception of probable cause would differ depending on the correct version, that factual dispute must be resolved by a fact finder. [Citations.] [¶] . . . [W]e do not find the facts relative to probable cause to arrest, and the alleged related conspiracy, so plain as to lead us to only a single conclusion, i.e., a conclusion in defendants' favor. The facts are complex, intricate and in key

areas contested. Even more important, the inferences to be drawn from the web of facts are disputed and unclear—and are likely to depend on credibility judgments." (*King, supra*, 242 Cal.App.4th at p. 291, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 181

Chin et al., California Practice Guide: Employment Litigation, Ch.7-C, *42 USC § 1983*, ¶ 7:1365 (The Rutter Group)

5 Levy et al., California Torts, Ch. 60, *Principles of Liability and Immunity of Public Entities and Employees*, § 60.06 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.36A (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Institutional and Individual Immunity*, ¶ 2.03 (Matthew Bender)

3022. Unreasonable Search—Search With a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] carried out an unreasonable search of [his/her/***nonbinary pronoun***] [person/home/automobile/office/[***insert other***]]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] searched [***name of plaintiff***]'s [person/home/automobile/office/[***insert other***]];**
2. **That [***name of defendant***]'s search was unreasonable;**
3. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s unreasonable search was a substantial factor in causing [***name of plaintiff***]'s harm.**

In deciding whether the search was unreasonable, you should consider, among other factors, the following:

(a) The scope of the warrant;

(b) The extent of the particular intrusion;

(c) The place in which the search was conducted; [and]

(d) The manner in which the search was conducted; [and]

(e) [*Insert other applicable factor***].**

New September 2003; Renumbered from CACI No. 3002 December 2012; Revised November 2017

Directions for Use

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

This instruction may be modified to assert a claim for an unreasonable detention while a search warrant is being executed by referencing the detention in elements 2 and 5, in the sentence introducing the factors, and in factor (d). Additional factors relevant to the reasonableness of the detention should be included under factor (e). (See *Davis v. United States* (9th Cir. 2017) 854 F.3d 594, 599.)

Sources and Authority

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)
- "Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search not subject to suppression." (*U.S. v. Ramirez* (1998) 523 U.S. 65, 71 [118 S.Ct. 992, 140 L.Ed.2d 191.)
- " 'The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.' " (*Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834], internal citation omitted.)
- " '[T]he Fourth Amendment proscribes only "unreasonable" searches and seizures.' The reasonableness of a search or seizure depends 'not only on *when* [it] is made, but also *how* it is carried out.' 'In other words, even when supported by probable cause, a search or seizure may be invalid if carried out in an unreasonable fashion.' " (*Cameron v. Craig* (9th Cir. 2013) 713 F.3d 1012, 1021, original italics, internal citation omitted.)
- "Under the Fourth Amendment, 'a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.' Nevertheless, 'special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case.' For instance, search-related detentions that are 'unnecessarily painful [or] degrading' and 'lengthy detentions[] of the elderly, or of children, or of individuals suffering from a serious illness or disability raise additional concerns.' Thus, a 'seizure must be "carefully tailored' to the law enforcement interests that . . . justify detention while a search warrant is being executed.' " (*Davis, supra,* 854 F.3d at p. 599, internal citations omitted.)
- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties.' " By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," " does not act under color

of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)
- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1989) 865 F.2d 1539, 1540, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892 et seq.

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.04 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes,* § 113.14 (Matthew Bender)

3023. Unreasonable Search or Seizure—Search or Seizure Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] carried out an unreasonable [search/seizure] of [his/her/***nonbinary pronoun***] [person/home/automobile/office//property/[***insert other***]] because [he/she/***nonbinary pronoun***] did not have a warrant. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [searched/seized] [***name of plaintiff***]'s [person/home/automobile/office/property/[***insert other***]];**
2. **That [***name of defendant***] did not have a warrant;**
3. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s [search/seizure] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Renumbered from CACI No. 3003 December 2012; Revised November 2019

Directions for Use

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

Sources and Authority

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)
- "A Fourth Amendment 'search' occurs when a government agent 'obtains information by physically intruding on a constitutionally protected area,' or infringes upon a 'reasonable expectation of privacy,' As we have explained, . . . 'when the government "physically occupie[s] private property for the purpose of obtaining information," a Fourth Amendment search occurs, regardless whether the intrusion violated any reasonable expectation of privacy. Only where the

search *did not* involve a physical trespass do courts need to consult *Katz*'s reasonable-expectation-of-privacy test.' " (*Whalen v. McMullen* (9th Cir. 2018) 907 F.3d 1139, 1146–1147, original italics, internal citations omitted.)

- "[A] seizure conducted without a warrant is *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (*Sandoval v. County of Sonoma* (9th Cir. 2018) 912 F.3d 509, 515, original italics.)
- "[F]or the purposes of § 1983, a properly issued warrant makes an officer's otherwise unreasonable entry non-tortious—that is, not a trespass. Absent a warrant or consent or exigent circumstances, an officer must not enter; it is the entry that constitutes the breach of duty under the Fourth Amendment. As a result, the relevant counterfactual for the causation analysis is not what would have happened had the officers procured a warrant, but rather, what would have happened had the officers not unlawfully entered the residence." (*Mendez v. County of Los Angeles* (9th Cir. 2018) 897 F.3d 1067, 1076.)
- "[T]here is no talismanic distinction, for Fourth Amendment purposes, between a warrantless 'entry' and a warrantless 'search.' 'The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home.' " (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 874.)
- " 'The Fourth Amendment prohibits only unreasonable searches . . . . [¶] The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.' " (*Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834], internal citation omitted.)
- " '[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' 'And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?' An officer's good faith is not enough." (*King v. State of California* (2015) 242 Cal.App.4th 265, 283 [195 Cal.Rptr.3d 286], internal citations omitted.)
- "Thus, the fact that the officers' reasonable suspicion of wrongdoing is not particularized to each member of a group of individuals present at the same location does not automatically mean that a search of the people in the group is unlawful. Rather, the trier of fact must decide whether the search was reasonable in light of the circumstances." (*Lyall v. City of Los Angeles* (9th Cir. 2015) 807 F.3d 1178, 1194.)

- " 'It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant.' Thus, a warrantless entry into a residence is presumptively unreasonable and therefore unlawful. Government officials 'bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.' " (*Conway, supra,* 45 Cal.App.4th at p. 172, internal citations omitted.)
- " '[I]t is a "basic principle of Fourth Amendment law" ' that warrantless searches of the home or the curtilage surrounding the home 'are presumptively unreasonable.' " (*Bonivert*, *supra*, 883 F.3d at p. 873.)
- "The Fourth Amendment shields not only actual owners, but also anyone with sufficient possessory rights over the property searched. . . . To be shielded by the Fourth Amendment, a person needs 'some joint control and supervision of the place searched,' not merely permission to be there." (*Lyall, supra,* 807 F.3d at pp. 1186–1187.)
- "[T]he Fourth Amendment's 'prohibition on unreasonable searches and seizures applies to searches conducted by public school officials.' " (*Scott v. County of San Bernardino* (9th Cir. 2018) 903 F.3d 943, 948.)
- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties.' " By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," " does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)
- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)
- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1989) 865 F.2d 1539, 1540, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 888, 892, 893

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.04 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes,* § 113.14 (Matthew Bender)

3024. Affirmative Defense—Search Incident to Lawful Arrest

[*Name of defendant*] claims that the search was reasonable and that a search warrant was not required. To succeed, [*name of defendant*] must prove all of the following:

1. **That the search was conducted as part of a lawful arrest of [*name of plaintiff*];**
2. **That [*name of defendant*] searched only [*name of plaintiff*] and the area within which [he/she/*nonbinary pronoun*] might have gained possession of a weapon or might have destroyed or hidden evidence; and**
3. **That the search was reasonable under the circumstances.**

In deciding whether the search was reasonable, you should consider, among other factors, the following:

(a) The extent of the particular intrusion;

(b) The place in which the search was conducted; [and]

(c) The manner in which the search was conducted; [and]

(d) [*insert other applicable factor*].

New September 2003; Renumbered from CACI No. 3004 December 2012

Directions for Use

For instructions regarding whether an arrest is lawful, see instructions in the False Imprisonment series (CACI Nos. 1400–1409).

This instruction is not intended for use in cases involving automobile searches: "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." (*New York v. Belton* (1981) 453 U.S. 454, 460 [101 S.Ct. 2860, 69 L.Ed.2d 768], footnotes omitted.)

Sources and Authority

- "Searches incident to lawful arrest constitute a well-established exception to the warrant requirement of the Fourth Amendment." (*Hallstrom v. Garden City* (9th Cir. 1993) 991 F.2d 1473, 1477, internal citations omitted.)
- "Under applicable federal law, a lawful custodial arrest creates a situation which justifies the full contemporaneous search without a warrant of the person arrested and of the immediately surrounding area. Such searches are considered valid because of the need to remove weapons and to prevent the concealment or destruction of evidence." (*People v. Gutierrez* (1984) 163 Cal.App.3d 332,

334–335 [209 Cal.Rptr. 376], internal citations omitted.)

- "Law enforcement officers are permitted to search the entire passenger compartment of a car, including the inside of containers, during a 'search incident to arrest.' " (*United States v. Tank* (2000) 200 F.3d 627, 631, fn. 6, internal citations omitted.)
- "In *New York v. Belton,* we determined that the lower courts 'have found no workable definition of "the area within the immediate control of the arrestee" when that area arguably includes the interior of an automobile and the arrestee is its recent occupant.' In order to provide a 'workable rule,' we held that 'articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon" . . . .' We also held that the police may examine the contents of any open or closed container found within the passenger compartment, 'for if the passenger compartment is within the reach of the arrestee, so will containers in it be within his reach.' " (*Michigan v. Long* (1983) 463 U.S. 1032, 1048–1049 [103 S.Ct. 3469, 77 L.Ed.2d 1201], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892, 893

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes,* § 113.14 (Matthew Bender)

3025. Affirmative Defense—Consent to Search

[*Name of defendant***] claims that the search was reasonable and that a search warrant was not required because [***name of plaintiff/third person***] consented to the search. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [[***name of plaintiff***]/[***name of third person***], who controlled or reasonably appeared to have control of the area,] knowingly and voluntarily consented to the search; and**
2. **That the search was reasonable under all of the circumstances.**

[[*Name of third person***]'s consent is insufficient if [***name of plaintiff***] was physically present and expressly refused to consent to the search.]**

In deciding whether the search was reasonable, you should consider, among other factors, the following:

(a) The extent of the particular intrusion;

(b) The place in which the search was conducted; [and]

(c) The manner in which the search was conducted; [and]

(d) [*insert other applicable factor(s)***].**

New September 2003; Revised April 2009; Renumbered from CACI No. 3005 December 2012

Directions for Use

Give the optional paragraph after element 2 if the defendant relied on the consent of someone other than the plaintiff to initiate the search. (See *Georgia v. Randolph* (2006) 547 U.S. 103, 106 [126 S.Ct. 1515, 164 L.Ed.2d 208].)

Sources and Authority

- "The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched or from a third party who possesses common authority over the premises." (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 181 [110 S.Ct. 2793, 111 L.Ed.2d 148], internal citations omitted.)
- " '[C]ommon authority' rests 'on mutual use of the property by persons generally having joint access or control for most purposes . . . .' The burden of establishing that common authority rests upon the State." (*Illinois v. Rodriguez, supra,* 497 U.S. at p. 181, internal citation omitted.)
- "The Fourth Amendment recognizes a valid warrantless entry and search of

premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. The question here is whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent. We hold that, in the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." (*Georgia, supra,* 547 U.S. at p. 106, internal citations omitted.)

- "Where consent is relied upon to justify the lawfulness of a search, the government 'has the burden of proving that the consent was, in fact, freely and voluntarily given.' 'The issue of whether or not consent to search was freely and voluntarily given is one of fact to be determined on the basis of the totality of the circumstances.' " (*U.S. v. Henry* (9th Cir. 1980) 615 F.2d 1223, 1230, internal citations omitted.)
- "Whether consent was voluntarily given 'is to be determined from the totality of all the circumstances.' We consider the following factors to assess whether the consent was voluntary: (1) whether the person was in custody; (2) whether the officers had their guns drawn; (3) whether a Miranda warning had been given; (4) whether the person was told that he had the right not to consent; and (5) whether the person was told that a search warrant could be obtained. Although no one factor is determinative in the equation, 'many of this court's decisions upholding consent as voluntary are supported by at least several of the factors.' " (*U.S. v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1026–1027, internal citations omitted.)
- "According to [defendant], 'express refusal means verbal refusal.' We disagree, as this interpretation finds no support in either common sense or the case law." (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 875.)
- "In determining whether a person consented to an intrusion into her home, we distinguish between 'undercover' entries, where a person invites a government agent who is concealing that he is a government agent into her home, and 'ruse' entries, where a known government agent misrepresents his purpose in seeking entry. The former does not violate the Fourth Amendment, as long as the undercover agent does not exceed the scope of his invitation while inside the home. But '[a] ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent.' " (*Whalen v. McMullen* (9th Cir. 2018) 907 F.3d 1139, 1146–1147, internal citations omitted.)
- "Because he entered the home while using a ruse and not while undercover, it is immaterial that he stayed within [plaintiff]'s presence in the home and did not conduct a broader search. He did not have consent to be in the home for the purposes of his visit." (*Whalen*, *supra*, 907 F.3d at p. 1150.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892, 893

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes,* § 113.14 (Matthew Bender)

3026. Affirmative Defense—Exigent Circumstances

[*Name of defendant***] claims that a search warrant was not required. To succeed, [***name of defendant***] must prove both of the following:**

1. **That a reasonable officer would have believed that, under the circumstances, there was not enough time to get a search warrant because entry or search was necessary to prevent [***insert one of the following:***]**

   [physical harm to the officer or other persons;]

   [the destruction or concealment of evidence;]

   [the escape of a suspect;] and

2. **That the search was reasonable under the circumstances.**

In deciding whether the search was reasonable, you should consider, among other factors, the following:

(a) The extent of the particular intrusion;

(b) The place in which the search was conducted; [and]

(c) The manner in which the search was conducted; [and]

(d) [*Insert other applicable factor***].**

New September 2003; Renumbered from CACI No. 3006 December 2012

Sources and Authority

- "Absent consent, exigent circumstances must exist for a warrantless entry into a home, despite probable cause to believe that a crime has been committed or that incriminating evidence may be found inside. Such circumstances are 'few in number and carefully delineated.' 'Exigent circumstances' means 'an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 172 [52 Cal.Rptr.2d 777], internal citation omitted.)
- "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 750 [104 S.Ct. 2091, 80 L.Ed.2d 732].)
- " 'There are two general exceptions to the warrant requirement for home searches: exigency and emergency.' These exceptions are 'narrow' and their boundaries are 'rigorously guarded' to prevent any expansion that would unduly

interfere with the sanctity of the home. In general, the difference between the two exceptions is this: The 'emergency' exception stems from the police officers' 'community caretaking function' and allows them 'to respond to emergency situations' that threaten life or limb; this exception does '*not* [derive from] police officers' function as criminal investigators.' By contrast, the 'exigency' exception does derive from the police officers' investigatory function; it allows them to enter a home without a warrant if they have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is 'necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.' (*Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3d 752, 763, original italics, internal citations omitted.)

- "[D]etermining whether an official had 'reasonable cause to believe exigent circumstances existed in a given situation . . . [is a] "question[] of fact to be determined by a jury." [Citation.]' " (*Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1475 [150 Cal.Rptr.3d 735].)
- "There is no litmus test for determining whether exigent circumstances exist, and each case must be decided on the facts known to the officers at the time of the search or seizure. However, two primary considerations in making this determination are the gravity of the underlying offense and whether the delay in seeking a warrant would pose a threat to police or public safety." (*Conway, supra,* 45 Cal.App.4th at p. 172.)
- " '[W]hile the commission of a misdemeanor offense,' such as the petty theft that [defendants] were investigating, 'is not to be taken lightly, it militates against a finding of exigent circumstances where the offense . . . is not inherently dangerous.' " (*Lyall v. City of Los Angeles* (9th Cir. 2015) 807 F.3d 1178, 1189.)
- "Finally, even where exigent circumstances exist, '[t]he search must be "strictly circumscribed by the exigencies which justify its initiation." ' 'An exigent circumstance may justify a search without a warrant. However, after the emergency has passed, the [homeowner] regains his right to privacy, and . . . a second entry [is unlawful].' " (*Conway, supra,* 45 Cal.App.4th at p. 173, internal citation omitted.)
- " 'Exigent circumstances are those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search [] until a warrant could be obtained.' Mere speculation is not sufficient to show exigent circumstances." (*United States v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1027–1028, internal citations omitted.)
- "The government bears the burden of showing specific and articulable facts to justify the finding of exigent circumstances." (*United States v. Iwai* (9th Cir. 2019) 930 F.3d 1141, 1144.)
- "This is a heavy burden and can be satisfied 'only by demonstrating specific and articulable facts to justify the finding of exigent circumstances.' Furthermore,

'the presence of exigent circumstances necessarily implies that there is insufficient time to obtain a warrant; therefore, the government must show that a warrant could not have been obtained in time.' " (*Reid, supra,* 226 F.3d at p. 1028, internal citations omitted.)

- "When the domestic violence victim is still in the home, circumstances may justify an entry pursuant to the exigency doctrine." (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 878.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892, 893

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes,* § 113.14 (Matthew Bender)

3027. Affirmative Defense—Emergency

[*Name of defendant*] claims that a search warrant was not required. To succeed on this defense, [*name of defendant*] must prove that a peace officer, under the circumstances, would have reasonably believed that violence was imminent and that there was an immediate need to protect [[himself/herself/*nonbinary pronoun*]/ [or] another person] from serious harm.

New December 2013

Directions for Use

The emergency defense is similar to the exigent circumstances defense. (See CACI No. 3026, *Affirmative Defense—Exigent Circumstances*.) Emergency requires imminent violence and a need to protect from harm. In contrast, exigent circumstances is broader, reaching such things as a need to prevent escape or the destruction of evidence. (See *Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3d 752, 763.)

Sources and Authority

- " 'There are two general exceptions to the warrant requirement for home searches: exigency and emergency.' These exceptions are 'narrow' and their boundaries are 'rigorously guarded' to prevent any expansion that would unduly interfere with the sanctity of the home. In general, the difference between the two exceptions is this: The 'emergency' exception stems from the police officers' 'community caretaking function' and allows them 'to respond to emergency situations' that threaten life or limb; this exception does '*not* [derive from] police officers' function as criminal investigators.' By contrast, the 'exigency' exception does derive from the police officers' investigatory function; it allows them to enter a home without a warrant if they have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is 'necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.' (*Hopkins, supra*, 573 F.3d at p. 763, original italics, internal citations omitted.)
- "We previously have recognized that officers acting in their community caretaking capacities and responding to a perceived emergency may conduct certain searches without a warrant or probable cause. To determine whether the emergency exception applies to a particular warrantless search, we examine whether: '(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope

and manner were reasonable to meet the need.' " (*Ames v. King County* (9th Cir. 2017) 846 F.3d 340, 350.)

- "The testimony that a reasonable officer would have perceived an immediate threat to his safety is, at a minimum, contradicted by certain portions of the record. The facts matter, and here, there are triable issues of fact as to whether 'violence was imminent,' and whether [defendant]'s warrantless entry was justified under the emergency exception." (*Sandoval v. Las Vegas Metro. Police Dept.* (9th Cir. 2014) 756 F.3d 1154, 1165, internal citation omitted.)
- "In sum, reasonable police officers in petitioners' position could have come to the conclusion that the Fourth Amendment permitted them to enter the . . . residence if there was an objectively reasonable basis for fearing that violence was imminent." (*Ryburn v. Huff* (2012) 565 U.S. 469, 477 [132 S.Ct. 987, 181 L.Ed.2d 966].)
- "[W]e have refused to hold that 'domestic abuse cases create a per se' emergency justifying warrantless entry. [¶] Indeed, all of our decisions involving a police response to reports of domestic violence have required an objectively reasonable basis for believing that an *actual or imminent injury* was unfolding in the place to be entered." (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 877, original italics, internal citations omitted.)
- "[O]fficer safety may also fall under the emergency rubric." (*Sandoval, supra*, 756 F.3d at p. 1163.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892, 893

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.04 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3028–3039. Reserved for Future Use

3040. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her/***nonbinary pronoun***] to prison conditions that violated [his/her/***nonbinary pronoun***] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That while imprisoned, [***describe violation that created risk, e.g., [name of plaintiff] was placed in a cell block with rival gang members***];**
2. **That [***name of defendant***]'s [conduct/failure to act] created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**
3. **That [***name of defendant***] knew that [his/her/***nonbinary pronoun***] [conduct/failure to act] created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**
4. **That [***name of defendant***] disregarded the risk by failing to take reasonable measures to address it;**
5. **That there was no reasonable justification for the [conduct/failure to act];**
6. **That [***name of defendant***] was performing [his/her/***nonbinary pronoun***] official duties when [he/she/***nonbinary pronoun***] [acted/purported to act/failed to act];**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s [conduct/failure to act] was a substantial factor in causing [***name of plaintiff***]'s harm.**

Whether the risk was obvious is a factor that you may consider in determining whether [*name of defendant***] knew of the risk.**

New September 2003; Revised December 2010, June 2011; Renumbered from CACI No. 3011 December 2012; Revised December 2014, June 2015, May 2017, May 2020

Directions for Use

Give this instruction in a case involving conduct that allegedly created a substantial risk of serious harm to an inmate. (See *Farmer v. Brennan* (1994) 511 U.S. 825 [114 S.Ct. 1970, 128 L.Ed.2d 811].) For an instruction on deprivation of medical care, see CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*. For an instruction involving the deprivation of

necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities*.

In element 1, describe the act or omission that created the risk. In elements 2 and 3, choose "conduct" if the risk was created by affirmative action. Choose "failure to act" if the risk was created by an omission.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to the inmate's health or safety. (*Farmer, supra*, 511 U.S. at p. 834.) "Deliberate indifference" involves a two part inquiry. First, the inmate must show that the prison officials were aware of a "substantial risk of serious harm" to the inmate's health or safety, but failed to act to address the danger. (See *Castro v. County of L.A.* (9th Cir. 2016) 833 F.3d 1060, 1073.) Second, the inmate must show that the prison officials had no "reasonable" justification for the conduct, in spite of that risk. (*Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150.) Elements 3, 4, and 5 express the deliberate-indifference components.

The "official duties" referred to in element 6 must be duties created by any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 6.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.
- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)
- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim . . . based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety . . . ." (*Farmer, supra*, 511 U.S. at p. 834, internal citations omitted.)
- "[D]irect causation by affirmative action is not necessary: 'a prison official may be held liable under the Eighth Amendment if he knows that inmates face a substantial risk of serious harm and disregards that risk *by failing to take reasonable measures to abate it*.' " (*Castro, supra*, 833 F.3d at p. 1067, original italics.)
- "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference

from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Farmer, supra*, 511 U.S. at p. 842, internal citation omitted.)

- "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." (*Farmer, supra*, 511 U.S. at p. 843 fn. 8.)
- "We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra*, 511 U.S. at p. 837.)
- "The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement. The Supreme Court has written that the test of *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), which requires only a reasonable relationship to a legitimate penological interest to justify prison regulations, does not apply to Eighth Amendment claims. . . . The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." (*Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240.)
- "We recognize that prison officials have a 'better grasp' of the policies required to operate a correctional facility than either judges or juries. For this reason, in . . . conditions of confinement cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security." (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citation omitted.)
- "However, our precedent should not be misread to suggest that jail officials are automatically entitled to deference instructions in conditions of confinement or excessive force cases brought by prisoners, or § 1983 actions brought by former inmates. We have long recognized that a jury need not defer to prison officials where the plaintiff produces substantial evidence showing that the jail's policy or practice is an unnecessary, unjustified, or exaggerated response to the need for prison security." (*Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176, 1183, internal citations omitted.)
- "Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and postconviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions." (*Shorter, supra*, 895 F.3d at p. 1182, fn. 4.)
- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean

'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 901

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶¶ 11.02–11.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.28 (Matthew Bender)

3041. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] provided [him/her/***nonbinary pronoun***] with inadequate medical care in violation of [his/her/***nonbinary pronoun***] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] had a serious medical need;**
2. **That [***name of defendant***] knew that [***name of plaintiff***] faced a substantial risk of serious harm if [his/her/***nonbinary pronoun***] medical need went untreated;**
3. **That [***name of defendant***] consciously disregarded that risk by not taking reasonable steps to treat [***name of plaintiff***]'s medical need;**
4. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

A serious medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and pointless infliction of pain.

Neither medical negligence alone, nor a difference of opinion between medical personnel or between doctor and patient, is enough to establish a violation of [*name of plaintiff***]'s constitutional rights.**

[In determining whether [*name of defendant***] consciously disregarded a substantial risk, you should consider the personnel, financial, and other resources available to [him/her/***nonbinary pronoun***] or those that [he/she/***nonbinary pronoun***] could reasonably have obtained. [***Name of defendant***] is not responsible for services that [he/she/***nonbinary pronoun***] could not provide or cause to be provided because the necessary personnel, financial, and other resources were not available or could not be reasonably obtained.]**

New September 2003; Revised December 2010; Renumbered from CACI No. 3012 December 2012; Revised June 2014, December 2014, June 2015, May 2020, November 2021

Directions for Use

Give this instruction in a case involving the deprivation of medical care to a

prisoner. For an instruction on a pretrial detainee's claim of inadequate medical care, see CACI No. 3046, *Violation of Pretrial Detainee's Federal Civil Rights—Fourteenth Amendment—Medical Care and Conditions of Confinement*.

For an instruction on the creation of a substantial risk of serious harm, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities*.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to the inmate's health or safety. In a medical-needs case, deliberate indifference requires that the prison officials have known of and disregarded an excessive risk to the inmate's health or safety. Negligence is not enough. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834–837 [114 S.Ct. 1970, 128 L.Ed.2d 811].) Elements 2 and 3 express deliberate indifference.

The "official duties" referred to in element 3 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

The Ninth Circuit has held that in considering whether an individual prison medical provider was deliberately indifferent, the jury should be instructed to consider the economic resources made available to the prison health care system. (See *Peralta v. Dillard* (9th Cir. 2014) 744 F.3d 1076, 1084 [*en banc*].) Although this holding is not binding on California courts, the last optional paragraph may be given if the defendant has presented evidence of lack of economic resources and the court decides that this defense should be presented to the jury.

Sources and Authority

- Deprivation of Civil Rights. Title 42 United States Code section 1983.
- "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under section 1983." (*Estelle v. Gamble* (1976) 429 U.S. 97, 104–105 [97 S.Ct. 285, 50 L.Ed.2d 251], internal citation and footnotes omitted.)
- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim . . . based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the

Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety . . . ." (*Farmer, supra*, 511 U.S. at p. 834, internal citations omitted.)

- " 'To set forth a constitutional claim under the Eighth Amendment predicated upon the failure to provide medical treatment, first the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, a plaintiff must show the defendant's response to the need was deliberately indifferent.' The 'deliberate indifference' prong requires '(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need, and (b) harm caused by the indifference.' 'Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown in the way in which prison [officials] provide medical care.' '[T]he indifference to [a prisoner's] medical needs must be substantial. Mere "indifference," "negligence," or "medical malpractice" will not support this [claim].' Even gross negligence is insufficient to establish deliberate indifference to serious medical needs." (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1081–1082, internal citations omitted.)
- "Indications that a plaintiff has a serious medical need include '[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain.' " (*Colwell v. Bannister* (9th Cir. 2014) 763 F.3d 1060, 1066.)
- "Consistent with that concept and the clear connections between mental health treatment and the dignity and welfare of prisoners, the Eighth Amendment's prohibition against cruel and unusual punishment requires that prisons provide mental health care that meets 'minimum constitutional requirements.' When the level of a prison's mental health care 'fall[s] below the evolving standards of decency that mark the progress of a maturing society,' the prison fails to uphold the constitution's dignitary principles." (*Disability Rights Montana, Inc. v. Batista* (9th Cir. 2019) 930 F.3d 1090, 1097, internal citation omitted.)
- "We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra*, 511 U.S. at p. 837.)
- "The subjective standard of deliberate indifference requires 'more than ordinary lack of due care for the prisoner's interests or safety.' The state of mind for deliberate indifference is subjective recklessness. But the standard is 'less stringent in cases involving a prisoner's medical needs . . . because "the State's responsibility to provide inmates with medical care ordinarily does not conflict

with competing administrative concerns." ' " (*Snow v. McDaniel* (9th Cir. 2012) 681 F.3d 978, 985, internal citations omitted.)

- "[D]eliberate indifference 'may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.'. . . . '[A] prisoner need not show his harm was substantial.' " (*Wilhelm v. Rotman* (9th Cir. 2012) 680 F.3d 1113, 1122, internal citation omitted.)
- "[A]llegations that a prison official has ignored the instructions of a prisoner's treating physician are sufficient to state a claim for deliberate indifference." (*Wakefield v. Thompson* (9th Cir. 1999) 177 F.3d 1160, 1165.)
- "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." (*Estelle, supra*, 429 U.S. at p. 106.)
- " 'A difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.' Rather, '[t]o show deliberate indifference, the plaintiff "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances" and that the defendants "chose this course in conscious disregard of an excessive risk to plaintiff's health." ' " (*Colwell, supra*, 763 F.3d at p. 1068.)
- "It has been recognized . . . that inadequate medical treatment may, in some instances, constitute a violation of 42 United States Code section 1983. In *Sturts v. City of Philadelphia*, for example, the plaintiff alleged that defendants acted 'carelessly, recklessly and negligently' when they failed to remove sutures from his eye, neck and face. The court concluded that although plaintiff was alleging inadequate medical treatment, he had stated a cause of action under section 1983: '. . . where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments. In some cases, however, the medical attention rendered may be so woefully inadequate as to amount to no treatment at all, thereby rising to the level of a § 1983 claim. . . .' " (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 176–177 [216 Cal.Rptr. 661, 703 P.2d 1], internal citations omitted.)
- "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citation omitted.)
- "[T]here is a two-pronged test for evaluating a claim for deliberate indifference to a serious medical need: First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in

further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." (*Akhtar v. Mesa* (9th Cir. 2012) 698 F.3d 1202, 1213.)

- "Where a plaintiff alleges systemwide deficiencies, 'policies and practices of statewide and systematic application [that] expose all inmates in [the prison's] custody to a substantial risk of serious harm,' we assess the claim through a two-pronged inquiry. The first, objective, prong requires that the plaintiff show that the conditions of the prison pose 'a substantial risk of serious harm.' The second, subjective, prong requires that the plaintiff show that a prison official was deliberately indifferent by being 'aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists,' and 'also draw[ing] the inference.' " (*Disability Rights Montana, Inc., supra*, 930 F.3d at p. 1097, internal citations and footnote omitted.)
- "A prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate. The challenged instruction properly advised the jury to consider the resources [defendant] had available in determining whether he was deliberately indifferent." (*Peralta, supra*, 744 F.3d at p. 1084.)
- "We recognize that prison officials have a 'better grasp' of the policies required to operate a correctional facility than either judges or juries. For this reason, in excessive force and conditions of confinement cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security. [¶] Such deference is generally absent from serious medical needs cases, however, where deliberate indifference 'can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.' " (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citations omitted.)
- "[T]rial judges in prison medical care cases should not instruct jurors to defer to the adoption and implementation of security-based prison policies, unless a party's presentation of the case draws a plausible connection between a security-based policy or practice and the challenged medical care decision." (*Chess v. Dovey* (9th Cir. 2015) 790 F.3d 961, 962.)
- "Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and postconviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions." (*Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176, 1182, fn. 4.)
- "We now turn to the second prong of the inquiry, whether the defendants were deliberately indifferent. This is not a case in which there is a difference of

medical opinion about which treatment is best for a particular patient. Nor is this a case of ordinary medical mistake or negligence. Rather, the evidence is undisputed that [plaintiff] was denied treatment for his monocular blindness solely because of an administrative policy, even in the face of medical recommendations to the contrary. A reasonable jury could find that [plaintiff] was denied surgery, not because it wasn't medically indicated, not because his condition was misdiagnosed, not because the surgery wouldn't have helped him, but because the policy of the [defendant] is to require an inmate to endure reversible blindness in one eye if he can still see out of the other. This is the very definition of deliberate indifference." (*Colwell, supra*, 763 F.3d at p. 1068.)

- "[C]laims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate indifference standard. Based thereon, the elements of a pretrial detainee's medical care claim against an individual defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries. 'With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily "turn[ ] on the facts and circumstances of each particular case." ' The ' "mere lack of due care by a state official" does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.' Thus, the plaintiff must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.' " (*Gordon v. County of Orange* (9th Cir. 2018) 888 F.3d 1118, 1124–1125, internal citations omitted.)
- "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.' The 'routine discomfort' that results from incarceration and which is 'part of the penalty that criminal offenders pay for their offenses against society' does not constitute a 'serious' medical need." (*Doty v. County of Lassen* (9th Cir. 1994) 37 F.3d 540, 546, internal citations and footnote omitted.)

Secondary Sources

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 244

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 901

Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial, Ch. 2E-10, *Special Jurisdictional Limitations—Eleventh Amendment As Limitation On Actions Against States*, ¶ 2:4923 (The Rutter Group)

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law*-

Prisons, ¶ 11.09 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.15 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.183 (Matthew Bender)

3042. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] used excessive force against [him/her/***nonbinary pronoun***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used force against [***name of plaintiff***];**
2. **That the force used was excessive;**
3. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s use of excessive force was a substantial factor in causing [***name of plaintiff***]'s harm.**

   Force is excessive if it is used maliciously and sadistically to cause harm. In deciding whether excessive force was used, you should consider, among other factors, the following:

   (a) The need for the use of force;

   (b) The relationship between the need and the amount of force that was used;

   (c) The extent of injury inflicted;

   (d) The extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; [and]

   (e) Any efforts made to temper the severity of a forceful response; [and]

   (f) [*Insert other relevant factor.***]**

Force is not excessive if it is used in a good-faith effort to protect the safety of inmates, staff, or others, or to maintain or restore discipline.

New September 2003; Revised June 2010; Renumbered from CACI No. 3010 December 2010; Renumbered from CACI No. 3013 December 2012

Directions for Use

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

There is law suggesting that the jury should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. This principle is covered in the final sentence by the term "good faith."

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.
- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)
- "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.' In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.' " (*Farmer v. Brennan* (1994) 511 U.S. 825, 832 [114 S.Ct. 1970, 128 L.Ed.2d 811], internal citations omitted.)
- "[A]pplication of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, 'the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." ' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 6 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)
- "[W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley:* whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." (*Hudson, supra*, 503 U.S. at pp. 6–7, internal citations omitted.)
- "[E]xcessive force under the Eighth Amendment does not require proof that an officer enjoyed or otherwise derived pleasure from his or her use of force." (*Hoard v. Hartman* (9th Cir. 2018) 904 F.3d 780, 782.)
- "[T]here is ample evidence here that the Supreme Court did not intend its use of 'maliciously and sadistically' . . . to work a substantive change in the law on excessive force beyond requiring intent to cause harm. Chief among this evidence is the fact that the Supreme Court has never addressed 'maliciously and sadistically' separately from the specific intent to cause harm. It has even, on one occasion, omitted any mention of 'maliciously and sadistically' altogether and simply explained that 'a purpose to cause harm is needed for Eighth Amendment liability in a [prison] riot case.' " (*Hoard, supra,* 904 F.3d at p. 789.)

- "Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that 'prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' " (*Hudson, supra*, 503 U.S. at p. 6, internal citations omitted.)
- "We recognize that prison officials have a 'better grasp' of the policies required to operate a correctional facility than either judges or juries. For this reason, in excessive force . . . cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security." (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citations omitted.)
- "[T]his Court rejected the notion that 'significant injury' is a threshold requirement for stating an excessive force claim. . . . 'When prison officials maliciously and sadistically use force to cause harm,' . . . 'contemporary standards of decency always are violated . . . whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.' " (*Wilkins v. Gaddy* (2010) 559 U.S. 34, 37 [130 S.Ct. 1175, 175 L.Ed.2d 995].)
- "This is not to say that the 'absence of serious injury' is irrelevant to the Eighth Amendment inquiry. '[T]he extent of injury suffered by an inmate is one factor that may suggest "whether the use of force could plausibly have been thought necessary" in a particular situation.' The extent of injury may also provide some indication of the amount of force applied. . . . [N]ot 'every malevolent touch by a prison guard gives rise to a federal cause of action.' 'The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.' An inmate who complains of a 'push or shove' that causes no discernible injury almost certainly fails to state a valid excessive force claim. . . . [¶] Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts." (*Wilkins, supra*, 559 U.S. at pp. 37–38, original italics, internal citations omitted.)
- " '[S]uch factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,' are relevant to that ultimate determination. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur. But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the

responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." (*Whitley v. Albers* (1986) 475 U.S. 312, 321 [106 S.Ct. 1078, 89 L.Ed.2d 251], internal citations omitted.)

- " '[T]he appropriate standard for a pretrial detainee's excessive force claim [under the Fourteenth Amendment] is solely an objective one.' In contrast, a convicted prisoner's excessive force claim under the Eighth Amendment requires a subjective inquiry into 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.' " (*Rodriguez v. County of L.A.* (9th Cir. 2018) 891 F.3d 776, 788, internal citation omitted.)
- "Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and postconviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions." (*Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176, 1182, fn. 4.)
- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 901

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.01 (Matthew Bender)

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶ 11.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.70 (Matthew Bender)

3043. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her/***nonbinary pronoun***] to prison conditions that deprived [him/her/***nonbinary pronoun***] of basic rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was imprisoned under conditions that deprived [him/her/***nonbinary pronoun***] of [***describe deprivation, e.g., clothing***];**
2. **That this deprivation was sufficiently serious in that it denied [***name of plaintiff***] a minimal necessity of life;**
3. **That [***name of defendant***]'s conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**
4. **That [***name of defendant***] knew that [his/her/***nonbinary pronoun***] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**
5. **That there was no reasonable justification for the deprivation;**
6. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties;**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Whether the risk was obvious is a factor that you may consider in determining whether [*name of defendant***] knew of the risk.**

New June 2015; Revised May 2020

Directions for Use

Give this instruction in a prisoner case involving deprivation of something serious. (See *Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150–1151.) For an instruction involving the creation of a risk, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction on deprivation of medical care, see CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to the inmate's health or safety. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811].) "Deliberate indifference" involves a two-part inquiry. First, the inmate must show that the prison officials were aware of a

substantial risk of serious harm to the inmate's health or safety. Second, the inmate must show that the prison officials had no reasonable justification for the conduct, in spite of that risk. (*Thomas*, *supra*, 611 F.3d at p. 1150.) Elements 4 and 5 express the deliberate-indifference components.

The "official duties" referred to in element 6 must be duties created by any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 6.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.
- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)
- "Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety." (*Johnson v. Lewis* (9th Cir. 2000) 217 F.3d 726, 731, internal citations omitted.)
- "[E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' 'only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)
- "[A] prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious,' a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities,' . . . ." (*Farmer, supra*, 511 U.S. at p. 834, internal citations omitted.)
- " '[O]nly the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety . . . ." (*Farmer*, *supra*, 511 U.S. at p. 834, internal citations omitted.)
- "[A]n inmate seeking to prove an Eighth Amendment violation must 'objectively show that he was deprived of something "sufficiently serious," ' and 'make a subjective showing that the deprivation occurred with deliberate indifference to the inmate's health or safety.' The second step, showing 'deliberate indifference,' involves a two part inquiry. First, the inmate must show that the prison officials were aware of a 'substantial risk of serious harm' to an inmate's health or safety. This part of our inquiry may be satisfied if the inmate shows that the risk posed by the deprivation is obvious. Second, the inmate must show that the prison officials had no 'reasonable' justification for the deprivation, in spite of that

risk." (*Thomas*, *supra*, 611 F.3d at p. 1150, footnote and internal citations omitted.)

- "Next, the inmate must 'make a subjective showing that the deprivation occurred with deliberate indifference to the inmate's health or safety.' To satisfy this subjective component of deliberate indifference, the inmate must show that prison officials 'kn[e]w[] of and disregard[ed]' the substantial risk of harm, but the officials need not have intended any harm to befall the inmate; 'it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.' " (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1074, internal citations omitted.)
- "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Farmer*, *supra*, 511 U.S. at p. 842, internal citation omitted.)
- "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." (*Farmer*, *supra*, 511 U.S. at p. 843 fn. 8.)
- "The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement. The Supreme Court has written that the test of *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), which requires only a reasonable relationship to a legitimate penological interest to justify prison regulations, does not apply to Eighth Amendment claims. The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." (*Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240.)
- "We recognize that prison officials have a 'better grasp' of the policies required to operate a correctional facility than either judges or juries. For this reason, in . . . conditions of confinement cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security." (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citation omitted.)
- "However, our precedent should not be misread to suggest that jail officials are automatically entitled to deference instructions in conditions of confinement or excessive force cases brought by prisoners, or § 1983 actions brought by former inmates. We have long recognized that a jury need not defer to prison officials where the plaintiff produces substantial evidence showing that the jail's policy or practice is an unnecessary, unjustified, or exaggerated response to the need for prison security." (*Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176, 1183, internal citations omitted.)

- "Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and postconviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions." (*Shorter, supra*, 895 F.3d at p. 1182, fn. 4.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 888

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶ 11.02 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

18 California Points and Authorities, Ch. 196, *Public Entities*, § 196.183 (Matthew Bender)

3044–3045. Reserved for Future Use

3046. Violation of Pretrial Detainee's Federal Civil Rights—Fourteenth Amendment—Medical Care and Conditions of Confinement (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] failed to provide [him/her/***nonbinary pronoun***] [safe conditions of confinement/needed medical care] in violation of [his/her/***nonbinary pronoun***] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] made an intentional decision regarding the [conditions of confinement/denial of needed medical care];**
2. **That the [conditions of confinement/denial of needed medical care] put [***name of plaintiff***] at substantial risk of serious harm;**
3. **That [***name of defendant***] did not take reasonable available measures to prevent or reduce the risk of serious harm, even though a reasonable officer under the same or similar circumstances would have understood the high degree of risk involved;**
4. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New November 2021

Directions for Use

Give this instruction in a case involving a pretrial detainee's conditions of confinement, including access to medical care. (See *Gordon v. County of Orange* (9th Cir. 2018) 888 F.3d 1118, 1124–1125.)

The instruction may be modified for use in a failure to protect case. (See *Castro v. County of Los Angeles* (9th Cir. 2016) 833 F.3d 1060 (en banc).) The instruction may also be modified to specify the condition of confinement at issue. For example, if the plaintiff claims that the defendant delayed or intentionally interfered with needed medical treatment, it may not be sufficiently clear to describe the defendant's conduct in the introductory paragraph and in elements 1 and 2 as a denial of needed medical care.

Sources and Authority

- Deprivation of Civil Rights. Title 42 United States Code section 1983.
- "Inmates who sue prison officials for injuries suffered while in custody may do

so under the Eighth Amendment's Cruel and Unusual Punishment Clause or, if not yet convicted, under the Fourteenth Amendment's Due Process Clause. Under both clauses, the plaintiff must show that the prison officials acted with 'deliberate indifference.' " (*Castro, supra,* 833 F.3d at pp. 1067–1068, internal citation omitted.)

- "[W]e hold that claims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate indifference standard." (*Gordon, supra,* 888 F.3d at pp. 1124–1125.)
- "[C]laims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate indifference standard. Based thereon, the elements of a pretrial detainee's medical care claim against an individual defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved-making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries. 'With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily "turn[ ] on the facts and circumstances of each particular case." ' The ' "mere lack of due care by a state official" does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.' Thus, the plaintiff must 'prove more than negligence but less than subjective intent-something akin to reckless disregard.' " (*Gordon, supra,* 888 F.3d at pp. 1124–1125, internal citations omitted.)
- " '[T]he objective deliberate indifference standard applies even when the incident occurred pre-*Gordon*.' Thus, to determine whether the defendants are entitled to qualified immunity, we do not consider whether they subjectively understood that [the detainee] faced a substantial risk of serious harm. Rather, we conduct 'an objective examination of whether established case law would make clear to every reasonable official that the defendant's *conduct* was unlawful in the situation he confronted.' " (*Russell v. Lumitap* (9th Cir. 2022) 31 F.4th 729, 740, original italics, internal citations and footnotes omitted.)
- "Our cases make clear that prison officials violate the Constitution when they 'deny, delay or intentionally interfere' with needed medical treatment. The same is true when prison officials choose a course of treatment that is 'medically unacceptable under the circumstances.' " (*Sandoval v. County of San Diego* (9th Cir. 2021) 985 F.3d 657, 679.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 356

3 Civil Rights Actions, Ch. 11, *Fourteenth Amendment—Due Process*, § 11.08; 7 Civil Rights Actions, Ch. F10, *Prisoner's Rights* (Matthew Bender)

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.16 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3047–3049. Reserved for Future Use

3050. Retaliation—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her/***nonbinary pronoun***] for exercising a constitutional right. To establish retaliation, [***name of plaintiff***] must prove all of the following:**

1. **That [he/she/***nonbinary pronoun***] was engaged in a constitutionally protected activity[, which I will determine after you, the jury, decide certain facts];**

[2. That [*name of defendant***] did not have probable cause for the [arrest/prosecution][, which I will determine after you, the jury, decide certain facts];]**

3. **That [***name of defendant***] [***specify alleged retaliatory conduct***];**
4. **That [***name of plaintiff***]'s constitutionally protected activity was a substantial or motivating factor for [***name of defendant***]'s acts;**
5. **That [***name of defendant***]'s acts would likely have deterred a reasonable person from [***specify protected activity, e.g., filing a lawsuit***]; and**
6. **That [***name of plaintiff***] was harmed as a result of [***name of defendant***]'s conduct.**

The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 1 [and element 2] above.**

[But before I can do so, you must decide whether [*name of plaintiff***] has proven the following: [***list all factual disputes that must be resolved by the jury.***].]**

[*or*]

[The court has determined that by [*specify conduct***], [***name of plaintiff***] was exercising [his/her/***nonbinary pronoun***] constitutionally protected right of [***insert right, e.g., privacy***].]**

[*or*]

[The court has determined that [*name of defendant***] did not have probable cause for the [arrest/prosecution].]**

New June 2010; Revised December 2010; Renumbered from CACI No. 3016 and Revised December 2012; Revised June 2013, May 2020, May 2021, November 2021

Directions for Use

Give this instruction along with CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements,* if the claimed civil rights violation

is retaliation for exercising constitutionally protected rights, including exercise of free speech rights as a private citizen. For a claim by a public employee who alleges that they suffered an adverse employment action in retaliation for their speech on an issue of public concern, see CACI No. 3053, *Retaliation for Exercise of Free Speech Rights—Public Employee—Essential Factual Elements*.

The retaliation should be alleged generally in element 1 of CACI No. 3000. The constitutionally protected activity refers back to the right alleged to have been violated in element 3 of CACI No. 3000.

Element 2 applies only in retaliatory arrest and prosecution cases. Omit element 2 if the retaliation alleged is not based on an arrest or prosecution.

Whether plaintiff was engaged in a constitutionally protected activity and, if applicable, whether probable cause for arrest or prosecution was absent (or whether the no-probable-cause requirement does not apply because of an exception) will usually have been resolved by the court as a matter of law before trial. (See *Nieves v. Bartlett* (2019) ___ U.S. ___ [139 S.Ct. 1715, 1724, 1727, 204 L.Ed.2d 1] [requiring a plaintiff to plead and prove the absence of probable cause for arrest but stating an exception to the no-probable-cause requirement "when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been"].) If there is a question of fact that the jury must resolve, include the optional bracketed language with element 1 and/or element 2, and give the first bracketed option of the final paragraph, identifying with specificity all disputed factual issues the jury must resolve for the court to determine the contested element or elements. If the court has determined element 1 or element 2, omit the optional bracketed language of the element and instruct the jury that the element has been determined as a matter of law by giving the second and/or third optional sentence(s) in the final paragraph.

If there are contested issues of fact regarding the exception to the no-probable-cause requirement, this instruction may be augmented to include the specific factual findings necessary for the court to determine whether the exception applies.

The plaintiff must show that the defendant acted with a retaliatory motive and that the motive was a "but for" cause of the plaintiff's injury, i.e., that the retaliatory action would not have been taken absent the retaliatory motive. (See *Nieves, supra,* 139 S.Ct. at p. 1722.) A plaintiff may prove causal connection with circumstantial evidence but establishing a causal connection between a defendant's animus and a plaintiff's injury will depend on the type of retaliation case. (*Id.* at pp. 1722–1723 [distinguishing straightforward cases from more complex cases].)

If the defendant claims that the response to the plaintiff's constitutionally protected activity was prompted by a legitimate reason, the defendant may attempt to persuade the jury that the defendant would have taken the same action even in the absence of the alleged impermissible, retaliatory reason. See CACI No. 3055, *Rebuttal of Retaliatory Motive*. (*Id.* at p. 1727.)

Sources and Authority

- "Where, as here, the plaintiff claims retaliation for exercising a constitutional right, the majority of federal courts require the plaintiff to prove that (1) he or she was engaged in constitutionally protected activity, (2) the defendant's retaliatory action caused the plaintiff to suffer an injury that would likely deter a person of ordinary firmness from engaging in that protected activity, and (3) the retaliatory action was motivated, at least in part, by the plaintiff's protected activity." (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062–1063 [99 Cal.Rptr.3d 661].)
- "[A]ctions that are otherwise proper and lawful may nevertheless be actionable if they are taken in retaliation against a person for exercising his or her constitutional rights." (*Tichinin, supra,* 177 Cal.App.4th at p. 1084.)
- "The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation." (*Nieves, supra,* 139 S.Ct. at p. 1725, internal citation omitted.)
- "To state a First Amendment retaliation claim, a plaintiff must plausibly allege 'that (1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct.' To ultimately 'prevail on such a claim, a plaintiff must establish a "causal connection" between the government defendant's "retaliatory animus" and the plaintiff's "subsequent injury." Specifically, a plaintiff must show that the defendant's retaliatory animus was 'a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.' " (*Capp v. County of San Diego* (9th Cir. 2019) 940 F.3d 1046, 1053, internal citations omitted.)
- " '[A] plaintiff need only identify the law or policy challenged as a constitutional violation and name the official within the entity who can appropriately respond to injunctive relief.' Thus, a plaintiff seeking injunctive relief for an ongoing First Amendment violation (e.g., a retaliatory policy) may sue individual board members of a public school system in their official capacities to correct the violation." (*Riley's Am. Heritage Farms v. Elsasser* (9th Cir. 2022) 32 F.4th 707, 732, internal citations omitted.)
- "For a number of retaliation claims, establishing the causal connection between a defendant's animus and a plaintiff's injury is straightforward. Indeed, some of our cases in the public employment context 'have simply taken the evidence of the motive and the discharge as sufficient for a circumstantial demonstration that the one caused the other,' shifting the burden to the defendant to show he would have taken the challenged action even without the impermissible motive. But the consideration of causation is not so straightforward in other types of retaliation cases." *Nieves, supra,* 139 S.Ct. at pp. 1722–1723.)
- "To demonstrate retaliation in violation of the First Amendment, [the plaintiff]

must ultimately prove first that [defendant] took action that 'would chill or silence a person of ordinary firmness from future First Amendment activities.' " (*Skoog v. County of Clackamas* (9th Cir. 2006) 469 F.3d 1221, 1231–1232, footnote and citation omitted.)

- "The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." (*Nieves v. Bartlett* (2019) ___ U.S. ___ [139 S.Ct. 1715, 1724, 204 L.Ed.2d 1].)
- "[W]e conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." (*Nieves, supra,* 139 S.Ct. at p. 1727.)
- "[T]he evidence of [plaintiff]'s alleged injuries, if believed, is sufficient to support a finding that the retaliatory action against him would deter a person of ordinary firmness from exercising his or her First Amendment rights. [¶] [Defendant] argues that plaintiff did not suffer any injury—i.e., [defendant]'s action did not chill [plaintiff]'s exercise of his rights—because he continued to litigate against [defendant]. However, that [plaintiff] persevered despite [defendant]'s action is not determinative. To reiterate, in the context of a claim of retaliation, the question is not whether the plaintiff was actually deterred but whether the defendant's actions would have deterred a person of ordinary firmness." (*Tichinin, supra,* 177 Cal.App.4th at p. 1082.)
- "Intent to inhibit speech, which 'is an element of the [retaliation] claim,' can be demonstrated either through direct or circumstantial evidence." (*Mendocino Envtl. Ctr. v. Mendocino County* (9th Cir. 1999) 192 F.3d 1283, 1300–1301, internal citation omitted.)
- "[Defendant] may avoid liability if he shows that a 'final decision maker's independent investigation and termination decision, responding to a biased subordinate's initial report of misconduct, . . . negate[s] any causal link' between his retaliatory motive and the adverse employment action. This is because a final decision maker's wholly independent investigation and decision establish that 'the employee's protected speech was not a but-for cause of the adverse employment action.' " (*Karl v. City of Mountlake Terrace* (9th Cir. 2012) 678 F.3d 1062, 1072–1073, internal citation omitted.)
- "While the scope, severity and consequences of [their] actions are belittled by defendants, we have cautioned that 'a government act of retaliation need not be severe . . . [nor] be of a certain kind' to qualify as an adverse action." (*Marez v. Bassett* (9th Cir. 2010) 595 F.3d 1068, 1075.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 894, 895, 978

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Opportunity Laws*, § 40.26 (Matthew Bender)

3 Civil Rights Actions, Ch. 17, *Discrimination in Federally Assisted Programs,* ¶ 17.24B (Matthew Bender)

4 Civil Rights Actions, Ch. 21A, *Employment Discrimination Based on Race, Color, Religion, Sex, or National Origin,* ¶ 21.22(F) (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.42, 100.47 (Matthew Bender)

3051. Unlawful Removal of Child From Parental Custody Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] wrongfully removed [*name of plaintiff*]'s child from [his/her/*nonbinary pronoun*] parental custody because [*name of defendant*] did not have a warrant. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] removed [*name of plaintiff*]'s child from [his/her/*nonbinary pronoun*] parental custody without a warrant;**
2. **That [*name of defendant*] was performing or purporting to perform [his/her/*nonbinary pronoun*] official duties;**
3. **That [*name of plaintiff*] was harmed; and**
4. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New June 2016

Directions for Use

This instruction is a variation on CACI No. 3021, *Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements*, and CACI No. 3023, *Unreasonable Search or Seizure—Search or Seizure Without a Warrant—Essential Factual Elements*, in which the warrantless act is the removal of a child from parental custody rather than an arrest or search. This instruction asserts a parent's due process right to familial association under the Fourteenth Amendment. It may be modified to assert or include the child's right under the Fourth Amendment to be free of a warrantless seizure. (See *Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1473–1474 [150 Cal.Rptr.3d 735].)

Warrantless removal is a constitutional violation unless the authorities possess information at the time of the seizure that establishes reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury. (*Arce, supra*, 211 Cal.App.4th at p. 1473.) The committee believes that the defendant bears the burden of proving imminent danger. (See Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."]; cf. *Welsh v. Wisconsin* (1984) 466 U.S. 740, 750 [104 S.Ct. 2091, 80 L.Ed.2d 732] ["Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries."].) CACI No. 3026, *Affirmative Defense—Exigent Circumstances* (to a warrantless search), may be modified to respond to this claim.

If the removal of the child was without a warrant and without exigent circumstances, but later found to be justified by the court, damages are limited to those caused by the procedural defect, not the removal. (See *Watson v. City of San Jose* (9th Cir. 2015) 800 F.3d 1135, 1139.)

Sources and Authority

- " ' "Parents and children have a well-elaborated constitutional right to live together without governmental interference.' [Citation.] 'The Fourteenth Amendment guarantees that parents will not be separated from their children without due process of law except in emergencies." This 'right to family association' requires '[g]overnment officials . . . to obtain prior judicial authorization before intruding on a parent's custody of her child unless they possess information at the time of the seizure that establishes "reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury." [Citation.]' " (*Arce, supra*, 211 Cal.App.4th at p. 1473, internal citations omitted.)
- " 'The Fourth Amendment also protects children from removal from their homes [without prior judicial authorization] absent such a showing. [Citation.] Officials, including social workers, who remove a child from its home without a warrant must have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant.' Because 'the same legal standard applies in evaluating Fourth and Fourteenth Amendment claims for the removal of children," we may "analyze [the claims] together.' " (*Arce, supra*, 211 Cal.App.4th at pp. 1473–1474.)
- "While the constitutional source of the parent's and the child's rights differ, the tests under the Fourteenth Amendment and the Fourth Amendment for when a child may be seized without a warrant are the same. The Constitution requires an official separating a child from its parents to obtain a court order unless the official has reasonable cause to believe the child is in 'imminent danger of serious bodily injury.' Seizure of a child is reasonable also where the official obtains parental consent." (*Jones v. County of L.A.* (9th Cir. 2015) 802 F.3d 990, 1000, internal citations omitted.)
- "This requirement 'balance[s], on the one hand, the need to protect children from abuse and neglect and, on the other, the preservation of the essential privacy and liberty interests that families are guaranteed under both the Fourth and Fourteenth Amendments of our Constitution.' " (*Demaree v. Pederson* (9th Cir. 2018) 880 F.3d 1066, 1074.)
- "[W]hether an official had 'reasonable cause to believe exigent circumstances existed in a given situation . . . [is a] "question[] of fact to be determined by a jury." [Citation.]' " (*Arce, supra*, 211 Cal.App.4th at p. 1475.)
- "Under the Fourth Amendment, government officials are ordinarily required to obtain prior judicial authorization before removing a child from the custody of her parent. However, officials may seize a child without a warrant 'if the

information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.' " (*Kirkpatrick v. Cnty. of Washoe* (9th Cir. 2016) 843 F.3d 784, 790 (en banc).)

- "[I]t does not matter whether the warrant could be obtained in hours or days. What matters is whether there is an identifiable risk of serious harm or abuse *during whatever the delay period is*." (*Demaree*, *supra*, 880 F.3d at p. 1079, original italics.)
- "The parental right secured by the Fourteenth Amendment 'is not reserved for parents with full legal and physical custody.' At the same time, however, '[p]arental rights do not spring full-blown from the biological connection between parent and child.' Judicially enforceable interests arising under the Fourteenth Amendment 'require relationships more enduring,' which reflect some assumption 'of parental responsibility.' It is '[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child,' that 'his interest in personal contact with his child acquires substantial protection under the due process clause.' Until then, a person with only potential parental rights enjoys a liberty interest in the companionship, care, and custody of his children that is 'unambiguously lesser in magnitude.' " (*Kirkpatrick, supra*, 843 F.3d at p. 789.)
- "[A] child is seized for purposes of the Fourth and Fourteenth Amendments when a representative of the state takes action causing a child to be detained at a hospital as part of a child abuse investigation, such that a reasonable person in the same position as the child's parent would believe that she cannot take her child home." (*Jones, supra*, 802 F.3d at p. 1001.)
- "An official 'cannot seize children suspected of being abused or neglected unless reasonable avenues of investigation are first pursued.' Further, because the 'scope of the intrusion' must be 'reasonably necessary to avert' a specific injury, the intrusion cannot be longer than necessary to avert the injury." (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1237, internal citations omitted.)
- "[A] jury is needed to determine what a reasonable parent in the [plaintiffs'] position would have believed and whether [defendant]'s conduct amounted to a seizure." (*Jones, supra*, 802 F.3d at p. 1002.)
- "In sum, although we do not dispute that Shaken Baby Syndrome is a serious, life-threatening injury, we disagree with the County defendants' assertion that a child may be detained without prior judicial authorization based solely on the fact that he or she has suffered a serious injury. Rather, the case law demonstrates that the warrantless detention of a child is improper unless there is "specific, articulable evidence" that the child would be placed at imminent risk of serious harm absent an immediate interference with parental custodial rights." (*Arce, supra*, 211 Cal.App.4th at p. 1481.)
- "[I]n cases where 'a deprivation is justified but procedures are deficient,

whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure.' In such cases, . . . a plaintiff must 'convince the trier of fact that he actually suffered distress because of the denial of procedural due process itself.' " (*Watson, supra*, 800 F.3d at p. 1139, internal citation omitted; see *Carey v. Piphus* (1978) 435 U.S. 247, 263 [98 S.Ct. 1042, 55 L.Ed.2d 252].)

- "Lack of health insurance . . . does not provide a reasonable cause to believe a child is in imminent danger." (*Keates*, *supra*, 883 F.3d at p. 1237.)
- "[B]arring a reasonable concern that material physical evidence might dissipate . . . or that some urgent medical problem exists requiring immediate medical attention, the state is required to notify parents and to obtain judicial approval before children are subjected to investigatory physical examinations." (*Mann v. Cty. of San Diego* (9th Cir. 2018) 907 F.3d 1154, 1161.)

Secondary Sources

3 Civil Rights Actions, Ch. 12B, *Deprivation of Rights Under Color of State Law—Family Relations*, ¶ 12B.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3 California Points and Authorities, Ch. 35A, *Civil Rights: Equal Protection*, § 35A.29 et seq. (Matthew Bender)

3052. Use of Fabricated Evidence—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] deliberately fabricated evidence against [him/her/***nonbinary pronoun***], and that as a result of this evidence being used against [him/her/***nonbinary pronoun***], [he/she/***nonbinary pronoun***] was deprived of [his/her/***nonbinary pronoun***] [***specify right, privilege, or immunity secured by the Constitution, e.g., liberty***] without due process of law. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***specify fabricated evidence, e.g., informed the district attorney that plaintiff's DNA was found at the scene of the crime***];**
2. **That this [***e.g., statement***] was not true;**
3. **That [***name of defendant***] knew that the [***e.g., statement***] was not true; and**
4. **That because of [***name of defendant***]'s conduct, [***name of plaintiff***] was deprived of [his/her/***nonbinary pronoun***] [***e.g., liberty***].**

To decide whether there was a deprivation of rights because of the fabrication, you must determine what would have happened if the [*e.g., statement***] had not been used against [***name of plaintiff***].**

[Deprivation of liberty does not require that [*name of plaintiff***] have been put in jail. Nor is it necessary that [he/she/***nonbinary pronoun***] prove that [he/she/***nonbinary pronoun***] was wrongly convicted of a crime.]**

New May 2017

Directions for Use

This instruction is for use if the plaintiff claims to have been deprived of a constitutional or legal right based on false evidence. Give also CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*.

What would have happened had the fabricated evidence not been presented (i.e., causation) is a question of fact. (*Kerkeles v. City of San Jose* (2011) 199 Cal.App.4th 1001, 1013 [132 Cal.Rptr.3d 143].)

Give the last optional paragraph if the alleged fabrication occurred in a criminal case. It would appear that the use of fabricated evidence for prosecution may be a constitutional violation even if the arrest was lawful or objectively reasonable. (See *Kerkeles, supra*, 199 Cal.App.4th at pp. 1010–1012, quoting favorably *Ricciuti v. New York City Transit Authority* (2d Cir. 1997) 124 F.3d 123, 130.)

Sources and Authority

- "Substantive due process protects individuals from arbitrary deprivation of their liberty by government." (*Costanich v. Dep't of Soc. & Health Servs.* (9th Cir. 2010) 627 F.3d 1101, 1110.)
- "[T]here is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." (*Devereaux v. Abbey* (9th Cir. 2001) 263 F.3d 1070, 1074–1075.)
- "In order to prevail on a judicial deception claim, a plaintiff must prove that '(1) the defendant official deliberately fabricated evidence and (2) the deliberate fabrication caused the plaintiff's deprivation of liberty.' " (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1240.)
- "To establish causation, [plaintiff] must raise a triable issue that the fabricated evidence was the cause in fact and proximate cause of his injury. Like in any proximate cause analysis, an intervening event may break the chain of causation between the allegedly wrongful act and the plaintiff's injury." (*Caldwell v. City & County of San Francisco* (9th Cir. 2018) 889 F.3d 1105, 1115, internal citation omitted.)
- "A plaintiff can prove deliberate fabrication in several ways. Most basically, a plaintiff can produce direct evidence of deliberate fabrication. Alternatively, a plaintiff can produce circumstantial evidence related to a defendant's motive." (*Caldwell, supra,* 889 F.3d at p. 1112, internal citations omitted.)
- " 'No arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee. To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice. Like a prosecutor's knowing use of false evidence to obtain a tainted conviction, a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable "corruption of the truth-seeking function of the trial process." [Citations.]' " (*Ricciuti, supra*, 124 F.3d at p. 130.)
- "Even if there was probable cause to arrest plaintiff, we cannot say as a matter of law on the record before us that he would have been subjected to continued prosecution and an unfavorable preliminary hearing without the use of the false lab report and testimony derived from it. These are questions of fact which defendants appear to concede are material to the issue of causation, and which cannot be determined without weighing the evidence presented and conclusions reached at the preliminary hearing. Defendants' statement of undisputed facts does not establish lack of causation as a matter of law." (*Kerkeles, supra*, 199 Cal.App.4th at p. 1013.)
- "There is no authority for defendants' argument that a due process claim cannot

be established unless the false evidence is used to *convict* the plaintiff. . . . [T]he right to be free from criminal *charges*, not necessarily the right to be free from conviction, is a clearly established constitutional right supporting a section 1983 claim." (*Kerkeles, supra*, 199 Cal.App.4th at p. 1010.)

- "There is no sound reason to impose a narrow restriction on a plaintiff's case by requiring incarceration as a sine qua non of a deprivation of a liberty interest." (*Kerkeles, supra*, 199 Cal.App.4th at p. 1011.)
- "[T]here is no such thing as a minor amount of actionable perjury or of false evidence that is somehow permissible. Why? Because government perjury and the knowing use of false evidence are absolutely and obviously irreconcilable with the Fourteenth Amendment's guarantee of Due Process in our courts. Furthermore, the social workers' alleged transgressions were not made under pressing circumstances requiring prompt action, or those providing ambiguous or conflicting guidance. There are no circumstances in a dependency proceeding that would permit government officials to bear false witness against a parent." (*Hardwick v. County of Orange* (9th Cir. 2017) 844 F.3d 1112, 1119.)
- "[T]o the extent that [plaintiff] has raised a deliberate-fabrication-of-evidence claim, he has not adduced or pointed to any evidence in the record that supports it. For purposes of our analysis, we assume that, in order to support such a claim, [plaintiff] must, at a minimum, point to evidence that supports at least one of the following two propositions: (1) Defendants continued their investigation of [plaintiff] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information." (*Devereaux, supra*, 263 F.3d at p. 1076.)
- "[T]he Constitution prohibits the deliberate fabrication of evidence whether or not the officer knows that the person is innocent. The district court erred by granting judgment as a matter of law to Defendants because, in this case involving direct evidence of fabrication, Plaintiff was not required to show that [defendant] actually or constructively knew that he was innocent." (*Spencer v. Peters* (9th Cir. 2017) 857 F.3d 789, 800, internal citations omitted.)
- "The *Devereaux* test envisions an investigator whose unlawful motivation is illustrated by her state of mind regarding the alleged perpetrator's innocence, or one who surreptitiously fabricates evidence by using coercive investigative methods. These are circumstantial methods of proving deliberate falsification. Here, [plaintiff] argues that the record directly reflects [defendant]'s false statements. If, under *Devereaux*, an interviewer who uses coercive interviewing techniques that are known to yield false evidence commits a constitutional violation, then an interviewer who deliberately mischaracterizes witness statements in her investigative report also commits a constitutional violation. Similarly, an investigator who purposefully reports that she has interviewed witnesses, when she has actually only attempted to make contact with them, deliberately fabricates evidence." (*Costanich, supra*, 627 F.3d at p. 1111.)
- "[N]ot all inaccuracies in an investigative report give rise to a constitutional

claim. Mere 'careless[ness]' is insufficient, as are mistakes of 'tone.' Errors concerning trivial matters cannot establish causation, a necessary element of any § 1983 claim. And fabricated evidence does not give rise to a claim if the plaintiff cannot 'show the fabrication actually injured her in some way.' " (*Spencer, supra,* 857 F.3d at p. 798, internal citations omitted.)

- "In light of long-standing criminal prohibitions on making deliberately false statements under oath, no social worker could reasonably believe that she was acting lawfully in making deliberately false statements to the juvenile court in connection with the removal of a dependent child from a caregiver." (*Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1113 [190 Cal.Rptr.3d 97], footnotes omitted.)
- "[P]retrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case. The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification." (*Manuel v. City of Joliet* (2017) 580 U.S. 357 [137 S.Ct. 911, 918, 197 L.Ed.2d 312], internal citation omitted.)
- "Deliberately fabricated evidence in a prosecutor's file can rebut any presumption of prosecutorial independence [i.e., that filing of a criminal complaint immunizes investigating officers because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time]. . . . In sum, if a plaintiff establishes that officers either presented false evidence to or withheld crucial information from the prosecutor, the plaintiff overcomes the presumption of prosecutorial independence and the analysis reverts back to a normal causation question." (*Caldwell, supra,* 889 F.3d at p. 1116, internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 901 et seq.

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.05 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3053. Retaliation for Exercise of Free Speech Rights—Public Employee—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her/***nonbinary pronoun***] because [he/she/***nonbinary pronoun***] exercised [his/her/***nonbinary pronoun***] right to speak as a private citizen about a matter of public concern. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of plaintiff***] was speaking as a private citizen and not as a public employee when [he/she/***nonbinary pronoun***] [***describe speech alleged to be protected by the First Amendment, e.g., criticized the mayor at a city council meeting***];]**
2. **That [***name of defendant***] [***specify retaliatory acts, e.g., terminated plaintiff's employment***];**
3. **That [***name of plaintiff***]'s [***e.g., speech to the city council***] was a substantial motivating reason for [***name of defendant***]'s decision to [***e.g., terminate plaintiff's employment***];**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

If [*name of plaintiff***] proves all of the above, [***name of defendant***] is not liable if [he/she/***nonbinary pronoun***/it] proves either of the following:**

6. **That [***name of defendant***] had an adequate employment-based justification for treating [***name of plaintiff***] differently from any other member of the general public; or**
7. **That [***name of defendant***] would have [***specify adverse action, e.g., terminated plaintiff's employment***] anyway for other legitimate reasons, even if [he/she/***nonbinary pronoun***/it] also retaliated based on [***name of plaintiff***]'s protected conduct.**

In deciding whether [*name of plaintiff***] was speaking as a public citizen or a public employee (element 1), you should consider whether [his/her/***nonbinary pronoun***] [***e.g., speech***] was within [his/her/***nonbinary pronoun***] job responsibilities. [However, the listing of a given task in an employee's written job description is neither necessary nor sufficient alone to demonstrate that conducting the task is part of the employee's professional duties.]**

New November 2017; Revised May 2020

Directions for Use

This instruction is for use in a claim by public employees who allege that they suffered an adverse employment action in retaliation for their private speech on an issue of public concern. Speech made by public employees in their official capacity is not insulated from employer discipline by the First Amendment but speech made in one's private capacity as a citizen is. (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 421 [126 S.Ct. 1951, 164 L.Ed.2d 689].) For a claim by a private citizen who alleges retaliation, see CACI No. 3050, *Retaliation—Essential Factual Elements*.

Element 1, whether the employee was speaking as a private citizen or as a public employee, and element 6, whether the public employer had an adequate justification for the adverse action, are ultimately determined as a matter of law, but may involve disputed facts. (*Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1071.) If there are no disputed facts, these elements should not be given. They may be modified to express the particular factual issues that the jury must resolve.

Give the bracketed optional sentence in the last paragraph if the defendant has placed the plaintiff's formal written job description in evidence. (See *Garcetti, supra,* 547 U.S. at p. 424.)

Note that there are two causation elements. The protected speech must have caused the employer's adverse action (element 3), and the adverse action must have caused the employee harm (element 5). This second causation element will rarely be disputed in a termination case. For optional language if the employer claims that there was no adverse action, see CACI No. 2505, *Retaliation—Essential Factual Elements* (under California's Fair Employment and Housing Act). See also CACI No. 2509, *"Adverse Employment Action" Explained* (under FEHA).

Sources and Authority

- " '[C]itizens do not surrender their First Amendment rights by accepting public employment.' Moreover, '[t]here is considerable value . . . in encouraging, rather than inhibiting, speech by public employees,' because 'government employees are often in the best position to know what ails the agencies for which they work.' At the same time, '[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions.' Accordingly, government employees may be subject to some restraints on their speech 'that would be unconstitutional if applied to the general public.' " (*Moonin v. Tice* (9th Cir. 2017) 868 F.3d 853, 860–861, internal citations omitted.)
- "First Amendment retaliation claims are governed by the framework in *Eng*. See 552 F.3d at 1070–1072. [Plaintiff] must show that (1) he spoke on a matter of public concern, (2) he spoke as a private citizen rather than a public employee, and (3) the relevant speech was a substantial or motivating factor in the adverse employment action. Upon that showing, the State must demonstrate that (4) it had an adequate justification for treating [plaintiff] differently from other members of the general public, or (5) it would have taken the adverse

employment action even absent the protected speech. '[A]ll the factors are necessary, in the sense that failure to meet any one of them is fatal to the plaintiff's case.' " (*Kennedy v. Bremerton Sch. Dist.* (9th Cir. 2017) 869 F.3d 813, 822, internal citations omitted.)

- "In a First Amendment retaliation case, an adverse employment action is an act that is reasonably likely to deter employees from engaging in constitutionally protected speech." (*Greisen v. Hanken* (9th Cir. 2019) 925 F.3d 1097, 1113.)
- "*Pickering* [*v. Bd. of Educ.* (1968) 391 U.S. 563 [88 S.Ct. 1731, 20 L.Ed.2d 811]] and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." (*Garcetti, supra,* 547 U.S. at p. 418, internal citations omitted.)
- "In the forty years since *Pickering,* First Amendment retaliation law has evolved dramatically, if sometimes inconsistently. Unraveling *Pickering's* tangled history reveals a sequential five-step series of questions: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech. Analysis of these questions, further complicated by restraints on our interlocutory appellate jurisdiction, involves a complex array of factual and legal inquiries requiring detailed explanation." (*Eng, supra,* 552 F.3d at p. 1070.)
- "Whether speech is on a matter of public concern is a question of law, determined by the court . . .. The speech need not be entirely about matters of public concern, but it must 'substantially involve' such matters. '[S]peech warrants protection when it "seek[s] to bring to light actual or potential wrongdoing or breach of public trust." ' " (*Greisen, supra*, 925 F.3d at p. 1109.)
- "Public employees' expression is on a matter of public concern if it 'relat[es] to any matter of political, social, or other concern to the community,' and not 'upon matters *only* of personal interest.' Some subjects *both* affect a public employee's personal interests *and* implicate matters of public concern. *Rendish* [*v. City of Tacoma* (9th Cir. 1997) 123 F.3d 1216, 1223] held that unlawful discrimination

is such a matter, recognizing that 'the public has an interest in unlawful discrimination' in City government, and that employee speech about such discrimination therefore involves matters of public concern even if it arises out of a personal dispute. [¶ . . . ¶] Th[is] rule applies to both administrative and judicial proceedings seeking to 'bring to light potential or actual discrimination' by government officials, and controls even when the plaintiff seeks only private relief for the vindication of her own rights. This precedent clearly establishes that speech by public employees about unlawful discrimination in the workplace is inherently speech on a matter of public concern." (*Ballou v. McElvain* (9th Cir. 2022) 29 F.4th 413, ___, 2022 U.S. App. LEXIS 8038, *33, original italics, internal citations and footnotes omitted.)

- "[Defendant] may avoid liability if he shows that a 'final decision maker's independent investigation and termination decision, responding to a biased subordinate's initial report of misconduct, . . . negate[s] any causal link' between his retaliatory motive and the adverse employment action. This is because a final decision maker's wholly independent investigation and decision establish that 'the employee's protected speech was not a but-for cause of the adverse employment action.' " (*Karl v. City of Mountlake Terrace* (9th Cir. 2012) 678 F.3d 1062, 1072–1073, internal citation omitted.)
- "Whether an individual speaks as a public employee is a mixed question of fact and law. 'First, a factual determination must be made as to the "scope and content of a plaintiff's job responsibilities." ' 'Second, the "ultimate constitutional significance" of those facts must be determined as a matter of law.' " (*Barone v. City of Springfield* (9th Cir. 2018) 902 F.3d 1091, 1099, internal citations omitted.)
- "An employee does not speak as a citizen merely because the employee directs speech towards the public, or speaks in the presence of the public, particularly when an employee's job duties include interacting with the public." (*Barone*, *supra*, 902 F.3d at p. 1100.)
- "[T]he parties in this case do not dispute that [plaintiff] wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." (*Garcetti, supra,* 547 U.S. at p. 424.)
- "To show that retaliation was a substantial or motivating factor behind an adverse employment action, a plaintiff can (1) introduce evidence that the speech and adverse action were proximate in time, such that a jury could infer that the action took place in retaliation for the speech; (2) introduce evidence that the

employer expressed opposition to the speech; or (3) introduce evidence that the proffered explanations for the adverse action were false and pretextual." (*Anthoine v. N. Cent. Counties Consortium* (9th Cir. 2010) 605 F.3d 740, 750.)

- "[I]n synthesizing relevant Ninth Circuit precedent since *Garcetti*, an en banc panel of this Court in *Dahlia v. Rodriguez,* 735 F.3d 1060, 1074–76 (9th Cir. 2013), announced three guiding principles for undertaking the practical factual inquiry of whether an employee's speech is insulated from employer discipline under the First Amendment. . . . The guiding principles are: [¶] 1. 'First, particularly in a highly hierarchical employment setting such as law enforcement, whether or not the employee confined his communications to his chain of command is a relevant, if not necessarily dispositive, factor in determining whether he spoke pursuant to his official duties. When a public employee communicates with individuals or entities outside of his chain of command, it is unlikely that he is speaking pursuant to his duties.' [¶] 2. 'Second, the subject matter of the communication is also of course highly relevant to the ultimate determination whether the speech is protected by the First Amendment . . . When an employee prepares a routine report, pursuant to normal departmental procedure, about a particular incident or occurrence, the employee's preparation of that report is typically within his job duties . . . . By contrast, if a public employee raises within the department broad concerns about corruption or systemic abuse, it is unlikely that such complaints can reasonably be classified as being within the job duties of an average public employee, except when the employee's regular job duties involve investigating such conduct.' [¶] 3. 'Third, we conclude that when a public employee speaks in direct contravention to his supervisor's orders, that speech may often fall outside of the speaker's professional duties. Indeed, the fact that an employee is threatened or harassed by his superiors for engaging in a particular type of speech provides strong evidence that the act of speech was not, as a 'practical' matter, within the employee's job duties notwithstanding any suggestions to the contrary in the employee's formal job description.' " (*Brandon v. Maricopa County* (9th Cir. 2017) 849 F.3d 837, 843–844, internal citations omitted.)
- "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the [defendant]'s decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the [defendant] had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct." (*Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 287 [97 S.Ct. 568, 50 L.Ed.2d 471].)
- "Although the *Pickering* balancing inquiry is ultimately a legal question, like the private citizen inquiry, its resolution often entails underlying factual disputes. Thus we must once again assume any underlying disputes will be resolved in favor of the plaintiff to determine, as a matter of law, whether the state has

'adequate justification' to restrict the employee's speech. If the allegations, viewed in light most favorable to the plaintiff, indicate adequate justification, qualified immunity should be granted." (*Eng, supra,* 552 F.3d at pp. 1071–1072, internal citations omitted.)

- "Although the *Pickering* framework is most often applied in the retaliation context, a similar analysis is used when assessing prospective restrictions on government employee speech. Where a 'wholesale deterrent to a broad category of expression' rather than 'a post hoc analysis of one employee's speech and its impact on that employee's public responsibilities' is at issue, the Court weighs the impact of the ban as a whole—both on the employees whose speech may be curtailed and on the public interested in what they might say—against the restricted speech's ' "necessary impact on the actual operation" of the Government.' '[U]nlike an adverse action taken in response to actual speech,' a prospective restriction 'chills potential speech before it happens.' The government therefore must shoulder a heavier burden when it seeks to justify an ex ante speech restriction as opposed to 'an isolated disciplinary action.' " (*Moonin, supra,* 868 F.3d at p. 861, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 563

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law §§ 894, 895

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03 (Matthew Bender)

3054 Reserved for Future Use

3055. Rebuttal of Retaliatory Motive

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] [***specify alleged retaliatory conduct, e.g., arrested plaintiff***] because [***specify nonretaliatory reason for the adverse action***].**

If [*name of plaintiff***] proves that retaliation was a substantial or motivating factor for [***name of defendant***]'s [***specify alleged retaliatory conduct***], you must then consider if [***name of defendant***] would have taken the same action even in the absence of [***name of plaintiff***]'s constitutionally protected activity.**

To succeed on this defense, [*name of defendant***] must prove that [he/she/***nonbinary pronoun***/it] would have [***specify alleged retaliatory conduct, e.g., arrested plaintiff***] on the basis of [***specify the defendant's stated nonretaliatory reason for the adverse action***], regardless of retaliation for [***name of plaintiff***]'s [***specify constitutionally protected activity***].**

New May 2021

Directions for Use

This instruction sets forth a defendant's response to a plaintiff's claim of retaliation. See CACI No. 3050, *Retaliation—Essential Factual Elements*. The defendant bears the burden of proving the nonretaliatory reason for the allegedly retaliatory conduct. (See *Nieves v. Bartlett* (2019) ___ U.S. ___ [139 S.Ct. 1715, 1725, 204 L.Ed.2d 1].

In retaliatory arrest and prosecution cases, use this instruction only if the court has determined the absence of probable cause or that an exception to the no-probable-cause requirement applies because the plaintiff presented objective evidence that otherwise similarly situated individuals not engaged in the same sort of constitutionally protected activity were not arrested or prosecuted. (See *Nieves, supra,* 139 S.Ct. at p. 1727 [stating exception to no-probable-cause requirement when otherwise similarly situated individuals were not arrested for the same conduct].)

Sources and Authority

- "[I]f the plaintiff establishes the absence of probable cause, 'then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation.' " (*Nieves, supra,* 139 S.Ct. at p. 1725.)
- "Under *Mt. Healthy*, once a petitioner has made a showing of a First Amendment retaliation claim, 'the burden shifts to the government to show that it "would have taken the same action even in the absence of the protected conduct." ' The Government 'must show more than that they "*could* have"

punished the plaintiffs in the absence of the protected speech; instead, "the burden is on the defendants to show" through evidence that they "*would* have" punished the plaintiffs under those circumstances.' " (*Bello-Reyes v. Gaynor* (9th Cir. 2021) 985 F.3d 696, 702, original italics, internal citations omitted.)

Secondary Sources

4 Witkin & Epstein, California Criminal Law (4th ed. 2020) Pretrial, § 367

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 511

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 894–895

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Opportunity Laws*, § 40.26 (Matthew Bender)

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.15 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3056–3059. Reserved for Future Use

3060. Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52)

[*Name of plaintiff***] claims that [***name of defendant***] denied [him/her/***nonbinary pronoun***] full and equal [accommodations/advantages/facilities/privileges/services] because of [his/her/***nonbinary pronoun***] [sex/race/color/religion/ancestry/ national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [denied/aided or incited a denial of/discriminated or made a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [***name of plaintiff***];**
2. **[That a substantial motivating reason for [***name of defendant***]'s conduct was [its perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]];]**

   [That the [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[*insert other actionable characteristic***]] of a person whom [***name of plaintiff***] was associated with was a substantial motivating reason for [***name of defendant***]'s conduct;]**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2011, June 2012; Renumbered from CACI No. 3020 December 2012; Revised June 2013, June 2016

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's conduct. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of

both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Unruh Civil Rights Act has not been addressed by the courts.

With the exception of claims that are also violations of the Americans With Disabilities Act (ADA) (see *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623]), intentional discrimination is required for violations of the Unruh Civil Rights Act. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149 [278 Cal.Rptr. 614, 805 P.2d 873].) The intent requirement is encompassed within the motivating-reason element. For claims that are also violations of the ADA, do not give element 2.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

For an instruction on damages under the Unruh Civil Rights Act, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than $4,000 regardless of any actual damages. (Civ. Code, § 52(a).) In this regard, harm is presumed, and elements 3 and 4 may be considered as established if no actual damages are sought. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Unruh Civil Rights Act violations are per se injurious]; Civ. Code, § 52(a) [provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

The Act is not limited to the categories expressly mentioned in the statute. Other forms of arbitrary discrimination by business establishments are prohibited. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 736 [180 Cal.Rptr. 496, 640 P.2d 115].) Therefore, this instruction allows the user to "*insert other actionable characteristic*" throughout. Nevertheless, there are limitations on expansion beyond the statutory classifications. First, the claim must be based on a personal characteristic similar to those listed in the statute. Second, the court must consider whether the alleged discrimination was justified by a legitimate business reason. Third, the consequences of allowing the claim to proceed must be taken into account. (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1392–1393 [127 Cal.Rptr.3d 794]; see *Harris, supra*, 52 Cal.3d at pp. 1159–1162.) However, these issues are most likely to be resolved by the court rather than the jury. (See *Harris, supra*, 52 Cal.3d at p. 1165.) Therefore, no elements are included to address what may be an "other actionable characteristic." If there are contested factual issues, additional

instructions or special interrogatories may be necessary.

Sources and Authority

- Unruh Civil Rights Act. Civil Code section 51.
- Remedies Under Unruh Civil Rights Act. Civil Code section 52.
- "The Unruh Act was enacted to 'create and preserve a nondiscriminatory environment in California business establishments by "banishing" or "eradicating" arbitrary, invidious discrimination by such establishments.' " (*Flowers v. Prasad* (2015) 238 Cal.App.4th 930, 937 [190 Cal.Rptr.3d 33].)
- "Invidious discrimination is the treatment of individuals in a manner that is malicious, hostile, or damaging." (*Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1404 [195 Cal.Rptr.3d 706].)
- "A plaintiff can recover under the Unruh Civil Rights Act on two alternate theories: (1) a violation of the ADA [citation]; or (2) denial of access to a business establishment based on intentional discrimination." (*Martin v. Thi E-Commerce, LLC* (2023) 95 Cal.App.5th 521, 527 [313 Cal.Rptr.3d 488].)
- "To state a claim under the Unruh Civil Rights Act, a plaintiff must allege the defendant is a business establishment that intentionally discriminates against and/or denies plaintiff full and equal treatment of a service, advantage, or accommodation based on plaintiff's protected status." (*Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910, 922 [313 Cal.Rptr.3d 330].)
- "A person who aids and abets the commission of an offense, such as an intentional tort, may be liable if the person ' "knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act" ' or ' "gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." ' A person can be liable for aiding and abetting violations of civil rights laws." (*Liapes, supra,* 95 Cal.App.5th at p. 926, internal citations omitted.)
- " 'The Legislature used the words "all" and "of every kind whatsoever" in referring to business establishments covered by the Unruh Act, and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible. The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain." The word "establishment," as broadly defined, includes not only a fixed location, such as the "place where one is permanently fixed for residence or business," but also a permanent "commercial force or organization" or "a permanent settled position, (as in life or business)." ' " (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795 [191 Cal.Rptr. 320, 662 P.2d 427], internal citations omitted.)
- "[W]e proceed to decide whether [defendant] is a business establishment. The

resolution of this issue is one of law." (*Rotary Club of Duarte, supra,* 178 Cal.App.3d at p. 1050.)

- "When a plaintiff has visited a business's website with intent to use its services and alleges that the business's terms and conditions exclude him or her from full and equal access to its services, the plaintiff need not enter into an agreement with the business to establish standing under the Unruh Civil Rights Act. In general, a person suffers discrimination under the Act when the person presents himself or herself to a business with an intent to use its services but encounters an exclusionary policy or practice that prevents him or her from using those services. We conclude that this rule applies to online businesses and that visiting a website with intent to use its services is, for purposes of standing, equivalent to presenting oneself for services at a brick-and-mortar store. Although mere awareness of a business's discriminatory policy or practice is not enough for standing under the Act, entering into an agreement with the business is not required." (*White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1023 [250 Cal.Rptr.3d 770, 446 P.3d 276].)
- "We hold that including websites connected to a physical place of public accommodation is not only consistent with the plain language of Title III, but it is also consistent with Congress's mandate that the ADA keep pace with changing technology to effectuate the intent of the statute." (*Thurston v. Midvale Corp.* (2019) 39 Cal.App.5th 634, 644 [252 Cal.Rptr.3d 292].)
- "As to intentional discrimination, the California Supreme Court has held that the discriminatory effect of a facially neutral policy or action is not alone a basis for inferring intentional discrimination under the Unruh Civil Rights Act. It follows that we cannot infer intentional discrimination from [plaintiff's] alleged facts that he made [defendant] aware of the discriminatory effect of [defendant's] facially neutral website, and that [defendant] did not ameliorate these effects." (*Martinez v. Cot'n Wash, Inc.* (2022) 81 Cal.App.5th 1026, 1032 [297 Cal.Rptr.3d 712], internal citation omitted.)
- "Beyond the pleading stage, if a plaintiff wants to prevail on an Unruh Civil Rights Act claim, he or she must present sufficient evidence to overcome the online defendant's argument that he or she 'did not actually possess a *bona fide intent* to sign up for or use its services.' " (*Thurston v. Omni Hotels Management Corp.* (2021) 69 Cal.App.5th 299, 307 [284 Cal.Rptr.3d 341], internal citation omitted, original italics.)
- "Here, the City was not acting as a business establishment. It was amending an already existing municipal code section to increase the minimum age of a responsible person from the age of 21 years to 30. The City was not directly discriminating against anyone and nothing in the plain language of the Unruh Civil Rights Act makes its provisions applicable to the actions taken by the City." (*Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 175 [196 Cal.Rptr.3d 267].)
- "[T]he protection against discrimination afforded by the Unruh Act applies to 'all

persons,' and is not reserved for restricted categories of prohibited discrimination." (*Marina Point, Ltd.*, *supra*, 30 Cal.3d at p. 736.)

- "Nevertheless, the enumerated categories, bearing the 'common element' of being 'personal' characteristics of an individual, necessarily confine the Act's reach to forms of discrimination based on characteristics similar to the statutory classifications—such as 'a person's geographical origin, physical attributes, and personal beliefs.' The 'personal characteristics' protected by the Act are not defined by 'immutability, since some are, while others are not [immutable], but that they represent traits, conditions, decisions, or choices fundamental to a person's identity, beliefs and self-definition.' " (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1145 [228 Cal.Rptr.3d 336].)
- "In addition to the particular forms of discrimination specifically outlawed by the Act (sex, race, color, etc.), courts have held the Act 'prohibit[s] discrimination based on several classifications which are not specifically enumerated in the statute.' These judicially recognized classifications include unconventional dress or physical appearance, families with children, homosexuality, and persons under 18." (*Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836 [103 Cal.Rptr.2d 552], internal citations omitted.)
- "The Act applies not merely in situations where businesses exclude individuals altogether, but also 'where unequal treatment is the result of a business practice.' 'Unequal treatment includes offering price discounts on an arbitrary basis to certain classes of individuals.' " (*Candelore*, *supra*, 19 Cal.App.5th at pp. 1145–1146, internal citations omitted.)
- "Race discrimination claims under . . . the Unruh Civil Rights Act follow the analytical framework established under federal employment law. Although coaches are different from 'ordinary employers,' the *McDonnell Douglas* framework strikes the appropriate balance in evaluating race discrimination claims brought by college athletes: . . . ." (*Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 661 [242 Cal.Rptr.3d 757], internal citations omitted.)
- "[T]he language and history of the Unruh Act indicate that the legislative object was to prohibit intentional discrimination in access to public accommodations. We have been directed to no authority, nor have we located any, that would justify extension of a disparate impact test, which has been developed and applied by the federal courts primarily in employment discrimination cases, to a general discrimination-in-public-accommodations statute like the Unruh Act. Although evidence of adverse impact on a particular group of persons may have probative value in public accommodations cases and should therefore be admitted in appropriate cases subject to the general rules of evidence, a plaintiff must nonetheless plead and prove a case of intentional discrimination to recover under the Act." (*Harris, supra*, 52 Cal.3d at p. 1149.)
- "On examining the language, statutory context, and history of section 51, subdivision (f), we conclude . . . [t]he Legislature's intent in adding subdivision

(f) was to provide disabled Californians injured by violations of the ADA with the remedies provided by section 52. A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under section 52." (*Munson, supra*, 46 Cal.4th at p. 665.)

- "Civil Code section 51, subdivision (f) states: 'A violation of the right of any individual under the federal [ADA] shall also constitute a violation of this section.' The ADA provides in pertinent part: 'No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation.' The ADA defines discrimination as 'a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.' " (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825], internal citations omitted.)
- " 'Although the Unruh Act proscribes "any form of arbitrary discrimination," certain types of discrimination have been denominated "reasonable" and, therefore, not arbitrary.' Thus, for example, 'legitimate business interests may justify limitations on consumer access to public accommodations.' " (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684], internal citations omitted.)
- "Discrimination may be reasonable, and not arbitrary, in light of the nature of the enterprise or its facilities, legitimate business interests (maintaining order, complying with legal requirements, and protecting business reputation or investment), and public policy supporting the disparate treatment." (*Javorsky, supra*, 242 Cal.App.4th at p. 1395.)
- "[T]he Act's objective of prohibiting 'unreasonable, arbitrary or invidious discrimination' is fulfilled by examining whether a price differential reflects an 'arbitrary, class-based generalization.' . . . [A] policy treating age groups differently in this respect may be upheld, at least if the pricing policy (1) ostensibly provides a social benefit to the recipient group; (2) the recipient group is disadvantaged economically when compared to other groups paying full price; and (3) there is no invidious discrimination." (*Javorsky, supra*, 242 Cal.App.4th at p. 1399.)
- "Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public." (*Harris, supra,* 52 Cal.3d at p. 1165, internal citations omitted.)
- "It is thus manifested by section 51 that all persons are entitled to the full and

equal privilege of associating with others in any business establishment. And section 52, liberally interpreted, makes clear that discrimination by such a business establishment against one's right of association on account of the associates' color, is violative of the Act. It follows . . . that discrimination by a business establishment against persons on account of their association with others of the black race is actionable under the Act." (*Winchell v. English* (1976) 62 Cal.App.3d 125, 129 [133 Cal.Rptr. 20].)

- "Appellant is disabled as a matter of law not only because she is HIV positive, but also because it is undisputed that respondent 'regarded or treated' her as a person with a disability. The protection of the Unruh Civil Rights Act extends both to people who are currently living with a physical disability that limits a life activity and to those who are regarded by others as living with such a disability. . . . 'Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the "regarded as" definition casts a broader net and protects *any* individual "regarded" or "treated" by an employer "as having, or having had, any physical condition that makes achievement of a major life activity difficult" or may do so in the future.' Thus, even an HIV-positive person who is outwardly asymptomatic is protected by the Unruh Civil Rights Act." (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 529–530 [155 Cal.Rptr.3d 620], original italics, internal citations omitted.)
- "[T]he Unruh Civil Rights Act prohibits arbitrary discrimination in public accommodations with respect to trained service dogs, but not to service-animals-in-training." (*Miller v. Fortune Commercial Corp.* (2017) 15 Cal.App.5th 214, 224 [223 Cal.Rptr.3d 133].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 994–1016

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1525 et seq. (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10–116.16 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 et seq. (Matthew Bender)

3061. Discrimination in Business Dealings—Essential Factual Elements (Civ. Code, § 51.5)

[*Name of plaintiff***] claims that [***name of defendant***] denied [him/her/***nonbinary pronoun***] full and equal rights to conduct business because of [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [discriminated against/boycotted/blacklisted/refused to buy from/refused to contract with/refused to sell to/refused to trade with] [***name of plaintiff***];**

2. **[That a substantial motivating reason for [***name of defendant***]'s conduct was [its perception of] [***name of plaintiff***]'s [sex/race/color/religion/ ancestry/national origin/ disability/medical condition/ genetic information/marital status/sexual orientation/citizenship/ primary language/immigration status/[***insert other actionable characteristic***]];]**

   [*or***]**

   [That a substantial motivating reason for [*name of defendant***]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]] of [***name of plaintiff***]'s [partners/members/stockholders/directors/officers/managers/superintendents/agents/employees/business associates/suppliers/customers];]**

   [*or***]**

   [That a substantial motivating reason for [*name of defendant***]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]] of a person with whom [***name of plaintiff***] was associated;]**

3. **That [***name of plaintiff***] was harmed; and**

4. **That [***name of defendant***]'s conduct was a substantial factor in**

causing [*name of plaintiff*]'s harm.

New September 2003; Revised June 2012; Renumbered from CACI No. 3021 and Revised December 2012; Revised June 2013, December 2016

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

Under the Unruh Civil Rights Act (see CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements*), the California Supreme Court has held that intentional discrimination is required. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159–1162 [278 Cal.Rptr. 614, 805 P.2d 873].) While there is no similar California case imposing an intent requirement under Civil Code section 51.5, Civil Code section 51.5 requires that the discrimination be *on account of* the protected category. (Civ. Code, § 51.5(a).) The kinds of prohibited conduct would all seem to involve intentional acts. (See *Nicole M. v. Martinez Unified Sch. Dist.* (N.D. Cal. 1997) 964 F. Supp. 1369, 1389, superseded by statute on other grounds as stated in *Sandoval v. Merced Union High Sch.* (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 28446.) The intent requirement is encompassed within the motivating-reason element (element 2).

There is an exception to the intent requirement under the Unruh Act for conduct that violates the Americans With Disabilities Act. (See *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623].). Because this exception is based on statutory construction of the Unruh Act (see Civ. Code, § 51(f)), the committee does not believe that it applies to section 51.5, which contains no similar language.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

Element 2 uses the term "substantial motivating reason" to express causation between the protected classification and the defendant's conduct. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under Civil Code section 51.5 has not been addressed by the courts.

For an instruction on damages under Civil Code section 51.5, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than $4,000. (Civ. Code, § 52(a)); see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

It is possible that elements 3 and 4 are not needed if only the statutory minimum $4,000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

Conceptually, this instruction has some overlap with CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements.* For a discussion of the basis of this instruction, see *Jackson v. Superior Court* (1994) 30 Cal.App.4th 936, 941 [36 Cal.Rptr.2d 207].

Sources and Authority

- Discrimination in Business Dealings. Civil Code section 51.5.
- Protected Characteristics. Civil Code section 51(b).
- "In 1976 the Legislature added Civil Code section 51.5 to the Unruh Civil Rights Act and amended Civil Code section 52 (which provides penalties for those who violate the Unruh Civil Rights Act), in order to, inter alia, include section 51.5 in its provisions." (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 384 [206 Cal.Rptr. 866], footnote omitted.)
- "[I]t is clear from the cases under section 51 that the Legislature did not intend in enacting section 51.5 to limit the broad language of section 51 to include only selling, buying or trading. Both sections 51 and 51.5 have been liberally applied to all types of business activities. Furthermore, section 51.5 forbids a business to 'discriminate against' 'any person' and does not just forbid a business to 'boycott or blacklist, refuse to buy from, sell to, or trade with any person.' " (*Jackson, supra*, 30 Cal.App.4th at p. 941, internal citation and footnote omitted.)
- "Although the phrase 'business establishment of every kind whatsoever' has been interpreted by the Supreme Court and the Court of Appeal in the context of section 51, we are aware of no case which interprets that term in the context of section 51.5. We believe, however, that the Legislature meant the identical language in both sections to have the identical meaning." (*Pines, supra*, 160 Cal.App.3d at p. 384, internal citations omitted.)
- "[T]he classifications specified in section 51.5, which are identical to those of section 51, are likewise not exclusive and encompass other personal characteristics identified in earlier cases." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 538 [30 Cal.Rptr.2d 706], internal citations omitted.)
- "[T]he analysis under Civil Code section 51.5 is the same as the analysis we

have already set forth for purposes of the [Unruh Civil Rights] Act." (*Semler v. General Electric Capital Corp*. (2011) 196 Cal.App.4th 1380, 1404 [127 Cal.Rptr.3d 794].)

- "[W]hen such discrimination occurs, a person has standing under section 51.5 if he or she is 'associated with' the disabled person and has also personally experienced the discrimination." (*Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1134 [205 Cal.Rptr.3d 656].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 994–1015

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10–116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 (Matthew Bender)

3062. Gender Price Discrimination—Essential Factual Elements (Civ. Code, § 51.6)

[*Name of plaintiff*] claims that [*name of defendant*] charged [him/her/*nonbinary pronoun*] a higher price for services because of [his/her/*nonbinary pronoun*] gender. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] charged [*name of plaintiff*] more for services of similar or like kind because of [his/her/*nonbinary pronoun*] gender;**
2. **That [*name of plaintiff*] was harmed; and**
3. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

It is not improper to charge a higher price for services if the price difference is based on the amount of time, difficulty, or cost of providing the services.

New September 2003; Renumbered from CACI No. 3022 December 2012; Revised June 2013, July 2018

Directions for Use

For an instruction on damages under Civil Code section 51.6, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than $4,000. (Civ. Code, § 52(a)); see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

It is possible that elements 2 and 3 are not needed if only the statutory minimum $4,000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

Price discrimination based on age has been held to violate the Unruh Act, at least if there is no statute-based policy supporting the differential. (See *Candelore v. Tinder,*

Inc. (2018) 19 Cal.App.5th 1138, 1146–1155 [228 Cal.Rptr.3d 336]; but see *Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1402–1403 [195 Cal. Rptr. 3d 706].)

Sources and Authority

- Gender Price Discrimination. Civil Code section 51.6.
- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)
- " '[D]iscounts must be "applicable alike to persons of every sex, color, race, [and age, etc.]", instead of being contingent on some arbitrary, class-based generalization.' " (*Candelore*, *supra*, 19 Cal.App.5th at p. 1154.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1002, 1003

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.44 (Matthew Bender)

3063. Acts of Violence—Ralph Act—Essential Factual Elements (Civ. Code, § 51.7)

[*Name of plaintiff***] claims that [***name of defendant***] committed an act of violence against [him/her/***nonbinary pronoun***] because of [his/her/***nonbinary pronoun***] [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/citizenship/primary language/immigration status/position in a labor dispute/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] committed a violent act against [***name of plaintiff***] [or [his/her/***nonbinary pronoun***] property];**
2. **That a substantial motivating reason for [***name of defendant***]'s conduct was [[his/her/***nonbinary pronoun***] perception of] [***name of plaintiff***]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/citizenship/primary language/immigration status/position in a labor dispute/[***insert other actionable characteristic***]];**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 3023 December 2009; Renumbered from CACI No. 3023A December 2012; Revised June 2013, December 2016

Directions for Use

Use this instruction for a cause of action under the Ralph Act involving actual acts of violence alleged to have been committed by the defendant against the plaintiff. For an instruction involving only threats of violence, see CACI No. 3064, *Threats of Violence—Ralph Act—Essential Factual Elements*.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's acts. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Ralph Act has not been addressed by the courts.

Liability may also be found if a defendant "aids, incites, or conspires" in the denial of a right protected under Civil Code section 51.7. (Civ. Code, § 52(b).) This instruction should be modified if aiding, inciting, or conspiring is asserted as

theories of liability. See also instructions in the Conspiracy series (CACI No. 3600 et seq.).

Sources and Authority

- Ralph Act. Civil Code section 51.7.
- Protected Characteristics. Civil Code section 51(b).
- Remedies Under Ralph Act. Civil Code section 52(b).
- "The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873].)
- "Under the Ralph Act, a plaintiff must establish the defendant threatened or committed violent acts against the plaintiff or their property, and a motivating reason for doing so was a prohibited discriminatory motive, or that [defendant] aided, incited, or conspired in the denial of a protected right." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1291 [217 Cal.Rptr.3d 275].)
- "Nor do we agree with defendants that 'because of' logically means 'hatred.' Section 51.7 provides that all persons 'have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of . . .' specified characteristics, including sex, and provides for a civil remedy for violation of that right. Nothing in the statute requires that a plaintiff prove that the offending act was motivated by hate." (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 269 [150 Cal.Rptr.3d 861].)
- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 989 et seq.

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial Claims and Defenses, Ch. 14(IV)-B, *Ralph Civil Rights Act of 1976—Elements*, ¶ 14:940 (The Rutter Group)

Cheng et al., Cal. Fair Housing and Public Accommodations § 914:2, 14:39 (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Matthew Bender)

California Civil Practice: Civil Rights Litigation, §§ 3:1–3:15 (Thomson Reuters)

3064. Threats of Violence—Ralph Act—Essential Factual Elements (Civ. Code, § 51.7)

[*Name of plaintiff***] claims that [***name of defendant***] intimidated [him/her/** *nonbinary pronoun***] by threat of violence because of [his/her/***nonbinary pronoun***] [race/color/religion/ancestry/national origin/political affiliation/ sex/sexual orientation/age/disability/citizenship/primary language/immigration status/position in a labor dispute/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally threatened violence against [***name of plaintiff***] [or [his/her/***nonbinary pronoun***] property], [whether or not [***name of defendant***] actually intended to carry out the threat];**
2. **That a substantial motivating reason for [***name of defendant***]'s conduct was [[his/her/***nonbinary pronoun***] perception of] [***name of plaintiff***]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/citizenship/primary language/immigration status/position in a labor dispute/[***insert other actionable characteristic***]];**
3. **That a reasonable person in [***name of plaintiff***]'s position would have believed that [***name of defendant***] would carry out [his/her/** *nonbinary pronoun***] threat;**
4. **That a reasonable person in [***name of plaintiff***]'s position would have been intimidated by [***name of defendant***]'s conduct;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 3023 December 2009; Renumbered from CACI No. 3023B December 2012; Revised June 2013, December 2016

Directions for Use

Use this instruction for a cause of action under the Ralph Act involving threats of violence alleged to have been directed by the defendant toward the plaintiff. For an instruction involving actual acts of violence, see CACI No. 3063, *Acts of Violence—Ralph Act—Essential Factual Elements*.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's threats. "Substantial motivating reason" has been held to be the appropriate standard under

the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, "*Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Ralph Act has not been addressed by the courts.

No published California appellate opinion establishes elements 3 and 4. However, the Ninth Circuit Court of Appeals and the California Fair Employment and Housing Commission have held that a reasonable person in the plaintiff's position must have been intimidated by the actions of the defendant and have perceived a threat of violence. (See *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1289–1290; *Dept. Fair Empl. & Hous. v. Lake Co. Dept. of Health Serv.* (July 22, 1998) 1998 CAFEHC LEXIS 16, **55–56.)

Liability may also be found if a defendant "aids, incites, or conspires" in the denial of a right protected under Civil Code section 51.7. (Civ. Code, § 52(b).) This instruction should be modified if aiding, inciting, or conspiring is asserted as theories of liability. See also instructions in the Conspiracy series (CACI No. 3600 et seq.).

Sources and Authority

- Ralph Act. Civil Code section 51.7.
- Protected Characteristics. Civil Code section 51(b).
- Remedies Under Ralph Act. Civil Code section 52(b).
- "The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873].)
- "Under the Ralph Act, a plaintiff must establish the defendant threatened or committed violent acts against the plaintiff or their property, and a motivating reason for doing so was a prohibited discriminatory motive, or that [defendant] aided, incited, or conspired in the denial of a protected right." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1291 [217 Cal.Rptr.3d 275].)
- "Nor do we agree with defendants that 'because of' logically means 'hatred.' Section 51.7 provides that all persons 'have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of . . .' specified characteristics, including sex, and provides for a civil remedy for violation of that right. Nothing in the statute requires that a plaintiff prove that the offending act was motivated by hate." (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 269 [150 Cal.Rptr.3d 861].)
- "The test is: 'would a reasonable person, standing in the shoes of the plaintiff, have been intimidated by the actions of the defendant and have perceived a threat of violence?' " (*Winarto, supra,* 274 F.3d at pp. 1289–1290, internal citation omitted.)
- "When a threat of violence would lead a reasonable person to believe that the

threat will be carried out, in light of the 'entire factual context,' including the surrounding circumstances and the listeners' reactions, then the threat does not receive First Amendment protection, and may be actionable under the Ralph Act. The only intent requirement is that respondent 'intentionally or knowingly communicates his [or her] threat, not that he intended or was able to carry out his threat.' A threat exists if the 'target of the speaker reasonably believes that the speaker has the ability to act him or herself or to influence others. . . . It is the perception of a reasonable person that is dispositive, not the actual intent of the speaker.' " (*Dept. Fair Empl. & Hous., supra,* 1998 CAFEHC LEXIS at pp. 55–56, internal citations omitted.)

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 989 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Employment Discrimination—Unruh Civil Rights Act*, ¶¶ 7:1528–7:1529 (The Rutter Group)

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims and Defenses, Ch. 14(IV)-B, *Ralph Civil Rights Act of 1976—Elements*, ¶ 14:940 (The Rutter Group)

Cheng et al., Cal. Fair Housing and Public Accommodations §§ 14:2, 14:3 (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Matthew Bender)

California Civil Practice: Civil Rights Litigation §§ 3:1–3:15 (Thomson Reuters)

3065. Sexual Harassment in Defined Relationship—Essential Factual Elements (Civ. Code, § 51.9)

[*Name of plaintiff***] claims that [***name of defendant***] sexually harassed [him/her/***nonbinary pronoun***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of plaintiff***] had a [business/service/ [or] professional] relationship with [***name of defendant***];]**

   [*or***]**

   [That [*name of defendant***] held [himself/herself/***nonbinary pronoun***] out as being able to help [***name of plaintiff***] establish a [business/service/ [or] professional] relationship with [[***name of defendant***]/ [or] [***name of third party***]];]**

2. **[That [***name of defendant***] made [sexual advances/solicitations/sexual requests/demands for sexual compliance/[***insert other actionable conduct***]] to [***name of plaintiff***];]**

   [or]

   [That [*name of defendant***] engaged in [verbal/visual/physical] conduct of a [sexual nature/hostile nature based on gender];]**

3. **That [***name of defendant***]'s conduct was unwelcome and also pervasive or severe; and**

4. **That [***name of plaintiff***] has suffered or will suffer [economic loss or disadvantage/personal injury/the violation of a statutory or constitutional right] as a result of [***name of defendant***]'s conduct.**

New September 2003; Revised April 2008; Renumbered from CACI No. 3024 December 2012; Revised January 2019

Directions for Use

Select the appropriate option for element 1 depending on the nature of the relationship between the parties. Select either or both options for element 2 depending on the defendant's conduct. For a nonexclusive list of relationships covered, see Civil Code section 51.9(a)(1).

See also CACI No. 2524, *"Severe or Pervasive" Explained.*

Sources and Authority

- Sexual Harassment in Defined Relationship. Civil Code section 51.9.
- "[The] history of the [1999] amendments to Civil Code section 51.9 leaves no doubt of the Legislature's intent to conform the requirements governing liability

for sexual harassment in professional relationships outside the workplace to those of the federal law's Title VII and California's FEHA, both of which pertain to liability for sexual harassment in the workplace. Under both laws, an employee plaintiff who cannot prove a demand for sexual favors in return for a job benefit (that is, quid pro quo harassment) must show that the sexually harassing conduct was so pervasive or severe as to alter the conditions of employment. With respect to liability under section 51.9, which covers a wide variety of business relationships outside the workplace, the relevant inquiry is whether the alleged sexually harassing conduct was sufficiently pervasive or severe as to alter the conditions of the business relationship. This inquiry must necessarily take into account the nature and context of the particular business relationship." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1048 [95 Cal.Rptr.3d 636, 209 P.3d 963].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law § 992

1 California Landlord-Tenant Practice, Ch. 3, *Liability for Sexual Harassment* (Cont.Ed.Bar 2d ed.) § 3.70A

1 Wrongful Employment Termination Practice, Ch. 3, *When Plaintiff is Not Employee, Applicant, or Independent Contractor* (Cont.Ed.Bar 2d ed.) § 3.12

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36; Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.35, 116.90; Ch. 117, *Civil Rights: Housing Discrimination*, § 117.32 (Matthew Bender)

1 Westley et al., Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 2, *Creation of Tenancy*, 2.13 (Matthew Bender)

3066. Bane Act—Essential Factual Elements (Civ. Code, § 52.1)

[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with [or attempted to interfere with] [his/her/***nonbinary pronoun***] civil rights by threats, intimidation, or coercion. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That by threats, intimidation or coercion, [***name of defendant***] caused [***name of plaintiff***] to reasonably believe that if [he/she/***nonbinary pronoun***] exercised [his/her/***nonbinary pronoun***] right [***insert right, e.g., "to vote"***], [***name of defendant***] would commit violence against [[him/her/***nonbinary pronoun***]/ [or] [his/her/***nonbinary pronoun***] property] and that [***name of defendant***] had the apparent ability to carry out the threats;]**

   [*or***]**

   [That [*name of defendant***] acted violently against [[***name of plaintiff***]/ [and] [***name of plaintiff***]'s property] [to prevent [him/her/***nonbinary pronoun***] from exercising [his/her/***nonbinary pronoun***] right [***e.g., to vote***]/to retaliate against [***name of plaintiff***] for having exercised [his/her/***nonbinary pronoun***] right [***e.g., to vote***]];]**

[2. That [*name of defendant***] intended to deprive [***name of plaintiff***] of [his/her/***nonbinary pronoun***] enjoyment of the interests protected by the right [***e.g., to vote***];]**

3. **That [***name of plaintiff***] was harmed; and**

4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

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*New September 2003; Renumbered from CACI No. 3025 and Revised December 2012, November 2018, May 2024**

Directions for Use

Select the first option for element 1 if the defendant's conduct involved threats of violence. (See Civ. Code, § 52.1(k).) Select the second option if the conduct involved actual violence.

The Bane Act provides that speech alone is not sufficient to constitute a violation unless it involves a credible threat of violence. (Civ. Code, § 52.1(k).) This limitation would appear to foreclose a claim based on threats, intimidation, or coercion involving a nonviolent consequence. (See *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 [80 Cal.Rptr.2d 60] [to state a cause of action under Bane Act there must first be violence or intimidation by threat of violence].) No case has been found, however, that applies the speech limitation to

foreclose a claim based on coercion without violence or a threat of violence, and several courts have suggested that this point is not fully settled. (See *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 959 [137 Cal.Rptr.3d 839] [we "need not decide that every plaintiff must allege violence or threats of violence in order to maintain an action under section 52.1"]; *City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 408 [39 Cal.Rptr.3d 1] [also noting issue but finding it unnecessary to address].) To assert such a claim, modify element 1, option 1 to allege coercion based on a nonviolent threat with severe consequences.

Civil Code section 52(a) provides for damages up to three times actual damages but a minimum of $4,000 for violations of Civil Code section 51 (Unruh Act), 51.5, and 51.6. Civil Code section 52(b) provides for punitive damages for violations of Civil Code sections 51.7 (Ralph Act) and 51.9. Neither subsection of Section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the reference to section 52 in subsection (b) of the Bane Act would seem to indicate that damages may be recovered under both subsections (a) and (b) of section 52.

Under the Unruh Act, if only the statutory minimum damages of $4,000 is sought, it is not necessary to prove harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Section 52 provides for minimum statutory damages for every violation of section 51, regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].) Presumably, the same rule applies under the Bane Act as the statutory minimum of section 52(a) should be recoverable Therefore, omit elements 2 and 3 unless actual damages are sought. If actual damages are sought, combine CACI No. 3067, *Unruh Civil Rights Act—Damages*, and CACI No. 3068, *Ralph Act—Damages and Penalty*, to recover damages under both subsections (a) and (b) of section 52.

It has been the rule that in a wrongful detention case, the coercion required to support a Bane Act claim must be coercion independent from that inherent in the wrongful detention itself. (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 981 [159 Cal.Rptr.3d 204].) One court, however, did not apply this rule in a wrongful arrest case. The court instead held that the "threat, intimidation or coercion" element requires a specific intent to violate protected rights. (*Cornell v. City & County of San Francisco* (2017) 17 Cal.App.5th 766, 790–804 [225 Cal.Rptr.3d 356].) Element 2 expresses this requirement.

Sources and Authority

- Bane Act. Civil Code section 52.1.
- Remedies Under Bane Act. Civil Code section 52.
- "The Bane Act permits an individual to pursue a civil action for damages where another person 'interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state.' 'The essence of a Bane Act claim is that the defendant, by the specified

improper means (i.e., "threat[], intimidation or coercion"), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law.' " (*King v. State of California* (2015) 242 Cal.App.4th 265, 294 [195 Cal.Rptr.3d 286], internal citation omitted.)

- "[S]ection 52.1, was enacted a decade [after the Ralph Act] as part of Assembly Bill No. 63 (1987–1988 Reg. Sess.) (Assembly Bill No. 63) and is known as the Tom Bane Civil Rights Act. It was intended to supplement the Ralph Civil Rights Act as an additional legislative effort to deter violence. The stated purpose of the bill was 'to fill in the gaps left by the Ralph Act' by allowing an individual to seek relief to prevent the violence from occurring before it was committed and providing for the filing of criminal charges." (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1447 [39 Cal.Rptr.3d 706], internal citation omitted.)
- "The Legislature enacted section 52.1 to stem a tide of hate crimes." (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338 [70 Cal.Rptr.2d 844, 949 P.2d 941], internal citation omitted.)
- "[T]o state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence. Second, the violence or threatened violence must be due to plaintiff's membership in one of the specified classifications set forth in Civil Code section 51.7 or a group similarly protected by constitution or statute from hate crimes." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1290 [217 Cal.Rptr.3d 275].)
- "The plaintiff must show 'the defendant interfered with or attempted to interfere with the plaintiff's legal right by threatening or committing violent acts.' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 395 [218 Cal.Rptr.3d 38].)
- "However, the statutory language does not limit its application to hate crimes. Notably, the statute does not require a plaintiff to allege the defendant acted with discriminatory animus or intent based upon the plaintiff's membership in a protected class of persons." (*Shoyoye, supra*, 203 Cal.App.4th at p. 956.)
- "The phrase 'under color of law' indicates, without doubt, that the Legislature intended to include law enforcement officers within the scope of Section 52.1 if the requisites of the statute are otherwise met." (*Cornell, supra,* 17 Cal.App.5th at p. 800.)
- "Civil Code section 52.1, the Bane Act civil counterpart of [Penal Code] section 422.6, recognizes a private right of action for damages and injunctive relief for interference with civil rights." (*In re M.S.* (1995) 10 Cal.4th 698, 715 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)
- "[T]he Bane Act requires that the challenged conduct be intentional." (*Simmons v. Superior Court* (2016) 7 Cal.App.5th 1113, 1125 [212 Cal.Rptr.3d 884].)
- "[S]ection 52.1 does require an attempted or completed act of interference with a

legal right, accompanied by a form of coercion." (*Jones, supra,* 17 Cal.4th at p. 334.)

- "The statutory framework of section 52.1 indicates that the Legislature meant the statute to address interference with constitutional rights involving more egregious conduct than mere negligence." (*Shoyoye, supra*, 203 Cal.App.4th at p. 958.)
- " '[W]here coercion is inherent in the constitutional violation alleged, . . . the statutory requirement of "threats, intimidation, or coercion" is not met. The statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself.' " (*Simmons, supra,* 7 Cal.App.5th at p. 1126.)
- "The Legislature's purpose suggests to us that the coercive nature of a tax—however exorbitant or unfair that tax may be—was not what the Legislature had in mind when it forbade interference with legal rights by 'threat, intimidation, or coercion.' Plaintiffs have cited no case where economic or monetary pressures alone have been found to constitute coercion under the Bane Act." (*County Inmate Telephone Service Cases* (2020) 48 Cal.App.5th 354, 371 [262 Cal.Rptr.3d 1].)
- "It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to Section 52.1 of the Civil Code does not require the individual whose rights are secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of California, to be a member of a protected class identified by its race, color, religion, or sex, among other things." (Assembly Bill 2719 (Stats. 2000, ch. 98) [abrogating the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282]].)
- "Subdivision (j) of Civil Code section 52.1 provides that speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or group of persons, the person or group of persons against whom the speech is directed 'reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.' . . . The presence of the express 'reasonable fear' element, in addition to the 'apparent ability' element, in Civil Code section 52.1, governing civil actions for damages, most likely reflects the Legislature's determination [that] a defendant's civil liability should depend on the harm actually suffered by the victim." (*In re M.S., supra,* 10 Cal.4th at p. 715, internal citation omitted.)
- "[Q]ualified immunity of the kind applied to actions brought under section 1983 does not apply to actions brought under Civil Code section 52.1." (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1246 [63 Cal.Rptr.3d 741].)
- "[A] wrongful detention that is 'accompanied by the requisite threats, intimidation, or coercion'—'coercion independent from the coercion inherent in the wrongful detention itself' that is 'deliberate or spiteful'—is a violation of the Bane Act." (*Bender, supra*, 217 Cal.App.4th at p. 981, internal citations omitted.)

- "Here, there clearly *was* a showing of coercion separate and apart from the coercion inherent in an unlawful arrest. [Defendant officer] wrongfully detained and arrested plaintiff, because he had no probable cause to believe plaintiff had committed any crime. But, in addition, [defendant officer] deliberately and unnecessarily beat and pepper sprayed the unresisting, already handcuffed plaintiff. That conduct was not the coercion that is inherent in a wrongful arrest." (*Bender, supra*, 217 Cal.App.4th at p. 979, original italics.)
- "We acknowledge that some courts have read *Shoyoye* as having announced 'independen[ce] from [inherent coercion]' as a requisite element of all Section 52.1 claims alleging search-and-seizure violations, but we think those courts misread the statute as well as the import of *Venegas*. By its plain terms, Section 52.1 proscribes any 'interfere[nce] with' or attempted 'interfere[nce] with' protected rights carried out 'by threat, intimidation or coercion.' Nothing in the text of the statute requires that the offending 'threat, intimidation or coercion' be 'independent' from the constitutional violation alleged." (*Cornell, supra,* 17 Cal.App.5th at pp. 799–800.)
- "[W]here, as here, an unlawful arrest is properly pleaded and proved, the egregiousness required by Section 52.1 is tested by whether the circumstances indicate the arresting officer had a specific intent to violate the arrestee's right to freedom from unreasonable seizure, not by whether the evidence shows something beyond the coercion 'inherent' in the wrongful detention." (*Cornell, supra,* 17 Cal.App.5th at pp. 801–802.)
- "[T]his test ' "essentially sets forth two requirements for a finding of 'specific intent' . . . The first is a purely legal determination. Is the . . . right at issue clearly delineated and plainly applicable under the circumstances of the case? If the trial judge concludes that it is, then the jury must make the second, factual, determination. Did the defendant commit the act in question with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that . . . right? If both requirements are met, even if the defendant did not in fact recognize the [unlawfulness] of his act, he will be adjudged as a matter of law to have acted [with the requisite specific intent]—i.e., 'in reckless disregard of constitutional [or statutory] prohibitions or guarantees.' " ' " (*Cornell, supra,* 17 Cal.App.5th at p. 803.)
- "Civil Code section 52.1 does not address the immunity established by section 844.6 [public entity immunity for injury to prisoners]. Nothing in Civil Code section 52.1 indicates an intent to abrogate this specific immunity provision. The immunity that it creates therefore applies to [plaintiff]'s Bane Act claim." (*Towery v. State of California* (2017) 14 Cal.App.5th 226, 234 [221 Cal.Rptr.3d 692].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 989 et seq.

Cheng et al., Cal. Fair Housing and Public Accommodations § 14:5 (The Rutter

Group)

California Civil Practice: Civil Rights Litigation §§ 3:1–3:15 (Thomson Reuters)

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Employment Opportunity Laws*, § 40.12[2] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117A, *Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence*, § 117A.11 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, §§ 35.01, 35.20 et seq. (Matthew Bender)

3067. Unruh Civil Rights Act—Damages (Civ. Code, §§ 51, 52(a))

If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [him/her/***nonbinary pronoun***] for the harm. This compensation is called "damages."**

[*Name of plaintiff***] must prove the amount of [his/her/***nonbinary pronoun***] damages. However, [***name of plaintiff***] does not have to prove the exact amount of the harm or the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

[*Insert item(s) of claimed harm.***]**

In addition, you may award [*name of plaintiff***] up to three times the amount of [his/her/***nonbinary pronoun***] actual damages as a penalty against [***name of defendant***].**

New September 2003; Revised June 2012; Renumbered from CACI No. 3026 December 2012; Revised June 2013

Directions for Use

Give this instruction for violations of the Unruh Civil Rights Act in which actual damages are claimed. (See Civ. Code, § 51; CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements*.) This instruction may also be given for claims under Civil Code section 51.5 (see CACI No. 3061, *Discrimination in Business Dealings—Essential Factual Elements*) and Civil Code section 51.6 (see CACI No. 3062, *Gender Price Discrimination—Essential Factual Elements*). If the only claim is for statutory damages of $4,000 (see Civ. Code, § 52(a)), this instruction is not needed. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Unruh Act violations are per se injurious; Civ. Code, § 52(a) provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

See the instructions in the Damages series (CACI Nos. 3900 et seq.) for additional instructions on actual damages and punitive damages. Note that the statutory minimum amount of recovery for a plaintiff is $4,000 in addition to actual damages. If the verdict is for less than that amount, the judge should modify the verdict to reflect the statutory minimum.

Sources and Authority

- Remedies Under Unruh Act and Other Civil Rights Statutes. Civil Code section 52(a).
- "[B]y passing the Unruh Act, the Legislature established that arbitrary sex discrimination by businesses is *per se* injurious. Section 51 provides that all patrons are entitled to *equal* treatment. Section 52 provides for minimum statutory damages . . . for *every* violation of section 51, *regardless* of the plaintiff's actual damages." (*Koire*, *supra*, 40 Cal.3d at p. 33, original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1030, 1715–1724

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 994, 995

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-G, *Unruh Civil Rights Act*, ¶ 7:1525 et seq. (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)

3068. Ralph Act—Damages and Penalty (Civ. Code, §§ 51.7, 52(b))

If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***] claim against [***name of defendant***], you must award the following:**

1. **Actual damages sufficient to reasonably compensate [***name of plaintiff***] for the harm;**
2. **A civil penalty of $25,000; and**
3. **Punitive damages.**

[*Name of plaintiff***] must prove the amount of [his/her/***nonbinary pronoun***] actual damages. However, [***name of plaintiff***] does not have to prove the exact amount of the harm or the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of actual damages claimed by [*name of plaintiff***]:**

[*Insert item(s) of claimed harm.***]**

New September 2003; Revised June 2012; Renumbered from CACI No. 3027 December 2012

Directions for Use

Give this instruction for violations of the Ralph Act. (See Civ. Code, § 51.7; CACI No. 3063, *Acts of Violence—Ralph Act—Essential Factual Elements,* and CACI No. 3064, *Threats of Violence—Ralph Act—Essential Factual Elements*.) This instruction may also be given for claims under Civil Code section 51.9 (see CACI No. 3065, *Sexual Harassment in Defined Relationship—Essential Factual Elements*) with item 2 omitted. (See Civ. Code, § 52(b)(2).)

See the Damages series (CACI Nos. 3900 et seq.) for additional instructions on actual damages and punitive damages. CACI No. 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase),* instructs the jury on how to calculate the amount of punitive damages.

Sources and Authority

- Remedies Under Ralph Act. Civil Code section 52(b).

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1014, 1015

Chin, et al., California Practice Guide: Employment Litigation, Ch. 7-G, *Unruh Civil Rights Act*, ¶ 7:1525 et seq. (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.48 (Matthew Bender)

3069. Harassment in Educational Institution (Ed. Code, § 220)

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed by being subjected to harassment at school because of [his/her/*nonbinary pronoun*] [*specify characteristic, e.g., sexual orientation*] and that [*name of defendant*] is responsible for that harm. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] suffered harassment that was so severe, pervasive, and offensive that it effectively deprived [him/her/*nonbinary pronoun*] of the right of equal access to educational benefits and opportunities;**
2. **That [*name of defendant*] had actual knowledge of that harassment; and**
3. **That [*name of defendant*] acted with deliberate indifference in the face of that knowledge.**

[*Name of defendant*] acted with deliberate indifference if [his/her/*nonbinary pronoun*/its] response to the harassment was clearly unreasonable in light of all the known circumstances.

New April 2009; Renumbered from CACI No. 3028 December 2012

Directions for Use

This instruction does not include language that elaborates on what does or does not constitute "deliberate indifference" beyond the broad standard of "clearly unreasonable in light of all the known circumstances." In *Donovan v. Poway Unified School Dist.,* the court noted that "deliberate indifference" will often be a fact-based question for which bright line rules are ill-suited. However, the court noted numerous examples from federal cases in which the standard was applied. The failure of school officials to undertake a timely investigation of a complaint of discrimination may amount to deliberate indifference. School officials also must take timely and reasonable measures to end known harassment. A response may be clearly unreasonable if a school official ignores a complaint of discrimination or if the initial measures chosen to respond to the harassment are ineffective. (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 611 [84 Cal.Rptr.3d 285].) Any of these factors that are applicable to the facts of the case may be added at the end of the instruction.

Sources and Authority

- Harassment in Educational Institution. Education Code section 201.
- Discrimination in Educational Institutions. Education Code section 220.
- Duty to Inform of Remedies. Education Code section 262.3(b).

- "We conclude that to prevail on a claim under section 220 for peer sexual orientation harassment, a plaintiff must show (1) he or she suffered "severe, pervasive and offensive" harassment that effectively deprived the plaintiff of the right of equal access to educational benefits and opportunities; (2) the school district had 'actual knowledge' of that harassment; and (3) the school district acted with 'deliberate indifference' in the face of such knowledge. We further conclude that from the words of section 262.3, subdivision (b), as well as from other markers of legislative intent, money damages are available in a private enforcement action under section 220." (*Donovan, supra,* 167 Cal.App.4th at p. 579.)
- "Like Title IX, . . . enforcement of the Education Code's antidiscrimination law rests on the assumption of 'actual notice' to the funding recipient. . . . [¶¶] We decline to adopt a liability standard for damages under section 220 based on principles of respondeat superior and/or constructive notice, particularly in light of the circumstances presented here when the claim of discrimination is not, for example, based on an official policy of the District, but is instead the result of peer sexual orientation harassment and the District's response (or lack thereof) to such harassment. . . . [N]egligence principles should not apply to impose liability under a statutory scheme when administrative enforcement of that scheme contemplates actual notice to the funding recipient, with an opportunity to take corrective action before a private action may lie. By requiring actual notice, we ensure liability for money damages under section 220 is based on a funding recipient's *own* misconduct, determined by its *own* deliberate indifference to known acts of harassment." (*Donovan, supra,* 167 Cal.App.4th at pp. 604–605, original italics, internal citations omitted.)
- "The decisions of federal courts interpreting Title IX provide a meaningful starting point to determine whether the response of defendants here amounted to deliberate indifference under section 220. Under federal law, deliberate indifference is a ' "very high standard." ' Actions that in hindsight are 'unfortunate' or even 'imprudent' will not suffice." (*Donovan, supra,* 167 Cal.App.4th at p. 610, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 869, 870

11 California Forms of Pleading and Practice, Ch. 112, *Civil Rights: Government-Funded Programs and Activities*, §§ 112.11, 112.16 (Matthew Bender)

3 California Points and Authorities, Ch. 35A, *Civil Rights: Equal Protection*, § 35A.32A (Matthew Bender)

3070. Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act—Essential Factual Elements (Civ. Code, §§ 54.3, 55.56)

[*Name of defendant***] is the owner of [a/an] [***e.g., restaurant***] named [***name of business***] that is open to the public. [***Name of plaintiff***] is a person with a disability who [***specify disability that creates accessibility problems***].**

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was denied full and equal access to [***name of defendant***]'s business on a particular occasion because of physical barriers. To establish this claim, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of defendant***]'s business had barriers that violated construction-related accessibility standards in that [***specify barriers***]; and [either]**
2. **[That [***name of plaintiff***] personally encountered the violation on a particular occasion.]**

   [or]

   [That [*name of plaintiff***] was deterred from accessing [***name of defendant***]'s business on a particular occasion.]**

[A violation that [*name of plaintiff***] personally encountered may be sufficient to cause a denial of full and equal access if [he/she/***nonbinary pronoun***] experienced difficulty, discomfort, or embarrassment because of the violation.]**

[To prove that [*name of plaintiff***] was deterred from accessing [***name of defendant***]'s business on a particular occasion, [he/she/***nonbinary pronoun***] must prove both of the following:**

1. **That [***name of plaintiff***] had actual knowledge of one or more violations that prevented or reasonably dissuaded [him/her/***nonbinary pronoun***] from accessing [***name of defendant***]'s business, which [***name of plaintiff***] intended to patronize on a particular occasion.**
2. **That the violation(s) would have actually denied [***name of plaintiff***] full and equal access if [he/she/***nonbinary pronoun***] had tried to patronize [***name of defendant***]'s business on that particular occasion.]**

New December 2014; Revised December 2016, May 2020, November 2023

Directions for Use

Use this instruction if a plaintiff seeks statutory damages based on a construction-related accessibility claim under the Disabled Persons Act (DPA) or the Unruh Civil Rights Act. (See Civ. Code, § 55.56(a).) Do not give this instruction if actual damages are sought. CACI No. 3067, *Unruh Civil Rights Act—Damages,* may be given for claims for actual damages under the Unruh Act and adapted for use under the DPA.

The DPA provides persons with disabilities or medical conditions with rights of access to public facilities. (See Civ. Code, §§ 54, 54.1.) Under the DPA, a person with a disability who encounters barriers to access at a public accommodation may recover minimum statutory damages for each particular occasion on which the person with a disability was denied access. (Civ. Code, §§ 54.3, 55.56(f).) However, the Construction-Related Accessibility Standards Compliance Act requires that, before statutory damages may be recovered, the person with a disability must have either personally encountered the violation on a particular occasion or been deterred from accessing the facility on a particular occasion. (See Civ. Code, § 55.56(b).) Also, specified violations are deemed to be merely technical and are presumed to not cause a person difficulty, discomfort, or embarrassment for the purpose of an award of minimum statutory damages. (See Civ. Code, § 55.56(e).)

Give either or both options for element 2, depending on whether the plaintiff personally encountered the barrier or was deterred from patronizing the business because of awareness of the barrier. The next-to-last paragraph is explanatory of the first option, and the last paragraph is explanatory of the second option.

Sources and Authority

- Disabled Persons Act: Right of Access to Public Facilities. Civil Code sections 54, 54.1.
- Action for Interference With Admittance to or Enjoyment of Public Facilities. Civil Code section 54.3.
- Construction-Related Accessibility Standard Act. Civil Code section 55.56.
- "Part 2.5 of division 1 of the Civil Code, currently consisting of sections 54 to 55.3, is commonly referred to as the 'Disabled Persons Act,' although it has no official title. Sections 54 and 54.1 generally guarantee individuals with disabilities equal access to public places, buildings, facilities and services, as well as common carriers, housing and places of public accommodation, while section 54.3 specifies remedies for violations of these guarantees, including a private action for damages." (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 674 fn. 8 [94 Cal.Rptr.3d 685, 208 P.3d 623], internal citations omitted.)
- "[L]egislation (applicable to claims filed on or after Jan. 1, 2009 ([Civ. Code,] § 55.57)) restricts the availability of statutory damages under sections 52 and 54.3, permitting their recovery only if an accessibility violation actually denied the plaintiff full and equal access, that is, only if 'the plaintiff personally encountered the violation on a particular occasion, or the plaintiff was deterred

from accessing a place of public accommodation on a particular occasion' (§ 55.56, subd. (b)). It also limits statutory damages to one assessment per occasion of access denial, rather than being based on the number of accessibility standards violated. (*Id.*, subd. (e).)" (*Munson*, *supra*, 46 Cal.4th at pp. 677–678.)

- " '[S]ection 54.3 imposes the standing requirement that the plaintiff have suffered an actual denial of equal access before any suit for damages can be brought. . . . [A] plaintiff cannot recover damages under section 54.3 unless the violation actually denied him or her access to some public facility. [¶] Plaintiff's attempt to equate a denial of equal access with the presence of a violation of federal or state regulations would nullify the standing requirement of section 54.3, since any disabled person could sue for statutory damages whenever he or she encountered noncompliant facilities, regardless of whether that lack of compliance actually impaired the plaintiff's access to those facilities. Plaintiff's argument would thereby eliminate any distinction between a cause of action for equitable relief under section 55 and a cause of action for damages under section 54.3.' " (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1223 [99 Cal.Rptr.3d 746].)
- "We do not read *Reycraft* and *Urhausen* for the proposition that plaintiffs may not sue someone other than the owner or operator of the public facility described in section 54, for violating a plaintiff's rights under the DPA. A defendant's ability to control a particular location may ultimately be relevant to the question of liability, that is, whether the defendant interfered with the plaintiff's admission to or enjoyment of a public facility. But nothing in the language of section 54.3 suggests that damages may not be recovered against nonowners or operators. To the contrary, section 54.3 broadly and plainly provides: '[a]ny person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in [s]ections 54 and 54.1 or otherwise interferes with the rights of an individual with a disability under [s]ections 54, 54.1 and 54.2 is liable for . . . actual damages . . . .' " (*Ruiz v. Musclewood Investment Properties, LLC* (2018) 28 Cal.App.5th 15, 24 [238 Cal.Rptr.3d 835].)
- "In our view, *Reycraft* does not require that a plaintiff who sues for interference of his rights must present himself to *defendant's* business, with the intent to utilize *defendant's* services. Instead, a plaintiff who seeks damages for a violation of section 54.3 must establish that he 'presented himself' to a 'public place' with the intent of 'utilizing its services in the manner in which those . . . services are typically offered to the public and was actually denied' admission or enjoyment (or had his admission or enjoyment interfered with) on a particular occasion. Here, as alleged, plaintiff presented himself at a public place (the sidewalk) with the intent of using it in the manner it is typically offered to the public (walking on it for travel), and actually had his enjoyment interfered with on six occasions. Plaintiff therefore has standing to sue for damages." (*Ruiz, supra*, 28 Cal.App.5th at p. 24, original italics, internal citation omitted.)
- "Like the Unruh Civil Rights Act, the DPA incorporates the ADA to the extent that 'A violation of the right of an individual under the Americans with

Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section.' (Civ. Code, § 54, subd. (c)." (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1073–1076

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.36 (Matthew Bender)

3071. Retaliation for Refusing to Authorize Disclosure of Medical Information—Essential Factual Elements (Civ. Code, § 56.20(b))

[*Name of plaintiff***] claims that [***name of defendant***] discriminated against [him/her/***nonbinary pronoun***] because [he/she/***nonbinary pronoun***] refused to authorize disclosure of [his/her/***nonbinary pronoun***] medical information to [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] asked [***name of plaintiff***] to sign an authorization so that [***name of defendant***] could obtain medical information about [***name of plaintiff***] from [his/her/***nonbinary pronoun***] health care providers;**
2. **That [***name of plaintiff***] refused to sign the authorization;**
3. **That [***name of defendant***] [***specify retaliatory acts, e.g., terminated plaintiff's employment***];**
4. **That [***name of plaintiff***]'s refusal to sign the authorization was a substantial motivating reason for [***name of defendant***]'s decision to [***e.g., terminate plaintiff's employment***];**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Even if [*name of plaintiff***] proves all of the above, [***name of defendant***]'s conduct was not unlawful if [***name of defendant***] proves that the lack of the medical information made it necessary to [***e.g., terminate plaintiff's employment***].**

New June 2015; Revised May 2020

Directions for Use

An employer may not discriminate against an employee in terms or conditions of employment due to the employee's refusal to sign an authorization to release the employee's medical information to the employer. (Civ. Code, § 56.20(b).). However, an employer may take any action that is necessary in the absence of the medical information due to the employee's refusal to sign an authorization. (*Ibid.*)

Give this instruction if an employee claims that the employer retaliated against the employee for refusing to authorize release of medical information. The employee has the burden of proving a causal link between the refusal to authorize and the employer's retaliatory actions. The employer then has the burden of proving necessity. (See *Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 453 [177 Cal.Rptr.3d 145].) If necessary, the instruction may be expanded to define

"medical information." (See Civ. Code, § 56.05(j) ["medical information" defined].)

The statute requires that the employer's retaliatory act be "due to" the employee's refusal to release the medical information. (Civ. Code, § 56.20(b).) One court has instructed the jury that the refusal to release must be a "motivating reason" for the retaliation. (See *Kao*, *supra*, 229 Cal.App.4th at p. 453.) With regard to the causation standard under the Fair Employment and Housing Act, the California Supreme Court has held that the protected activity must have been a *substantial* motivating reason. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Sources and Authority

- Confidentiality of Medical Information Act. Civil Code section 56 et seq.
- Employee's Refusal to Authorize Release of Medical Records to Employer. Civil Code section 56.20(b).
- "An employer 'discriminates' against an employee in violation of section 56.20, subdivision (b), if it improperly retaliates against or penalizes an employee for refusing to authorize the employee's *health care provider* to disclose confidential medical information *to the employer or others* (see Civ. Code, § 56.11), or for refusing to authorize *the employer* to disclose confidential medical information relating to the employee *to a third party* (see Civ. Code, § 56.21)." (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 861 [59 Cal.Rptr.2d 696, 927 P.2d 1200], original italics.)
- "[T]he jury was instructed that if [plaintiff] proved his refusal to authorize release of confidential medical information for the FFD [fitness for duty examination] was 'the motivating reason for [his] discharge,' [defendant] 'nevertheless avoids liability by showing that . . . its decision to discharge [plaintiff] was necessary because [plaintiff] refused to take the FFD examination.' " (*Kao*, *supra*, 229 Cal.App.4th at p. 453.)

Secondary Sources

3 Wilcox, California Employment Law, Ch. 51, *Confidentiality of Medical Information*, § 51.13

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.202[4] (Matthew Bender)

3072–3099. Reserved for Future Use

VF-3000. Violation of Federal Civil Rights—In General (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [intentionally/[***other applicable state of mind***]] [***insert wrongful act***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] violate [***name of plaintiff***]'s right [***insert right, e.g., "of privacy"***] while acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s [***insert wrongful act***] a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3001. Public Entity Liability (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Did the [***name of local governmental entity***] have an official [policy/custom] [***specify policy or custom***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of local governmental entity***] know, or should it have been obvious to it, that this official [policy/custom] was likely to result in a deprivation of the right [***specify right violated***]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of officer or employee***] an [officer/employee/[***other***]] of [***name of local governmental entity***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of officer or employee***] [intentionally/[***insert other applicable state of mind***]] [***insert conduct allegedly violating plaintiff's civil rights***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of officer or employee***]'s conduct violate [***name of plaintiff***]'s right [***specify right***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Did [***name of officer or employee***] act because of this official**

[policy/custom]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2011; Renumbered from CACI No. VF-3005 December 2012; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3001, *Local Government Liability—Policy*

or Custom—Essential Factual Elements. It should be given with CACI No. VF-3000, *Violation of Federal Civil Rights—In General*, to impose liability on the governmental entity for the acts of its officer or employee.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3002. Public Entity Liability—Failure to Train (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Was [***name of local governmental entity***]'s training program inadequate to train its [officers/employees] to properly handle usual and recurring situations?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of local governmental entity***] know[, or should it have been obvious to it,] that the inadequate training program was likely to result in a deprivation of the right [***specify right violated***]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of officer or employee***] violate [***name of plaintiff***]'s right [***specify right***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the failure to provide adequate training the cause of the deprivation of [***name of plaintiff***]'s right [***specify right***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant]

New September 2003; Revised April 2007, December 2010, June 2011, December 2011; Renumbered from CACI No. VF-3006 December 2012; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3003, *Local Government Liability—Failure to Train—Essential Factual Elements.* It should be given with CACI No. VF-3000, *Violation of Federal Civil Rights—In General*, to impose liability on the governmental entity for the acts of its officer or employee.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of

action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3003–VF-3009. Reserved for Future Use

VF-3010. Excessive Use of Force—Unreasonable Arrest or Other Seizure (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] use excessive force in [arresting/detaining] [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of defendant*] acting or purporting to act in the performance of [his/her/*nonbinary pronoun*] official duties?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of defendant*]'s use of excessive force a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3001 December 2012; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3011. Unreasonable Search—Search With a Warrant (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] conduct an unreasonable search of [***name of plaintiff***]'s [person/home/automobile/office/[***insert other***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of defendant***] acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s unreasonable search a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3002 December 2012; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3022, *Unreasonable Search—Search With a Warrant—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3012. Unreasonable Search or Seizure—Search or Seizure Without a Warrant (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [search/seize] [***name of plaintiff***]'s [person/home/automobile/office/property/[***insert other***]] without a warrant?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of defendant***] acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s [search/seizure] a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3003 December 2012; Revised December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 3023, *Unreasonable Search or Seizure—Search or Seizure Without a Warrant—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3013. Unreasonable Search—Search Without a Warrant—Affirmative Defense—Search Incident to Lawful Arrest (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] search [*name of plaintiff*]'s [person/home/automobile/office/[*insert other*]] without a warrant?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of defendant*] acting or purporting to act in the performance of [his/her/*nonbinary pronoun*] official duties?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the search conducted as part of a lawful arrest of [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, skip questions 4 and 5 and answer question 6.

4. **Did [*name of defendant*] search only [*name of plaintiff*] and the area within which [*name of plaintiff*] might have gained possession of a weapon or might have destroyed or hidden evidence?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. **Was the search reasonable under the circumstances?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [*name of defendant*]'s search a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3004 December 2012; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3023, *Unreasonable Search or Seizure—Search or Seizure Without a Warrant—Essential Factual Elements,* and CACI No. 3024, *Affirmative Defense—Search Incident to Lawful Arrest.* This form can be modified if another affirmative defense is at issue (see CACI No. 3025,

Affirmative Defense—Consent to Search, and CACI No. 3026, *Affirmative Defense—Exigent Circumstances*).

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3014–VF-3019. Reserved for Future Use

VF-3020. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] use force against [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was the force excessive?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***] acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s use of excessive force a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2011; Renumbered from CACI No. VF-3007 December 2012; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3042, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories.*

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest.* This verdict form may need to be augmented for the jury to make any factual

findings that are required in order to calculate the amount of prejudgment interest.

VF-3021. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **While imprisoned, [***describe violation that created risk of serious harm, e.g., was [name of plaintiff] placed in a cell block with rival gang members***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***]'s conduct create a substantial risk of serious harm to [***name of plaintiff***]'s health or safety?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] know that [his/her/***nonbinary pronoun***] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was there a reasonable justification for the conduct?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of defendant***] acting or purporting to act in the performance of [his/her/***nonbinary pronoun***] official duties?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2011; Renumbered from CACI No. VF-3008 December 2012; Revised June 2015, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3022. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] have a serious medical need?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] know that [*name of plaintiff*] faced a substantial risk of serious harm if [his/her/*nonbinary pronoun*] medical need went untreated?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] consciously disregard the risk by not taking reasonable steps to treat [*name of plaintiff*]'s medical need?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*] acting or purporting to act in the performance of [his/her/*nonbinary pronoun*] official duties?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of defendant*]'s deliberate indifference a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3009 December 2012; Revised June 2014, June 2015, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3023. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities

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We answer the questions submitted to us as follows:

1. **While imprisoned, was [***name of plaintiff***] deprived of [***describe deprivation, e.g., clothing***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was this deprivation sufficiently serious in that it denied [***name of plaintiff***] a minimal necessity of life?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***]'s conduct create a substantial risk of serious harm to [***name of plaintiff***]'s health or safety?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] know that [his/her/***nonbinary pronoun***] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was there a reasonable justification for [***name of defendant***]'s conduct?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [***name of defendant***] acting or purporting to act in the**

performance of [his/her/*nonbinary pronoun*] official duties?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify

the [clerk/bailiff/court attendant].

New December 2015; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3024–VF-3029. Reserved for Future Use

VF-3030. Unruh Civil Rights Act (Civ. Code, §§ 51, 52(a))

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [deny/aid or incite a denial of/discriminate or make a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [[***name of defendant***]'s perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]] a substantial motivating reason for [***name of defendant***]'s conduct?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Answer question 5.

5. What amount, if any, do you award as a penalty against [*name of defendant***]? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2012; Renumbered from CACI No.VF-3010 December 2012; Revised June 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the plaintiff's association with another is the basis for the claim, modify question 2 as in element 2 of CACI No. 3060.

Questions 3 and 4 may be omitted if only the statutory minimum of $4,000 damages is sought. Harm is presumed for this amount. (See Civ. Code, § 52(a); *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

The penalty in question 5 refers to the right of the jury to award a maximum of three times the amount of actual damages but not less than $4,000. (Civ. Code,

§ 52(a).) The judge should correct the verdict if the jury award goes over that limit. Also, if the jury awards nothing or an amount less than $4,000 in question 5, the judge should increase that award to $4,000 to reflect the statutory minimum.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3031. Discrimination in Business Dealings (Civ. Code, §§ 51.5, 52(a))

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [discriminate against/boycott/blacklist/refuse to buy from/refuse to contract with/refuse to sell to/refuse to trade with] [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [[***name of defendant***]'s perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]] a substantial motivating reason for [***name of defendant***]'s conduct?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Answer question 5.

5. What amount, if any, do you award as a penalty against [*name of defendant*]? $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, June 2012; Renumbered from CACI No. VF-3011 December 2012; Revised June 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3061, *Discrimination in Business Dealings—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If an alternative basis for the defendant's alleged motivation is at issue, modify question 2 as in element 2 of CACI No. 3061.

The award of a penalty in question 5 refers to the right of the jury to award a maximum of three times the amount of actual damages but not less than $4,000. (Civ. Code, § 52(a).) The judge should correct the verdict if the jury award goes over that amount. Also, if the jury awards nothing or an amount less than $4,000 in question 5, then the judge should increase that award to $4,000 to reflect the statutory minimum.

It is possible that questions 3 and 4 may be omitted if only the statutory minimum

$4,000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3032. Gender Price Discrimination (Civ. Code, § 51.6)

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] charge [*name of plaintiff*] more for services of similar or like kind because of [his/her/*nonbinary pronoun*] gender?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

   Total Future Economic Damages: $_____]

   [c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

   [d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

   TOTAL $_____

Answer question 4.

4. What amount, if any, do you award as a penalty against [*name of defendant*]? $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3012 December 2012; Revised June 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3062, *Gender Price Discrimination—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

The award of a penalty in question 4 refers to the right of the jury to award a maximum of three times the amount of actual damages but not less than $4,000. (See Civ. Code, § 52(a).), The judge should correct the verdict if the jury award goes over that amount. Also, if jury awards nothing or an amount less than $4,000 in question 4 then the judge should increase that award to $4,000 to reflect the statutory minimum.

It is possible that questions 2 and 3 may be omitted if only the statutory minimum $4,000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

If specificity is not required, users do not have to itemize all the damages listed in question 3 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801,

814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [threaten/commit] violent acts against [***name of plaintiff***] [or [his/her/***nonbinary pronoun***] property]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [[***name of defendant***]'s perception of] [***name of plaintiff***]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/citizenship/primary language/immigration status/position in a labor dispute/[***insert other actionable characteristic***]] a substantial motivating reason for [***name of defendant***]'s conduct?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[3. **Would a reasonable person in [***name of plaintiff***]'s position have believed that [***name of defendant***] would carry out [his/her/***nonbinary pronoun***] threats?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[4. **Would a reasonable person in [***name of plaintiff***]'s position have been intimidated by [***name of defendant***]'s conduct?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

5. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have

the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

[7. What amount do you award as punitive damages? $_____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2009, December 2010; Renumbered from CACI No. VF-3013 December 2012; Revised June 2013, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3063, *Acts of Violence—Ralph*

Act—Essential Factual Elements, and CACI No. 3064, *Threats of Violence—Ralph Act—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Include questions 3 and 4 in a case of threats of violence.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Punitive damages (question 7) are authorized by Civil Code section 52(b)(2). For instructions on punitive damages, see instructions in the Damages series (CACI No. 3900 et seq.)

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3034. Sexual Harassment in Defined Relationship (Civ. Code, § 51.9)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] have a business, service, or professional relationship with [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[Did [*name of defendant*] make [sexual advances/sexual solicitations/sexual requests/demands for sexual compliance/[*insert other actionable conduct*]] to [*name of plaintiff*]?]**

   [or]

   [Did [*name of defendant*] engage in [verbal/visual/physical] conduct of a [sexual nature/hostile nature based on gender]?]

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of defendant*]'s conduct unwelcome and also pervasive or severe?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of plaintiff*] unable to easily end the relationship with [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Has [*name of plaintiff*] suffered or will [he/she/*nonbinary pronoun*] suffer [economic loss or disadvantage/personal injury/the violation of a statutory or constitutional right] as a result of [*name of defendant*]'s conduct?**

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

[Answer question 7.

7. What amount do you award as punitive damages?

$_____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2008, December 2010; Renumbered from CACI No. VF-3014 December 2012; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3065, *Sexual Harassment in Defined Relationship—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Select either or both options for question 2 depending on the facts at issue.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances. For instructions on punitive damages, see instructions in the Damages series (CACI No. 3900 et seq.).

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make threats of violence against [[***name of plaintiff***]/ [or] [***name of plaintiff***]'s property]?**

   _____ **Yes** _____ **No**

   [*or*]

1. **Did [***name of defendant***] act violently against [[***name of plaintiff***]/ [and] [***name of plaintiff***]'s property]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***]'s threats cause [***name of plaintiff***] to reasonably believe that if [he/she/***nonbinary pronoun***] exercised [his/her/***nonbinary pronoun***] right [***insert right, e.g., "to vote"***] [***name of defendant***] would commit violence against [[him/her/***nonbinary pronoun***]/ [or] [his/her/***nonbinary pronoun***] property] and that [***name of defendant***] had the apparent ability to carry out the threat?**

   _____ **Yes** _____ **No**

   [*or*]

2. **Did [***name of defendant***] commit these acts of violence to [prevent [name of plaintiff] from exercising [his/her/***nonbinary pronoun***] right [***insert right, e.g., "to vote"***]/retaliate against [***name of plaintiff***] for having exercised [his/her/***nonbinary pronoun***] right [***insert right***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

[Answer question 5.

5. What amount do you award as punitive damages?

$_____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3015 and Revised December 2012, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3066, *Bane Act—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may

need to be modified depending on the facts of the case.

Give the first option for elements 1 and 2 if the defendant has threatened violence. Give the second option if the defendant actually committed violence.

Civil Code section 52(a) provides for damages up to three times actual damages but a minimum of $4,000 for violations of Civil Code section 51 (Unruh Act), 51.5, and 51.6. Civil Code section 52(b) provides for punitive damages for violations of Civil Code sections 51.7 (Ralph Act) and 51.9. Neither subsection of Section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the Bane Act refers to section 52. (See Civ. Code, § 52.1(c).) This reference would seem to indicate that damages may be recovered under both subsections (a) and (b) of section 52. The court should compute the damages under section 52(a) by multiplying actual damages by three, and awarding $4,000 if the amount is less. Questions 5 addresses punitive damages under section 52(b).

If no actual damages are sought, the $4,000 statutory minimum damages may be awarded without proof of harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].) In this case, only questions 1 and 2 need be answered.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3036–VF-3099. Reserved for Future Use

ELDER ABUSE AND DEPENDENT ADULT CIVIL PROTECTION ACT

3100. Financial Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.30)

[*Name of plaintiff***] claims that [[***name of individual defendant***]/ [and] [***name of employer defendant***]] violated the Elder Abuse and Dependent Adult Civil Protection Act by taking financial advantage of [him/her/***nonbinary pronoun***/[***name of decedent***]]. To establish this claim, [***name of plaintiff***] must prove that all of the following are more likely to be true than not true:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] [***insert one of the following:***]**

   [[took/hid/appropriated/obtained/ [or] retained] [*name of plaintiff/decedent***]'s property;]**

   [*or***]**

   [assisted in [taking/hiding/appropriating/obtaining/ [or] retaining] [*name of plaintiff/decedent***]'s property;]**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

3. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] [[took/hid/appropriated/obtained/ [or] retained]/assisted in [taking/hiding/appropriating/obtaining/ [or] retaining]] the property [for a wrongful use/ [or] with the intent to defraud/ [or] by undue influence];**

4. **That [***name of plaintiff/decedent***] was harmed; and**

5. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee' s] conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[One way [*name of plaintiff***] can prove that [[***name of individual defendant***]/[***name of employer defendant***]'s employee] [took/hid/appropriated/obtained/ [or] retained] the property for a wrongful use is by proving that [[***name of individual defendant***]/[***name of employer defendant***]'s employee] knew or should have known that [his/her/***nonbinary pronoun***] conduct was likely to be harmful to [***name of plaintiff/decedent***].**

[[[*Name of individual defendant***]/[***Name of employer defendant***]'s employee] [took/hid/appropriated/obtained/ [or] retained] the property if [***name of plaintiff/decedent***] was deprived of the property by an agreement, gift, will, [or] trust[, or] [***specify other testamentary instrument***] regardless of whether the property was held by [***name of plaintiff/decedent***] or by [his/her/***nonbinary pronoun***] representative.]**

New September 2003; Revised June 2005, October 2008, April 2009, June 2010, December 2013, June 2014

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder financial abuse, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series. Plaintiffs who are suing for their decedent's pain and suffering should also use CACI No. 3101, *Financial Abuse—Decedent's Pain and Suffering.*

If the individual responsible for the financial abuse is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

To recover compensatory damages, attorney fees, and costs against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

If "for a wrongful use" is selected in element 3, give the next-to-last optional paragraph on appropriate facts. This is not the exclusive manner of proving wrongful conduct under the statute. (See Welf. & Inst. Code, § 15610.30(b).)

If "by undue influence" is selected in element 3, also give CACI No. 3117, *Financial Abuse—"Undue Influence" Explained.*

Include the last optional paragraph if the elder was deprived of a property right by an agreement, donative transfer, or testamentary bequest. (See Welf. & Inst. Code, § 15610.30(c).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Abuse of Elder or Dependent Adult. Welfare and Institutions Code section 15610.07.
- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.
- "Elder" Defined. Welfare and Institutions Code section 15610.27.
- "Financial Abuse" Defined. Welfare and Institutions Code section 15610.30.
- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- "The Legislature enacted the Act to protect elders by providing enhanced remedies to encourage private, civil enforcement of laws against elder abuse and

neglect. An elder is defined as 'any person residing in this state, 65 years of age or older.' The proscribed conduct includes financial abuse. The financial abuse provisions are, in part, premised on the Legislature's belief that in addition to being subject to the general rules of contract, financial agreements entered into by elders should be subject to special scrutiny." (*Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 478 [177 Cal.Rptr.3d 320], internal citations omitted.)

- "The probate court cited Welfare and Institutions Code section 15610.30 to impose financial elder abuse liability as to plaintiffs' first cause of action for fiduciary abuse of an elder. This liability is supported by the court's findings that '[decedent] did not know the extent of [defendant's] spending,' and that '[w]hile it is not uncommon for a spouse to spend money or purchase items of which the other is unaware, and the line between such conduct and financial abuse is not always clear, what [defendant] did in this case went well beyond the line of reasonable conduct and constituted financial abuse,' and the court's further conclusion that much of defendant's credit card spending and writing herself checks from decedent's bank account during the marriage amounted to financial abuse." (*Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1356 [167 Cal.Rptr.3d 50].)
- "[T]he Legislature enacted the Act, including the provision prohibiting a taking by undue influence, to protect elderly individuals with limited or declining cognitive abilities from overreaching conduct that resulted in a deprivation of their property rights. To require the victim of financial elder abuse to wait to file suit until an agreement obtained through the statutorily proscribed conduct has been performed would not further that goal." (*Bounds, supra*, 229 Cal.App.4th at p. 481.)
- "When the [operable pleading] was filed, former section 15610.30, subdivision (a)(3) referred to the definition of undue influence found in Civil Code section 1575. However, in 2013, the Legislature amended section 15610.30, subdivision (a)(3) to refer, instead, to a broader definition of undue influence found in the newly enacted section 15610.70." (*Bounds, supra*, 229 Cal.App.4th at p. 479.)
- "[A] party may engage in elder abuse by misappropriating funds to which an elder is entitled under a contract." (*Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 656 [203 Cal.Rptr.3d 785].)
- "[U]nder subdivision (b) of section 15610.30, wrongful conduct occurs only when the party who violates the contract actually knows that it is engaging in a harmful breach, or reasonably should be aware of the harmful breach." (*Paslay, supra*, 248 Cal.App.4th at p. 658.)
- "The text of section 15610.30 is broad. It speaks not only of 'taking' real or personal property, but also 'secreting, appropriating, obtaining, or retaining' such property, and then, to capture the sense of all of these terms, goes on to use the more expansive term 'deprive[].' Some of the terms used in section 15610.30 are narrower than others; to 'secret,' for example, suggests hiding or concealment, and to 'retain' or to 'obtain' suggests affirmatively acquiring possession of

something. But we have no trouble concluding that the broadest of these terms—the word 'deprive'—in its ordinary meaning covers what the [elders] have alleged. The trial court's determination to the contrary relies heavily on the fact that the [elders] gifted (or intend to gift) whatever money or assets they transferred (or will transfer) to the Trust, but in our view this makes no difference. The Act, as amended in 2008, expressly contemplates that liability may flow from transfers made by 'agreement, donative transfer, or testamentary bequest . . . .' " (*Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 12 Cal.App.5th 442, 460 [218 Cal.Rptr.3d 808], internal citations omitted.)

- "It is one thing to say that financial agreements entered into by elders should be 'subject to special scrutiny', but quite another to suggest, as [plaintiff] does, that a lender has duties to a borrower who resides in this state and is '65 years of age or older' different from those it owes other borrowers." (*Hilliard v. Harbour* (2017) 12 Cal.App.5th 1006, 1015 [219 Cal.Rptr.3d 613].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 5:1, 7:2, 22:9–22:12 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.23, 6.30–6.34

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders*, § 5.33[4] (Matthew Bender)

3101. Financial Abuse—Decedent's Pain and Suffering (Welf. & Inst. Code, § 15657.5)

[*Name of plaintiff*] also seeks to recover damages for [*name of decedent*]'s pain and suffering. To recover these damages, [*name of plaintiff*] must also prove by clear and convincing evidence that [*name of individual defendant/*[*name of employer defendant*]'s employee] acted with [recklessness/oppression/fraud/ [or] malice] in committing the financial abuse.**

New September 2003; Revised June 2005, October 2008, April 2009

Directions for Use

Give this instruction along with CACI No. 3100, *Financial Abuse—Essential Factual Elements,* if the plaintiff seeks survival damages for pain and suffering in addition to conventional tort damages and attorney fees and costs. (See Welf. & Inst. Code, § 15657.5.) Although one would not normally expect that financial abuse alone would lead to a wrongful death action, the Legislature has provided this remedy should the situation arise.

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Enhanced Remedies for Financial Abuse. Welfare and Institutions Code section 15657.5.
- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to

take precautions' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.' " (*Delaney, supra,* 20 Cal.4th at pp. 31–32, internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], disapproved on other grounds in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 164 [202 Cal.Rptr.3d 447, 370 P.3d 1011], internal citations omitted.)
- "The effect of the 1991 amendment to the elder abuse law was to . . . permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 8:5–8:7, 8:15 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.23, 6.30–6.34, 6.45–6.47

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

3102A. Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15657.05; Civ. Code, § 3294(b))

[*Name of plaintiff***] also claims that [***name of employer defendant***] is responsible for [attorney fees and costs/ [and] [***name of decedent***]'s pain and suffering before death]. To establish this claim, [***name of plaintiff***] must prove by clear and convincing evidence [***insert one or more of the following four options:***]**

1. **[That [***name of individual defendant***] was an officer, a director, or a managing agent of [***name of employer defendant***] acting on behalf of [***name of defendant***];] [or]**
2. **[That an officer, a director, or a managing agent of [***name of employer defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her/***nonbinary pronoun***] with a knowing disregard of the rights or safety of others;] [or]**
3. **[That an officer, a director, or a managing agent of [***name of employer defendant***] authorized [***name of individual defendant***]'s conduct;] [or]**
4. **[That an officer, a director, or a managing agent of [***name of employer defendant***] knew of [***name of individual defendant***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if the employee exercises substantial independent authority and judgment in corporate decisionmaking such that the employee's decisions ultimately determine corporate policy.

[If [*name of plaintiff***] proves the above, I will decide the amount of attorney fees and costs.]**

Derived from former CACI No. 3102 October 2008; Revised April 2009, May 2020

Directions for Use

This instruction should be given with CACI No. 3104 (neglect), CACI No. 3107 (physical abuse), or CACI No. 3110 (abduction) if the plaintiff is seeking the enhanced remedies of attorney fees and costs and/or damages for a decedent's pain and suffering against an employer and the employee is also a defendant. (See Civ. Code, § 3294(b) Welf. & Inst. Code, §§ 15657(c), 15657.05.) If the employer is the only defendant, give CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*. The requirements of Civil Code section 3294(b) need not be met in order to obtain enhanced remedies from an employer for

financial abuse. (See Welf. & Inst. Code, § 15657.5(c).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Enhanced Remedies for Physical Abuse, Neglect, or Abandonment. Welfare and Institutions Code section 15657.
- Enhanced Remedies Against Employer Based on Acts of Employee. Welfare and Institutions Code section 15657.5(c).
- Enhanced Remedies for Abduction. Welfare and Institutions Code section 15657.05.
- Punitive Damages Against Employer. Civil Code section 3294(b).
- "[A] finding of ratification of [agent's] actions by [employer], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.' " (*Delaney, supra,* 20 Cal.4th at pp. 31–32, internal citations omitted.)
- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], disapproved on other grounds in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 164 [202 Cal.Rptr.3d 447, 370 P.3d 1011], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 9:1, 9:67, 10:1 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.41–6.44

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

3102B. Employer Liability for Enhanced Remedies—Employer Defendant Only (Welf. & Inst. Code, §§ 15657, 15657.05; Civ. Code, § 3294(b))

[*Name of plaintiff***] also claims that [***name of defendant***] is responsible for [attorney fees and costs/ [and] [***name of decedent***]'s pain and suffering before death]. To establish this claim, [***name of plaintiff***] must prove by clear and convincing evidence [***insert one or more of the following four options:***]**

1. **[That the employee who committed the acts was an officer, a director, or a managing agent of [***name of defendant***] acting on behalf of [***name of defendant***]]; [or]**
2. **[That an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of the employee who committed the acts and employed [him/her/***nonbinary pronoun***] with a knowing disregard of the rights or safety of others;] [or]**
3. **[That an officer, a director, or a managing agent of [***name of defendant***] authorized the conduct of the employee who committed the acts;] [or]**
4. **[That an officer, a director, or a managing agent of [***name of defendant***] knew of the wrongful conduct of the employee who committed the acts and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if the employee exercises substantial independent authority and judgment in corporate decisionmaking such that the employee's decisions ultimately determine corporate policy.

[If [*name of plaintiff***] proves the above, I will decide the amount of attorney fees and costs.]**

Derived from former CACI No. 3102 October 2008; Revised April 2009, May 2020

Directions for Use

This instruction should be given with CACI No. 3104 (neglect), CACI No. 3107 (physical abuse), or CACI No. 3110 (abduction) if the plaintiff is seeking the enhanced remedies of attorney fees and costs and/or damages for a decedent's pain and suffering against an employer and the employee is not also a defendant. (See Civ. Code, § 3294(b); Welf. & Inst. Code, §§ 15657(c), 15677.05.) If the employee is also a defendant, give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*. The requirements of Civil Code section 3294(b) need not be met in order to obtain enhanced remedies from an

employer for financial abuse. (See Welf. & Inst. Code, § 15657.5(c).)

Sources and Authority

- Enhanced Remedies for Physical Abuse, Neglect, or Abandonment. Welfare and Institutions Code section 15657.
- Enhanced Remedies Against Employer for Acts of Employee. Welfare and Institutions Code section 15657.5(c).
- Enhanced Remedies for Abduction. Welfare and Institutions Code section 15657.05.
- Punitive Damages Against Employer. Civil Code section 3294(b).
- "[A] finding of ratification of [agent's] actions by [employer], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], disapproved on other grounds in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 164 [202 Cal.Rptr.3d 447, 370 P.3d 1011], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 9:1, 9:67, 10:1 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.41–6.44

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

3103. Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57)

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/[***name of decedent***]] was neglected by [[***name of individual defendant***]/ [and] [***name of employer defendant***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] had a substantial caretaking or custodial relationship with [***name of plaintiff/decedent***], involving ongoing responsibility for [his/her/***nonbinary pronoun***] basic needs, which an able-bodied and fully competent adult would ordinarily be capable of managing without assistance;**
2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] while [he/she/***nonbinary pronoun***] was in [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] care or custody;**
3. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] failed to use the degree of care that a reasonable person in the same situation would have used in providing for [***name of plaintiff/decedent***]'s basic needs, including [***insert one or more of the following:***]**

   [assisting in personal hygiene or in the provision of food, clothing, or shelter;]

   [providing medical care for physical and mental health needs;]

   [protecting [*name of plaintiff/decedent***] from health and safety hazards;]**

   [preventing malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**
4. **That [***name of plaintiff/decedent***] was harmed; and**
5. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

New September 2003; Revised December 2005, June 2006, October 2008, January 2017

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act (the Act) by the victim of elder neglect, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage),* in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent's pain and suffering, give CACI No. 3104, *Neglect—Enhanced Remedies Sought,* in addition to this instruction. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants,* or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only.* To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

The Act does not extend to cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) unless the professional had a substantial caretaking or custodial relationship with the elder or dependent adult patient, involving ongoing responsibility for one or more basic needs. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 152 [202 Cal.Rptr.3d 447, 370 P.3d 1011]; see Welf. & Inst. Code, § 15657.2; Civ. Code, § 3333.2(c)(2).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- "Elder Abuse" Defined. Welfare and Institutions Code section 15610.07.
- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.
- "Elder" Defined. Welfare and Institutions Code section 15610.27.
- "Neglect" Defined. Welfare and Institutions Code section 15610.57.
- Claims for Professional Negligence Excluded. Welfare and Institutions Code section 15657.2.
- "It is true that statutory elder abuse includes 'neglect as defined in Section 15610.57,' which in turn includes negligent failure of an elder custodian 'to provide medical care for [the elder's] physical and mental health needs.' . . . '[N]eglect' within the meaning of Welfare and Institutions Code section 15610.57 covers an area of misconduct distinct from 'professional negligence.'

As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783 [11 Cal.Rptr.3d 222, 86 P.3d 290], original italics, internal citations omitted.)

- "The Elder Abuse Act does not 'apply *whenever* a doctor treats any elderly patient. Reading the act in such a manner would radically transform medical malpractice liability relative to the existing scheme.' " (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 223 [232 Cal.Rptr.3d 733], original italics.)
- "We granted review to consider whether a claim of neglect under the Elder Abuse Act requires a caretaking or custodial relationship—where a person has assumed significant responsibility for attending to one or more of those basic needs of the elder or dependent adult that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance. Taking account of the statutory text, structure, and legislative history of the Elder Abuse Act, we conclude that it does." (*Winn, supra*, 63 Cal.4th at p. 155.)
- "[T]he Act does not apply unless the defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient. It is the nature of the elder or dependent adult's relationship with the defendant—not the defendant's professional standing—that makes the defendant potentially liable for neglect." (*Winn, supra*, 63 Cal.4th at p. 152.)
- "It must be determined, on a case-by-case basis, whether the specific responsibilities assumed by a defendant were sufficient to give rise to a substantial caretaking or custodial relationship. The fact that [another caregiver] provided for a large number of decedent's basic needs does not, in itself, serve to insulate defendants from liability under the Elder Abuse Act if the services they provided were sufficient to give rise to a substantial caretaking or custodial relationship." (*Oroville Hospital v. Superior Court* (2022) 74 Cal.App.5th 382, 405 [289 Cal.Rptr.3d 430].)
- "[E]ven where statutory definitions of 'dependent adult' or 'care custodian' are satisfied, '[i]t must be determined, on a case-by-case basis, whether the specific responsibilities assumed by a defendant were sufficient to give rise to a substantial caretaking or custodial relationship.' " (*Kruthanooch v. Glendale Adventist Medical Center* (2022) 83 Cal.App.5th 1109, 1131 [299 Cal.Rptr.3d 908], internal citation omitted.)
- "The Act seems premised on the idea that certain situations place elders and dependent adults at heightened risk of harm, and heightened remedies relative to conventional tort remedies are appropriate as a consequence. Blurring the

distinction between neglect under the Act and conduct actionable under ordinary tort remedies—even in the absence of a care or custody relationship—risks undermining the Act's central premise. Accordingly, plaintiffs alleging professional negligence may seek certain tort remedies, though not the heightened remedies available under the Elder Abuse Act." (*Winn, supra*, 63 Cal.4th at p. 159, internal citation omitted.)

- " '[I]t is the defendant's relationship with an elder or a dependent adult—not the defendant's professional standing or expertise—that makes the defendant potentially liable for neglect.' For these reasons, *Winn* better supports the conclusion that the majority of [defendant]'s interactions with decedent were custodial. [Defendant] has cited no authority allowing or even encouraging a court to assess care and custody status on a task-by-task basis, and the *Winn* court's focus on the extent of dependence by a patient on a health care provider rather than on the nature of the particular activities that comprised the patient-provider relationship counsels against adopting such an approach." (*Stewart v. Superior Court* (2017) 16 Cal.App.5th 87, 103–104 [224 Cal.Rptr.3d 219].)
- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- "Neglect includes the failure to assist in personal hygiene, or in the provision of food, clothing, or shelter; the failure to provide medical care for physical and mental health needs; the failure to protect from health and safety hazards; and the failure to prevent malnutrition or dehydration." (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 843 [230 Cal.Rptr.3d 42].)
- "[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)
- "[N]eglect as a form of abuse under the Elder Abuse Act refers 'to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' " (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404 [129 Cal.Rptr.3d 895].)
- "It seems to us, then, that respecting the patient's right to consent or object to surgery is a necessary component of 'provid[ing] medical care for physical and mental health needs.' Conversely, depriving a patient of the right to consent to surgery could constitute a failure to provide a necessary component of what we think of as 'medical care.' " (*Stewart*, *supra*, 16 Cal.App.5th at p. 107, internal citation omitted.)
- "[A] violation of staffing regulations here may provide a basis for finding neglect. Such a violation might constitute a negligent failure to exercise the care that a similarly situated reasonable person would exercise, or it might constitute

a failure to protect from health and safety hazards . . . . The former is the definition of neglect under the Act, and the latter is just one nonexclusive example of neglect under the Act." (*Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1348–1349 [200 Cal.Rptr.3d 345].)

- "Disagreements between physicians and the patient or surrogate about the type of care being provided does not give rise to an elder abuse cause of action." (*Alexander, supra,* 23 Cal.App.5th at p. 223.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.70–2.71

3 Levy et al., California Torts, Ch. 31 *Liability of Physicians and Other Medical Practitioners,* § 31.50[4][d] (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly,* § 5.33[3] (Matthew Bender)

3104. Neglect—Enhanced Remedies Sought (Welf. & Inst. Code, § 15657)

[*Name of plaintiff***] also seeks to recover [attorney fees and costs/ [and] damages for [***name of decedent***]'s pain and suffering]. To recover these remedies, [***name of plaintiff***] must prove all of the requirements for neglect by clear and convincing evidence, and must also prove by clear and convincing evidence that [[***name of individual defendant***]/[***name of employer defendant***]'s employee] acted with [recklessness/oppression/fraud/ [or] malice] in neglecting [***name of plaintiff/decedent***].**

[If [*name of plaintiff***] proves the above, I will decide the amount of attorney fees and costs.]**

New September 2003; Revised June 2005, October 2008

Directions for Use

Give this instruction along with CACI No. 3103, *Neglect—Essential Factual Elements*, if the plaintiff seeks the enhanced remedies of attorney fees and costs and damages for the decedent's predeath pain and suffering. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

If the plaintiff is seeking enhanced remedies against the individual's employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants,* or CACI No. 3102B*, Employer Liability for Enhanced Remedies—Employer Defendant Only.*

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Enhanced Remedies for Neglect. Welfare and Institutions Code section 15657.
- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. [¶] 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence,

involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31–32 [82 Cal.Rptr.2d 610, 971 P.2d 986], internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], disapproved on other grounds in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 164 [202 Cal.Rptr.3d 447, 370 P.3d 1011], internal citations omitted.)
- "The effect of the 1991 amendment to the elder abuse law was to . . . permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)
- "[I]f the neglect is 'reckless[],' or done with 'oppression, fraud or malice,' then the action falls within the scope of section 15657 and as such cannot be considered simply 'based on . . . professional negligence' within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of 'professional negligence' in section 15657.2, make clear the Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened 'clear and convincing evidence' standard." (*Delaney, supra,* 20 Cal.4th at p. 35, internal citation omitted.)
- "[W]e distill several factors that must be present for conduct to constitute neglect within the meaning of the Elder Abuse Act and thereby trigger the enhanced remedies available under the Act. The plaintiff must allege (and ultimately prove by clear and convincing evidence) facts establishing that the defendant (1) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care; (2) knew of conditions that made the elder or dependent adult unable to provide for his or

her own basic needs; and (3) denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury (if the plaintiff alleges recklessness). The plaintiff must also allege (and ultimately prove by clear and convincing evidence) that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering." (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 406–407 [129 Cal.Rptr.3d 895], internal citations omitted.)

- " 'Liability' under section 15657 includes as an element 'causation,' which, as all elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees." (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743].)
- "We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs' failure to obtain a verdict establishing causation—one element of liability—by clear and convincing evidence, precludes an award of attorney fees." (*Perlin, supra,* 163 Cal.App.4th at p. 666.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 9:1, 9:9, 9:11.1 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) § 2.72

3 Levy et al., California Torts, Ch. 31 *Liability of Physicians and Other Medical Practitioners,* § 31.50[4][d] (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly,* § 5.35 (Matthew Bender)

3105. Reserved for Future Use

3106. Physical Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.63)

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/[***name of decedent***]] was physically abused by [[***name of individual defendant***]/ [and] [***name of employer defendant***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] physically abused [***name of plaintiff/decedent***] by [***insert applicable grounds for abuse***];**
2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**
3. **That [***name of plaintiff/decedent***] was harmed; and**
4. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

New September 2003; Revised December 2005, October 2008

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder physical abuse, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent's pain and suffering, give CACI No. 3107, *Physical Abuse—Enhanced Remedies Sought,* in addition to this instruction. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the physical abuse is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants,* or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only.* To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

The instructions in this series are not intended to cover every circumstance in which

a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- "Elder Abuse" Defined. Welfare and Institutions Code section 15610.07.
- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.
- "Elder" Defined. Welfare and Institutions Code section 15610.27.
- "Physical Abuse" Defined. Welfare and Institutions Code section 15610.63.
- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 1:1, 9:1, 19:1 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.69, 2.71

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders,* § 5.33[2] (Matthew Bender)

3107. Physical Abuse—Enhanced Remedies Sought (Welf. & Inst. Code, § 15657)

[*Name of plaintiff*] also seeks to recover [attorney fees and costs/ [and] damages for [*name of decedent*]'s pain and suffering]. To recover these remedies, [*name of plaintiff*] must prove all of the requirements for the physical abuse by clear and convincing evidence, and must also prove by clear and convincing evidence that [[*name of individual defendant*]/[*name of employer defendant*]'s employee] acted with [recklessness/oppression/ fraud/ [or] malice] in physically abusing [*name of plaintiff*].

[If [*name of plaintiff*] proves the above, I will decide the amount of attorney fees and costs.]

New September 2003; Revised June 2005, October 2008

Directions for Use

Give this instruction along with CACI No. 3106, *Physical Abuse—Essential Factual Elements,* if the plaintiff seeks the enhanced remedies of attorney fees and costs and damages for the decedent's predeath pain and suffering. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the physical abuse is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

If the plaintiff is seeking enhanced remedies against the individual's employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants,* or CACI No. 3102B*, Employer Liability for Enhanced Remedies—Employer Defendant Only.*

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Enhanced Remedies for Physical Abuse. Welfare and Institutions Code section 15657.
- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. [¶] 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence,

involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31–32 [82 Cal.Rptr.2d 610, 971 P.2d 986], internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], disapproved on other grounds in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 164 [202 Cal.Rptr.3d 447, 370 P.3d 1011], internal citations omitted.)
- "The effect of the 1991 amendment to the elder abuse law was to . . . permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)
- "The Elder Abuse Act provides enhanced remedies for victims. A prevailing plaintiff is entitled to an award of attorney fees. A deceased victim's successor is entitled to an award of some noneconomic damages. There is no basis for interpreting the Elder Abuse Act as restricting an award of damages for those fortunate enough to have survived the abuse." (*Samantha B. v. Aurora Vista Del Mar, LLC* (2022) 77 Cal.App.5th 85, 104 [292 Cal.Rptr.3d 324], internal citations omitted.)
- "[I]f the neglect is 'reckless[],' or done with 'oppression, fraud or malice,' then the action falls within the scope of section 15657 and as such cannot be considered simply 'based on . . . professional negligence' within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of 'professional negligence' in section 15657.2, make clear the Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened 'clear and convincing evidence' standard." (*Delaney, supra,* 20 Cal.4th at p. 35, internal citation omitted.)

- " 'Liability' under section 15657 includes as an element 'causation,' which, as all elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees." (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743].)
- "We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs' failure to obtain a verdict establishing causation—one element of liability—by clear and convincing evidence, precludes an award of attorney fees." (*Perlin, supra,* 163 Cal.App.4th at p. 666.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 9:1, 9:9, 9:28 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) § 2.72

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly,* §§ 5.35, 5.37 (Matthew Bender)

3108. Reserved for Future Use

3109. Abduction—Essential Factual Elements (Welf. & Inst. Code, § 15610.06)

[*Name of plaintiff***] claims that [[***name of individual defendant***]/ [and] [***name of employer defendant***]] abducted [him/her/***nonbinary pronoun***/[***name of decedent***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] [removed [***name of plaintiff/decedent***] from California and] restrained [him/her/***nonbinary pronoun***/[***name of decedent***]] from returning to California;**
2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**
3. **[That [***name of plaintiff/decedent***] did not have the capacity to consent to the [removal and] restraint;]**

   [*or***]**

   [That [[*name of plaintiff/decedent***]'s conservator/the court] did not consent to the [removal and] restraint;]**
4. **That [***name of plaintiff/decedent***] was harmed; and**
5. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

New September 2003; Revised December 2005, October 2008

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder abduction, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, in the Damages series.

If the individual responsible for the abduction is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent's pain and suffering, give CACI No. 3110, *Abduction—Enhanced Remedies Sought*. (See Welf. & Inst. Code, § 15657.05.)

If the plaintiff is seeking enhanced remedies against the individual's employer, also

give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants,* or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only.* To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

The instructions in this series are not intended to cover every circumstance under which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- "Abduction" Defined. Welfare and Institutions Code section 15610.06.
- "Elder Abuse" Defined. Welfare and Institutions Code section 15610.07 provides:
- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.
- "Elder" Defined. Welfare and Institutions Code section 15610.27.
- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], disapproved on other grounds in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 164 [202 Cal.Rptr.3d 447, 370 P.3d 1011], internal citations omitted.)
- "The effect of the 1991 amendment to the elder abuse law was to . . . permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 7:1, 7:3 (The Rutter Group)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders,* § 5.33[5] (Matthew Bender)

3110. Abduction—Enhanced Remedies Sought (Welf. & Inst. Code, § 15657.05)

[*Name of plaintiff*] also seeks to recover [attorney fees and costs/ [and] damages for [*name of decedent*]'s pain and suffering]. To recover these remedies, [*name of plaintiff*] must prove all of the requirements for the abduction by clear and convincing evidence.

[If [*name of plaintiff*] proves the above, I will decide the amount of attorney fees and costs.]

New September 2003; Revised December 2005, April 2008, October 2008

Directions for Use

Give this instruction along with CACI No. 3109, *Abduction—Essential Factual Elements*, if the plaintiff seeks the enhanced remedies of attorney fees and costs and/or damages for the decedent's predeath pain and suffering. (See Welf. & Inst. Code, § 15657.05.)

If the plaintiff is seeking enhanced remedies against the individual's employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B*, Employer Liability for Enhanced Remedies—Employer Defendant Only.*

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Enhanced Remedies for Abduction. Welfare and Institutions Code section 15657.05.
- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], disapproved on other grounds in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 164 [202 Cal.Rptr.3d 447, 370 P.3d 1011], internal citations omitted.)
- " 'Liability' under section 15657 includes as an element 'causation,' which, as all

elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees." (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743].)

- "We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs' failure to obtain a verdict establishing causation—one element of liability—by clear and convincing evidence, precludes an award of attorney fees." (*Perlin, supra,* 163 Cal.App.4th at p. 666.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 7:1-7:3 (The Rutter Group)

3111. Reserved for Future Use

3112. "Dependent Adult" Explained (Welf. & Inst. Code, § 15610.23)

A "dependent adult" is a person, regardless of whether or not the person lives independently, who is between the ages of 18 and 64 years and who [*insert one of the following:***]**

> **[has physical or mental limitations that restrict that person's ability to carry out normal activities or to protect that person's rights. This includes persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.]**
>
> **[***or***]**
>
> **[is admitted as an inpatient to [a/an] [***insert 24-hour health facility***].]**

New September 2003; Revised January 2019, May 2020

Directions for Use

Read the alternative that is most appropriate to the facts of the case.

Sources and Authority

- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.
- "Developmentally Disabled Person" Defined. Welfare and Institutions Code section 15610.25.

Secondary Sources

California Elder Law Litigation (Cont.Ed.Bar) § 6.22

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.31 (Matthew Bender)

3113. "Recklessness" Explained

[[*Name of individual defendant***]/[***Name of employer defendant***]'s employee] acted with "recklessness" if [he/she/***nonbinary pronoun***] knew it was highly probable that [his/her/***nonbinary pronoun***] conduct would cause harm and [he/she/***nonbinary pronoun***] knowingly disregarded this risk.**

"Recklessness" is more than just the failure to use reasonable care.

New September 2003; Revised October 2008

Directions for Use

If the individual responsible for the elder abuse is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

Sources and Authority

- " 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31–32 [82 Cal.Rptr.2d 610, 971 P.2d 986], internal citations omitted.)
- "[T]he term 'recklessness' requires that the defendant have knowledge of a high degree of probability that dangerous consequences will result from his or her conduct and acts with deliberate disregard of that probability or with a conscious disregard of the probable consequences. Recklessness requires conduct more culpable than mere negligence." (*Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)
- "The trier of fact should decide whether a knowing pattern and practice of understaffing in violation of applicable regulations amounts to recklessness." (*Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1349 [200 Cal.Rptr.3d 345].)
- "A jury may see knowingly flouting staffing regulations as part of a pattern and practice to cut costs, thereby endangering the facility's elderly and dependent patients, as qualitatively different than simple negligence." (*Fenimore, supra*, 245 Cal.App.4th at p. 1350.)
- Restatement Second of Torts, section 500, provides: "The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his

conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."

Secondary Sources

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 9:1, 9:33, 9:33.1 (The Rutter Group)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[1] (Matthew Bender)

3114. "Malice" Explained

"Malice" means that [[*name of individual defendant***]/[***name of employer defendant***]'s employee] acted with intent to cause injury or that [his/her/** *nonbinary pronoun*] **conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when the person is aware of the probable dangerous consequences of the person's conduct and deliberately fails to avoid those consequences.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

New September 2003; Revised October 2008, May 2020

Directions for Use

If the individual responsible for the elder abuse is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

Sources and Authority

- "Malice" for Punitive Damages Defined. Civil Code section 3294(c)(1).
- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1727, 1729

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[1] (Matthew Bender)

3115. "Oppression" Explained

"Oppression" means that [[*name of individual defendant***]'s/[***name of employer defendant***]'s employee's] conduct was despicable and subjected [***name of plaintiff/decedent***] to cruel and unjust hardship in knowing disregard of [his/her/***nonbinary pronoun***] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

New September 2003; Revised October 2008

Directions for Use

If the individual responsible for the elder abuse is a defendant in the case, use "[*name of individual defendant*]'s." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee's."

Sources and Authority

- "Oppression" for Punitive Damages. Civil Code section 3294(c)(2).
- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

Secondary Sources

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[1] (Matthew Bender)

3116. "Fraud" Explained

"Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact with the intention of depriving [*name of plaintiff/decedent***] of property or of a legal right or otherwise to cause [***name of plaintiff/decedent***] injury.**

New September 2003; Revised October 2008

Sources and Authority

- "Fraud" for Punitive Damages. Civil Code section 3294(c)(3).
- "Although neglect that is fraudulent may be sufficient to trigger the enhanced remedies available under the Elder Abuse Act, without detrimental reliance, there is no fraud." (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 409 [129 Cal.Rptr.3d 895], internal citations omitted.)
- "Apart from recklessness, [plaintiffs] also alleged the [defendant] Hospital was liable for elder abuse remedies because it acted fraudulently. They alleged the Hospital concealed [decedent] 's fall from his family, knowing that the fall was an adverse event that would affect its Medicare funding. Unlike the allegations of recklessness in violating staffing regulations, we find these allegations of fraud insufficient. . . . There were no allegations explaining how such concealment harmed [decedent] or how he detrimentally relied on it." (*Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1351 [200 Cal.Rptr.3d 345], internal citation omitted.)

Secondary Sources

Balisok, Civil Litigation Series: Elder Abuse Litigation, § 9:43 (The Rutter Group)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[4] (Matthew Bender)

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 215.70 (Matthew Bender)

3117. Financial Abuse—"Undue Influence" Explained

"Undue influence" means excessive persuasion that overcomes another person's free will and causes the person to do something or to not do something that causes an unfair result. In determining whether [*name of defendant***] exerted undue influence on [***name of plaintiff***], you must consider all of the following:**

a. [*Name of plaintiff***]'s vulnerability. Factors to consider may include, but are not limited to, [incapacity/illness/disability/injury/age/education/impaired mental abilities/emotional distress/isolation/ [or] dependency], and whether [***name of defendant***] knew or should have known of [***name of plaintiff***]'s vulnerability.**

b. [*Name of defendant***]'s apparent authority. Factors to consider may include, but are not limited to, [***name of defendant***]'s position as a [fiduciary/family member/care provider/health care professional/legal professional/spiritual adviser/expert/ [or] [***specify other position***]].**

c. The actions or tactics that [*name of defendant***] used. Actions or tactics used may include, but are not limited to, all of the following:**

[(1) Controlling [*name of plaintiff***]'s necessaries of life, medications, interactions with others, access to information, or sleep;]**

[(2) Using affection, intimidation, or coercion;].

[(3) Initiating changes in personal or property rights, using haste or secrecy in making those changes, making changes at inappropriate times and places, and claiming expertise in making changes.]

d. The unfairness of the result. Factors to consider may include, but are not limited to, [the economic consequences to [*name of plaintiff***]/any change from [***name of plaintiff***]'s prior intent or course of conduct or dealing/the relationship between any value that [***name of plaintiff***] gave up to the value of any services or other consideration that [***name of plaintiff***] received/ [or] the appropriateness of the change in light of the length and nature of the relationship between [***name of plaintiff***] and [***name of defendant***]].**

Evidence of an unfair result, without more, is not enough to prove undue influence.

New June 2014

Directions for Use

Give this instruction with CACI No. 3100, *Financial Abuse—Essential Factual Elements,* if undue influence is alleged in element 3 of No. 3100. The instruction assumes that the person alleged to be exerting undue influence is a named defendant. Insert that person's name for "[*name of defendant*]" throughout even if the person is not a named defendant. Select relevant evidence in each of the factors.

Sources and Authority

- Undue Influence for Elder or Dependent Adult Abuse. Welfare and Institutions Code section 15610.70.
- "During the pendency of this appeal, the Legislature amended Welfare and Institutions Code section 15610.30, subdivision (a)(3) replacing 'by undue influence, as defined in Section 1575 of the Civil Code' with 'by undue influence, as defined in Section 15610.70.' The Legislature added a new section 15610.70 to the Welfare and Institutions Code, defining undue influence as 'excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity,' and listing factors to be considered in making an undue influence determination under section 15610.30. . . . Although the new reference to 'excessive persuasion' may not be entirely clear, perhaps calling to mind Aristophanes's Lysistrata, the Legislature declared that the newly applied definition is not intended to supersede or interfere with the common law meaning of undue influence." (*Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1356 fn.3 [167 Cal.Rptr.3d 50], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017), Torts § 80

Balisok, Elder Abuse Litigation, §§ 5:1, 22:9–22:12 (The Rutter Group)

30 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.49 (Matthew Bender)

3118–3199. Reserved for Future Use

VF-3100. Financial Abuse—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.30, 15657.5(b))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff/decedent*] [65 years of age or older/a dependent adult] at the time of the conduct?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of employee defendant*] [take/hide/appropriate/obtain/ [or] retain] [*name of plaintiff/decedent*]'s property [for a wrongful use/with the intent to defraud/ [or] by undue influence]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of employee defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff/decedent*]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question[s] 4 [and 5]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [*name of plaintiff/decedent*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

[5. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of employee defendant*] acted with [recklessness/malice/oppression/ [or] fraud]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death? $_____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised June 2005, April 2007, April 2008, October 2008, April 2009, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3100, *Financial Abuse—Essential Factual Elements*, and CACI No. 3101, *Financial Abuse—Decedent's Pain and Suffering*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the plaintiff alleges that the defendant assisted in the wrongful conduct, modify question 1 as in element 2 of CACI No. 3100.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If the jury answers "yes" to questions 1, 2, and 3, attorney fees and costs are recoverable from the individual defendant without any additional showing of any kind. (Welf. & Inst. Code, § 15657.5(a).) Attorney fees are also recoverable from the employer, assuming that standard vicarious liability is shown. (See Welf. & Inst. Code, § 15657.5(c).) Incorporate questions 3 and 4 from CACI No. VF-3700, *Negligence—Vicarious Liability,* to address the liability of the employer for the acts of the employee.

Should the financial abuse in some way have caused the victim's death, the decedent's pain and suffering before death is recoverable on a showing by clear and convincing evidence that the individual defendant acted with recklessness, oppression, fraud, or malice. (See Welf. & Inst. Code, § 15657.5(b); Code Civ. Proc., § 377.34.) In such a case, in question 4, include only item 4a for past economic loss. But also include questions 5 and 6.

If punitive damages are sought, incorporate a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3101. Financial Abuse—Employer Defendant Only (Welf. & Inst. Code, §§ 15610.30, 15657.5(b))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff/decedent*] [65 years of age or older/a dependent adult] at the time of the conduct?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*]'s employee [take/hide/appropriate/obtain [or] retain] [*name of plaintiff/decedent*]'s property [for a wrongful use/ [or] with the intent to defraud [or] by undue influence]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the employee's conduct a substantial factor in causing harm to [*name of plaintiff/decedent*]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question[s] 4 [and 5]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [*name of plaintiff/decedent*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

[5. Did [*name of plaintiff*] prove by clear and convincing evidence that the employee acted with [recklessness/malice/oppression/ [or] fraud]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death? _____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised June 2005, April 2007, April 2008, October 2008, April 2009, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3100, *Financial Abuse—Essential Factual Elements*, and CACI No. 3101, *Financial Abuse—Decedent's Pain and Suffering*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the plaintiff alleges that the defendant's employees assisted in the wrongful conduct, modify question 1 as in element 1 of CACI No. 3100.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If the jury answers "yes" to questions 1, 2, and 3, attorney fees and costs will be recoverable from the employer, assuming that standard vicarious liability is shown. (See Welf. & Inst. Code, § 15657.5(c).) Incorporate questions 3 and 4 from CACI No. VF-3700, *Negligence—Vicarious Liability,* to address the liability of the employer for the acts of the employee.

Should the financial abuse in some way have caused the victim's death, the decedent's pain and suffering before death is recoverable on a showing by clear and convincing evidence that the employee acted with recklessness, oppression, fraud, or malice. (See Welf. & Inst. Code, § 15657.5(b); Code Civ. Proc., § 377.34.) In such a case, in question 4 include only item 4a for past economic loss. But also include questions 5 and 6.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3102. Neglect—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.57, 15657; Civ. Code, § 3294(b))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] while [he/she/***nonbinary pronoun***] was in [***name of employee defendant***]'s care or custody?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of employee defendant***] have a substantial caretaking or custodial relationship with [***name of plaintiff/decedent***], involving ongoing responsibility for [his/her/***nonbinary pronoun***] basic needs?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of employee defendant***] fail to use that degree of care that a reasonable person in the same situation would have used in assisting in personal hygiene or in the provision of food, clothing, or shelter?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of employee defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question[s] 5 [and] [*select 6, 7 or both***]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. **What are [***name of plaintiff/decedent***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

[6. Did [*name of plaintiff*] prove by clear and convincing evidence that an officer, a director, or a managing agent of [*name of employer defendant*] had advance knowledge of the unfitness of [*name of employee defendant*] and employed [him/her/*nonbinary pronoun*] with a knowing disregard of the rights or safety of others?

_____ Yes _____ No]

[7. Did [*name of plaintiff*] prove 1 through 4 above by clear and convincing evidence and also prove by clear and convincing evidence that [*name of employee defendant*] acted with [recklessness/malice/oppression/ [or] fraud]?

_____ Yes _____ No]

[If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death? _____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2008, October 2008, December 2010, December 2016, November 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 3103, *Neglect—Essential Factual Elements*, CACI No. 3104, *Neglect—Enhanced Remedies Sought*, and CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Question 3 can be modified to correspond to the alleged wrongful conduct as in element 3 of CACI No. 3103.

Optional questions 6, 7, and 8 address enhanced remedies. If the neglect is proved by clear and convincing evidence, and it is also proved by clear and convincing evidence that the individual defendant acted with recklessness, malice, oppression, or fraud, attorney fees, costs, and a decedent's predeath pain and suffering may be recovered. (See Welf. & Inst. Code, § 15657.) If any of these remedies are sought against the employer, include question 6. (See Welf. & Inst. Code, § 15657(c).) Question 6 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102A.

If any enhanced remedies are sought against either the individual or the employer, include question 7. If the neglect led to the elder's death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.

In the transitional language after question 4, direct the jury to answer questions 6 or 7 or both, depending on which questions are to be included. If question 7 is to be included but question 6 is not, then 7 will be renumbered as 6.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3103. Neglect—Employer Defendant Only (Welf. & Inst. Code, §§ 15610.57, 15657; Civ. Code, § 3294(b))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] while [he/she/***nonbinary pronoun***] was in [***name of defendant***]'s care or custody?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff/decedent***] in [***name of defendant***]'s care or custody?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did one or more of [***name of defendant***]'s employees fail to use that degree of care that a reasonable person in the same situation would have used in assisting in personal hygiene or in the provision of food, clothing, or shelter?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the employee's conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question[s] 5 [and 6]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff/decedent***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

[6. Did [*name of plaintiff*] prove by clear and convincing evidence that an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of the employee and employed [him/her/*nonbinary pronoun*] with a knowing disregard of the rights or safety of others?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of plaintiff*] prove 1 through 4 above by clear and convincing evidence and also prove by clear and convincing evidence that the employee acted with [recklessness/malice/oppression/ [or] fraud]?

_____ Yes _____ No]

[If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death? _____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2008, October 2008, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3103, *Neglect—Essential Factual Elements*, CACI No. 3104, *Neglect—Enhanced Remedies Sought*, and CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Question 3 can be modified to correspond to the alleged wrongful conduct as in element 3 of CACI No. 3103.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Questions 6 and 7 are required to obtain employer liability for enhanced remedies, including attorney fees and costs. (See Welf. & Inst. Code, § 15657; Code Civ. Proc., § 377.34.) Question 6 may be altered to correspond to one of the alternative bracketed options in CACI No. 3102B.

If the neglect led to the elder's death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3104. Physical Abuse—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.63, 15657; Civ. Code, § 3294(b))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of employee defendant***] physically abuse [***name of plaintiff/decedent***]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of employee defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4 [and] [*select 5, 6, or both***]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

4. **What are [***name of plaintiff/decedent***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

[5. Did [*name of plaintiff*] prove by clear and convincing evidence that an officer, a director, or a managing agent of [*name of employer defendant*] had advance knowledge of the unfitness of [*name of employee defendant*] and employed [him/her/*nonbinary pronoun*] with a knowing disregard of the rights or safety of others?

_____ Yes _____ No]

[6. Did [*name of plaintiff*] prove 1 through 3 above by clear and convincing evidence and also prove by clear and convincing evidence that [*name of employee defendant*] acted with [recklessness/malice/oppression/ [or] fraud]?

_____ Yes _____ No]

[If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death? _____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2008, October 2008, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3106, *Physical Abuse—Essential Factual Elements*, CACI No. 3107, *Physical Abuse—Enhanced Remedies Sought*, and CACI

No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Optional questions 5, 6, and 7 address enhanced remedies. If the physical abuse is proved by clear and convincing evidence, and it is also proved by clear and convincing evidence that the individual defendant acted with recklessness, malice, oppression, or fraud, attorney fees, costs, and a decedent's predeath pain and suffering may be recovered. (See Welf. & Inst. Code, § 15657.) If any of these remedies are sought against the employer, include question 5. (See Welf. & Inst. Code, § 15657(c).) Question 5 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102A.

If any enhanced remedies are sought against either the individual or the employer, include question 6. If the physical abuse led to the neglected elder's death, in question 4 include only item 4a for past economic loss. But also include the transitional language after question 6 and include question 7.

In the transitional language after question 3, direct the jury to answer questions 5 or 6 or both, depending on which questions are to be included. If question 6 is to be included but question 5 is not, then 6 will be renumbered as 5.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3105. Physical Abuse—Employer Defendant Only (Welf. & Inst. Code, §§ 15610.63, 15657; Civ. Code, § 3294(b))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff/decedent*] [65 years of age or older/a dependent adult] at the time of the conduct?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*]'s employee physically abuse [*name of plaintiff/decedent*]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the employee's conduct a substantial factor in causing harm to [*name of plaintiff/decedent*]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question[s] 4 [and 5]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [*name of plaintiff/decedent*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

[5. Did [*name of plaintiff*] prove by clear and convincing evidence that an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of the employee and employed [him/her/*nonbinary pronoun*/them] with a knowing disregard of the rights or safety of others?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of plaintiff*] prove 1 through 3 by clear and convincing evidence and also prove by clear and convincing evidence that the employee acted with [recklessness/malice/oppression/ [or] fraud]?

_____ Yes _____ No]

[If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death? _____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2008, October 2008, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3106, *Physical Abuse—Essential Factual Elements*, CACI No. 3107, *Physical Abuse—Enhanced Remedies Sought*, and CACI

No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Questions 5 and 6 are required to obtain employer liability for enhanced remedies, including attorney fees and costs. (See Welf. & Inst. Code, § 15657; Code Civ. Proc., § 377.34.) Question 5 may be altered to correspond to one of the alternative bracketed options in CACI No. 3102B.

If the physical abuse led to the elder's death, in question 4 include only item 4a for past economic loss. But also include the transitional language after question 6 and include question 7.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3106. Abduction—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.06, 15657.05; Civ. Code, § 3294(b))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of employee defendant***] [remove [***name of plaintiff/decedent***] from California and] restrain [him/her/***nonbinary pronoun***/[***name of plaintiff/decedent***]] from returning to California?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff/decedent***] lack the capacity to consent to the [removal and] restraint?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of employee defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5 [and] [*select 6, 7, or both***]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. **What are [***name of plaintiff/decedent***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

[6. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of employee defendant*] was an officer, director, or managing agent of [*name of employer defendant*] acting on behalf of [*name of defendant*].

_____ Yes _____ No]

[7. Did [*name of plaintiff*] prove 1 through 4 above by clear and convincing evidence?

_____ Yes _____ No]

[If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death? _____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2008, October 2008, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3109, *Abduction—Essential Factual Elements*, CACI No. 3110, *Abduction—Enhanced Remedies Sought*, and CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Question 3 can be altered to correspond to the alternative bracketed option in element 3 of CACI No. 3109.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Optional questions 6, 7, and 8 address enhanced remedies. If the abduction is proved by clear and convincing evidence, attorney fees, costs, and a decedent's predeath pain and suffering may be recovered. (See Welf. & Inst. Code, § 15657.05.) If any of these remedies are sought against the employer, include question 6. (See Welf. & Inst. Code, § 15657.05(c).) Question 6 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102A.

If any enhanced remedies are sought against either the individual or the employer, include question 7. If the abduction led to the abductee's death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.

In the transitional language after question 4, direct the jury to answer questions 6, 7, or both, depending on which questions are to be included. If question 7 is to be included but question 6 is not, then 7 will be renumbered as 6.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3107. Abduction—Employer Defendant Only (Welf. & Inst. Code, §§ 15610.06, 15657.05; Civ. Code, § 3294(b))

We answer the questions submitted to us as follows:

1. **Was [*name of plaintiff/decedent*] [65 years of age or older/a dependent adult] at the time of the conduct?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*]'s employee [remove [*name of plaintiff/decedent*] from California and] restrain [him/her/*nonbinary pronoun*/[*name of plaintiff/decedent*]] from returning to California?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of plaintiff/decedent*] lack the capacity to consent to the [removal and] restraint?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the employee's conduct a substantial factor in causing harm to [*name of plaintiff/decedent*]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question[s] 5 [and 6]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff/decedent*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

[6. Did [*name of plaintiff*] prove by clear and convincing evidence that the employee was an officer, a director, or a managing agent of [*name of defendant*] acting in on behalf of [*name of defendant*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of plaintiff*] prove 1 through 4 by clear and convincing evidence?

_____ Yes _____ No]

[If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death? _____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, April 2008, October 2008, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3109, *Abduction—Essential Factual Elements*, CACI No. 3110, *Abduction—Enhanced Remedies Sought*, and CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Question 3 can be altered to correspond to the alternative bracketed option in element 3 of CACI No. 3109.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Questions 6 and 7 are required to obtain employer liability for enhanced remedies, including attorney fees and costs. (See Welf. & Inst. Code, § 15657.05(b); Code Civ. Proc., § 377.34.) Question 6 may be altered to correspond to one of the alternative bracketed options in CACI No. 3102B.

If the abduction led to the abductee's death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3108–VF-3199. Reserved for Future Use

Table A. Elder Abuse: Causes of Action, Remedies, and Employer Liability

CAUSES OF ACTION	INDIVIDUAL DEFENDANT	EMPLOYER DEFENDANT
FINANCIAL ABUSE	**Traditional Damages:** preponderance	**Traditional Damages:** vicarious liability
	Attorney Fees and Costs: preponderance (Welf. & Inst. Code, § 15657.5(a))	**Attorney Fees and Costs:** vicarious liability (Welf. & Inst. Code, § 15657.5(c))
	Pre-death Pain and Suffering: CCE:RMOF (Welf. & Inst. Code, § 15657.5(b))	**Pre-death Pain and Suffering:** vicarious liability + individual CCE:RMOF (Welf. & Inst. Code, 15657.5(b), (c))
ABDUCTION	**Traditional Damages:** preponderance	**Traditional Damages:** vicarious liability
	Attorney Fees and Costs: CCE (Welf. & Inst. Code, § 15657.05(a))	**Attorney Fees and Costs:** Civ. § Code 3294(b) + individual CCE (Welf. & Inst. Code, § 15657.05(c))
	Pre-death Pain and Suffering: CCE (Welf. & Inst. Code, § 15657.05(b))	**Pre-death Pain and Suffering:** Civ. Code, § 3294(b) + individual CCE (Welf. & Inst. Code, § 15657.05(c))
NEGLECT AND PHYSICAL ABUSE	**Traditional Damages:** preponderance	**Traditional Damages:** vicarious liability
	Attorney Fees and Costs: CCE:RMOF (Welf. & Inst. Code, § 15657(a))	**Attorney Fees and Costs:** Civ. Code, § 3294(b) + individual CCE:RMOF (Welf. & Inst. Code, § 15657(a))
	Pre-death Pain and Suffering: CCE:RMOF (Welf. & Inst. Code, § 15657(b))	**Pre-death Pain and Suffering:** Civ. Code, § 3294(b) + individual CCE:RMOF (Welf. & Inst. Code, § 15657(b))

KEY:

CCE = Clear and Convincing Evidence

RMOF = Recklessness, Malice, Oppression, or Fraud

Civ. Code, § 3294(b) = Standards for imposing liability on employer under Civil Code section 3294(b).

SONG-BEVERLY CONSUMER WARRANTY ACT

3200. Failure to Repurchase or Replace Consumer Good After Reasonable Number of Repair Opportunities—Essential Factual Elements (Civ. Code, § 1793.2(d))

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by [***name of defendant***]'s failure to repurchase or replace [a/an] [***consumer good***] after a reasonable number of repair opportunities. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought [a/an] [***consumer good***] [from/distributed by/manufactured by] [***name of defendant***];**

2. **That [***name of defendant***] gave [***name of plaintiff***] a warranty by [***insert at least one of the following:***]**

   [making a written statement that [*describe alleged express warranty***];] [or]**

   [showing [him/her/*nonbinary pronoun***] a sample or model of the [***consumer good***] and representing, by words or conduct, that [his/her/***nonbinary pronoun***] [***consumer good***] would match the quality of the sample or model;]**

3. **That the [***consumer good***] [***insert at least one of the following:***]**

   [did not perform as stated for the time specified;] [or]

   [did not match the quality [of the [sample/model]] [or] [as set forth in the written statement];]

4. **[That [***name of plaintiff***] delivered the [***consumer good***] to [***name of defendant***] or its authorized repair facilities for repair;]**

   [*or***]**

   [That [*name of plaintiff***] notified [***name of defendant***] in writing of the need for repair because [he/she/***nonbinary pronoun***] reasonably could not deliver the [***consumer good***] to [***name of defendant***] or its authorized repair facilities because of the [size and weight/method of attachment/method of installation] [or] [the nature of the defect] of the [***consumer good***]]; [and]**

5. **That [***name of defendant***] or its representative failed to repair the [***consumer good***] to match the [written statement/represented quality] after a reasonable number of opportunities; [and]**

6. **[That [***name of defendant***] did not replace the [***consumer good***] or reimburse [***name of plaintiff***] an amount of money equal to the purchase price of the [***consumer good***], less the value of its use by [***name of plaintiff***] before discovering the defect[s].]**

[A written statement need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant*] to have specifically intended to create a warranty. A warranty is not created if [*name of defendant*] simply stated the value of the [*consumer good*] or gave an opinion about the [*consumer good*]. General statements concerning customer satisfaction do not create a warranty.]

New September 2003; Revised April 2007, December 2007, December 2011

Directions for Use

An instruction on the definition of "consumer good" may be necessary if that issue is disputed. Civil Code section 1791(a) provides: " 'Consumer goods' means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables. 'Consumer goods' shall include new and used assistive devices sold at retail."

Select the alternative in element 4 that is appropriate to the facts of the case.

Regarding element 4, if the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute, Civil Code section 1793.2(c), is unclear on this point.

Depending on the circumstances of the case, further instruction on element 6 may be needed to clarify how the jury should calculate "the value of its use" during the time before discovery of the defect.

If remedies are sought under the California Uniform Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] [did not match the quality [of the [sample/model]]/as set forth in the written statement];

See also CACI No. 1243, *Notification/Reasonable Time*.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect in the [*consumer good*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of consumer goods.

See also CACI No. 3202, *"Repair Opportunities" Explained.*

Sources and Authority

- Song-Beverly Consumer Warranty Act: Right of Action. Civil Code section 1794(a).
- "Express Warranty" Defined. Civil Code section 1791.2.
- Express Warranty Made by Someone Other Than Manufacturer. Civil Code section 1795.
- Replacement or Reimbursement After Reasonable Number of Repair Attempts. Civil Code section 1793.2(d).
- Extension of Warranty. Civil Code section 1793.1(a)(2).
- Buyer's Delivery of Nonconforming Goods. Civil Code section 1793.2(c).
- Distributor or Seller of Used Consumer Goods. Civil Code section 1795.5.
- Song-Beverly Does Not Preempt Commercial Code. Civil Code section 1790.3.
- Extension of Warranty Period for Repairs. Civil Code section 1793.1(a)(2).
- Tolling of Warranty Period for Nonconforming Goods. Civil Code section 1795.6.
- " 'The Song-Beverly Act is a remedial statute designed to protect consumers who have purchased products covered by an express warranty . . . . One of the most significant protections afforded by the act is . . . that "if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer . . . ." . . .' In providing these remedies, the Legislature has not required that the consumer maintain possession of the goods at all times. All that is necessary is that the consumer afford the manufacturer a reasonable number of attempts to repair the goods to conform to the applicable express warranties." (*Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 191 [122 Cal.Rptr.3d 497], internal citation omitted.)
- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties . . . . [¶] [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)
- "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the

consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra,* 34 Cal.App.4th at p.1079, internal citations and footnotes omitted.)

- "[I]t is reasonable to conclude that all of the section 1780, subdivision (a) remedies, save for injunctive relief, are encompassed within section 1782, subdivision (b)'s reference to an 'action for damages . . . under Section 1780.' [¶] While it is true that damages and restitution are different remedies, serving different purposes, section 1780, subdivision (a)'s use of the broader term 'any damage' followed by the narrower term 'actual damages' within the list of specific potential remedies suggests that the CLRA takes a more expansive view of what constitutes 'damages' pursuant to its terms." (*DeNike v. Mathew Enterprise, Inc.* (2022) 76 Cal.App.5th 371, 379–380 [291 Cal.Rptr.3d 480].)
- "The legislative history of [Civil Code section 1793.2] demonstrates beyond any question that . . . a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 52, 57, 321–334

1 California UCC Sales and Leases (Cont.Ed.Bar) Warranties, §§ 3.4, 3.8, 3.15, 3.87

2 California UCC Sales and Leases (Cont.Ed.Bar) Prelitigation Remedies, § 17.70

2 California UCC Sales and Leases (Cont.Ed.Bar) Litigation Remedies, § 18.25

2 California UCC Sales and Leases (Cont.Ed.Bar) Leasing of Goods, § 19.38

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, § 91.15 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.100 et seq. (Matthew Bender)

California Civil Practice: Business Litigation §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27 (Thomson Reuters)

3201. Failure to Promptly Repurchase or Replace New Motor Vehicle After Reasonable Number of Repair Opportunities—Essential Factual Elements (Civ. Code, § 1793.2(d))

[*Name of plaintiff***] claims that [***name of defendant***] failed to promptly repurchase or replace [a/an] [***new motor vehicle***] after a reasonable number of repair opportunities. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [bought/leased] [a/an] [***new motor vehicle***] [from/distributed by/manufactured by] [***name of defendant***];**
2. **That [***name of defendant***] gave [***name of plaintiff***] a written warranty that [***describe alleged express warranty***];**
3. **That the vehicle had [a] defect[s] that [was/were] covered by the warranty and that substantially impaired its use, value, or safety to a reasonable person in [***name of plaintiff***]'s situation;**
4. **[That [***name of plaintiff***] delivered the vehicle to [***name of defendant***] or its authorized repair facility for repair of the defect[s];]**

   [*or***]**

   [That [*name of plaintiff***] notified [***name of defendant***] in writing of the need for repair of the defect[s] because [he/she/***nonbinary pronoun***] reasonably could not deliver the vehicle to [***name of defendant***] or its authorized repair facility because of the nature of the defect[s];]**
5. **That [***name of defendant***] or its authorized repair facility failed to repair the vehicle to match the written warranty after a reasonable number of opportunities to do so; and**
6. **That [***name of defendant***] did not promptly replace or buy back the vehicle.**

[It is not necessary for [*name of plaintiff***] to prove the cause of a defect in the [***new motor vehicle***].]**

[A written warranty need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant***] to have specifically intended to create a warranty. A warranty is not created if [***name of defendant***] simply stated the value of the vehicle or gave an opinion about the vehicle. General statements concerning customer satisfaction do not create a warranty.]**

New September 2003; Revised February 2005, December 2005, April 2007, December 2007, December 2011

Directions for Use

If remedies are sought under the California Uniform Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*new motor vehicle*] had a defect covered by the warranty;

See also CACI No. 1243, *Notification/Reasonable Time*.

Regarding element 4, if the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute, Civil Code section 1793.2(c), is unclear on this point.

Include the bracketed sentence preceding the final bracketed paragraph if appropriate to the facts. The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of a motor vehicle.

See also CACI No. 3202, *"Repair Opportunities" Explained*, CACI No. 3203, *Reasonable Number of Repair Opportunities—Rebuttable Presumption*, and CACI No. 3204, *"Substantially Impaired" Explained*.

Sources and Authority

- Song-Beverly Consumer Warranty Act: Right of Action. Civil Code section 1794(a).
- Extension of Warranty Period. Civil Code section 1793.1(a)(2).
- Song-Beverly Does Not Preempt Commercial Code. Civil Code section 1790.3.
- "Express Warranty" Defined. Civil Code section 1791.2.
- Express Warranty Made by Someone Other Than Manufacturer. Civil Code section 1795.
- "New Motor Vehicle" Defined. Civil Code section 1793.22(e)(2).
- Replacement or Reimbursement After Reasonable Number of Repair Attempts. Civil Code section 1793.2(d)(2).
- Buyer's Delivery of Nonconforming Goods. Civil Code section 1793.2(c).

- Extension of Warranty. Civil Code section 1793.1(a)(2).
- Tolling of Warranty Period for Nonconforming Goods. Civil Code section 1795.6.
- " 'The Song-Beverly Act is a remedial statute designed to protect consumers who have purchased products covered by an express warranty . . . . One of the most significant protections afforded by the act is . . . that "if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer . . . ." . . .' In providing these remedies, the Legislature has not required that the consumer maintain possession of the goods at all times. All that is necessary is that the consumer afford the manufacturer a reasonable number of attempts to repair the goods to conform to the applicable express warranties." (*Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 191 [122 Cal.Rptr.3d 497], internal citation omitted.)
- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties . . . . [¶] [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)
- "A plaintiff pursuing an action under the Act has the burden to prove that (1) the vehicle had a nonconformity covered by the express warranty that substantially impaired the use, value or safety of the vehicle (the nonconformity element); (2) the vehicle was presented to an authorized representative of the manufacturer of the vehicle for repair (the presentation element); and (3) the manufacturer or his representative did not repair the nonconformity after a reasonable number of repair attempts (the failure to repair element)." (*Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138, 152 [158 Cal.Rptr.3d 180].)
- "Although the Act treats motor vehicles differently from other types of consumer goods in several ways, we find no indication that the Legislature intended to treat motor vehicles differently with respect to the limitation on the Act's coverage to goods sold in California." (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 491 [30 Cal.Rptr.3d 823, 115 P.3d 98].)
- "Under well-recognized rules of statutory construction, the more specific definition [of 'new motor vehicle'] found in the current section 1793.22 governs the more general definition [of 'consumer goods'] found in section 1791." (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 126 [41 Cal.Rptr.2d 295].)
- " 'Nonconformity' is defined as 'a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee.' The term is similar to what the average person would understand to be a 'defect.' "

(*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249 [40 Cal.Rptr.2d 576], internal citation omitted; see also *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 801, fn. 11 [50 Cal.Rptr.3d 731] [nonconformity can include entire complex of related conditions].)

- "The issue of whether the problems constituted substantial impairment is one for the trier of fact." (*Schreidel, supra,* 34 Cal.App.4th at p. 1250.)
- "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra,* 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)
- "[W]e conclude the phrase 'other motor vehicles sold with a manufacturer's new car warranty' refers to cars sold with a full warranty, not to previously sold cars accompanied by some balance of the original warranty. We therefore conclude the trial judge was correct to conclude plaintiffs' truck does not meet the definition of 'new motor vehicle.' " (*Rodriguez v. FCA US, LLC* (2022) 77 Cal.App.5th 209, 225 [292 Cal.Rptr.3d 382], review granted July 13, 2022, S273143.)
- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that . . . a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)
- "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable opportunity to repair the vehicle.' " (*Oregel, supra*, 90 Cal.App.4th at p. 1103, original italics, internal citation omitted.)
- "[T]he Act does not require consumers to take any affirmative steps to secure relief for the failure of a manufacturer to service or repair a vehicle to conform to applicable warranties—other than, of course, permitting the manufacturer a reasonable opportunity to repair the vehicle . . . . In reality, . . . , the manufacturer seldom on its own initiative offers the consumer the options available under the Act: a replacement vehicle or restitution. Therefore, as a practical matter, the consumer will likely request replacement or restitution. But the consumer's request is not mandated by any provision in the Act. Rather, the consumer's request for replacement or restitution is often prompted by the

manufacturer's unforthright approach and stonewalling of fundamental warranty problems." (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1050 [104 Cal.Rptr.3d 853], original italics.)

- "[Defendant] argues allowing evidence of postwarranty repairs extends the term of its warranty to whatever limit an expert is willing to testify. We disagree. Evidence that a problem was fixed for a period of time but reappears at a later date is relevant to determining whether a fundamental problem in the vehicle was ever resolved. Indeed, that a defect first appears after a warranty has expired does not necessarily mean the defect did not exist when the product was purchased. Postwarranty repair evidence may be admitted on a case-by-case basis where it is relevant to showing the vehicle was not repaired to conform to the warranty during the warranty's existence." (*Donlen, supra*, 217 Cal.App.4th at p. 149, internal citations omitted.)
- "[W]e hold that registration renewal and nonoperation fees are not recoverable as collateral charges under section 1793.2, subdivision (d)(2)(B), part of the Act because they are not collateral to the price paid for the vehicle, but they are recoverable as incidental damages under section 1794, part of the Act if they were incurred and paid as a result of a manufacturer's failure to promptly provide a replacement vehicle or restitution under section 1793.2, subdivision (d)(2)." (*Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, 987 [266 Cal.Rptr.3d 346, 470 P.3d 56].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 52, 57, 325

1 California UCC Sales and Leases (Cont.Ed.Bar) Warranties, §§ 7.4, 7.8, 7.15, 7.87; *id.,* Prelitigation Remedies, § 13.68; *id.*, Litigation Remedies, § 14.25, *id.*, Division 10: Leasing of Goods, § 17.31

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, §§ 91.15, 91.18 (Matthew Bender)

20 California Points and Authorities, Ch. 206*, Sales*, § 206.104 (Matthew Bender)

California Civil Practice: Business Litigation. §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27 (Thomson Reuters)

3202. "Repair Opportunities" Explained

Each time the [*consumer good/new motor vehicle*] was given to [*name of defendant*] [or its authorized repair facility] for repair counts as an opportunity to repair, even if [it/they] did not do any repair work.

In determining whether [*name of defendant*] had a reasonable number of opportunities to fix the [*consumer good/new motor vehicle*], you should consider all the circumstances surrounding each repair visit. [*Name of defendant*] [or its authorized repair facility] must have been given at least two opportunities to fix the [*consumer good/new motor vehicle*] [unless only one repair attempt was possible because the [*consumer good/new motor vehicle*] was later destroyed or because [*name of defendant*] [or its authorized repair facility] refused to attempt the repair].

New September 2003; Revised February 2005, December 2005, June 2006

Directions for Use

This instruction applies only to claims under Civil Code section 1793.2(d) and not to other claims, such as claims for breach of the implied warranty of merchantability. (See *Mocek v. Alfa Leisure, Inc.* (2003) 114 Cal.App.4th 402, 406–407 [7 Cal.Rptr.3d 546].)

The final bracketed portion of the last sentence of this instruction is intended for use only in cases where the evidence shows that only one repair attempt was possible because of the subsequent malfunction and destruction of the vehicle or where the defendant refused to attempt the repair. (See *Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750 [52 Cal.Rptr.2d 134]; *Gomez v. Volkswagen of America, Inc.* (1985) 169 Cal.App.3d 921 [215 Cal.Rptr. 507].)

Sources and Authority

- Replacement or Reimbursement After Reasonable Number of Repair Attempts. Civil Code section 1793.2(d).
- "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1103–1104 [109 Cal.Rptr.2d 583], internal citation omitted.)
- "Section 1793.2(d) requires the manufacturer to afford the specified remedies of restitution or replacement if that manufacturer is unable to repair the vehicle 'after a reasonable number of attempts.' 'Attempts' is plural. The statute does not require the manufacturer to make restitution or replace a vehicle if it has had

only one opportunity to repair that vehicle." (*Silvio v. Ford Motor Co.* (2003) 109 Cal.App.4th 1205, 1208 [135 Cal.Rptr.2d 846].)

Secondary Sources

2 California UCC Sales & Leases (Cont.Ed.Bar) Prelitigation Remedies, § 17.70

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, § 91.15 (Matthew Bender)

20 California Points and Authorities, Ch. 206*, Sales*, § 206.104 et seq. (Matthew Bender)

3203. Reasonable Number of Repair Opportunities—Rebuttable Presumption (Civ. Code, § 1793.22(b))

The number of opportunities to make repairs is presumed to be reasonable if [*name of plaintiff***] proves that within [18 months from delivery of the [***new motor vehicle***] to [him/her/***nonbinary pronoun***/it]] [or] [the first 18,000 miles] [***insert option A, B, and/or C:***]**

[A. 1. The vehicle was made available to [*name of defendant***] [or its authorized repair facility] for repair of the same substantially impairing defect two or more times; [and]**

2. The defect resulted in a condition that was likely to cause death or serious bodily injury if the vehicle were driven; [and]

3. [[*Name of plaintiff***] directly notified [***name of manufacturer***] in writing about the need to repair the defect;] [or]]**

[B. 1. The vehicle was made available to [*name of defendant***] [or its authorized repair facility] for repair of the same substantially impairing defect four or more times; [and]**

2. [[*Name of plaintiff***] directly notified [***name of manufacturer***] in writing about the need to repair the defect;] [or]]**

[C. The vehicle was out of service for repair of substantially impairing defects by [*name of defendant***] [or its authorized repair facility] for more than 30 days.]**

If [*name of plaintiff***] has proved these facts, then the number of opportunities to make repairs was reasonable unless [***name of defendant***] proves that under all the circumstances [***name of defendant***] [or its authorized repair facility] was not given a reasonable opportunity to repair the defect.**

[The 30-day limit for repairing defects will be lengthened if [*name of defendant***] proves that repairs could not be made because of conditions beyond the control of [***name of defendant***] or its authorized repair facility.]**

New September 2003; Revised February 2005, May 2020

Directions for Use

This instruction should not be given if none of the enumerated situations apply to the plaintiff's case. (*Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1245 [13 Cal.Rptr.3d 679].)

Note that the factfinder's inquiry should be focused on overall reasonableness of the

opportunities plaintiff gave defendant to make repairs. Therefore, while satisfying the rebuttable presumption (without having it overcome by defendant) is one way for plaintiff to satisfy the reasonable opportunities requirement, the plaintiff may do so in other ways instead. Likewise, because the statutory presumption is rebuttable, defendant is allowed an opportunity to overcome it.

The rebuttable presumption concerning the number of repair attempts applies only to new motor vehicles—see the Tanner Consumer Protection Act. (Civ. Code, § 1793.22(b).)

The bracketed language in the first two optional paragraphs concerning notice made directly to the manufacturer are applicable only if "the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of [the Tanner Consumer Protection Act] and that of [Civil Code section 1793.2(d)], including the requirement that the buyer must notify the manufacturer directly." (See Civ. Code, § 1793.22(b)(3).) This is a matter that the judge should determine ahead of time as an issue of law.

Sources and Authority

- Replacement or Reimbursement After Reasonable Number of Repair Attempts. Civil Code section 1793.2(d)(2).
- Reasonable Number of Repair Opportunities. Civil Code section 1793.22(b).
- "We believe . . . that the only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1103–1104 [109 Cal.Rptr.2d 583], internal citations and footnote omitted.)

Secondary Sources

2 California UCC Sales & Leases (Cont.Ed.Bar) Prelitigation Remedies, § 17.10

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, § 91.16 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.104 (Matthew Bender)

California Civil Practice: Business Litigation, § 53:27 (Thomson Reuters)

3204. "Substantially Impaired" Explained

In deciding whether a reasonable person would believe that the vehicle's defect[s], if any, substantially impaired the vehicle's use, value, or safety, you may consider, among other factors, the following:

(a) [The nature of the defect[s];]

(b) [The cost and length of time required for repair;]

(c) [Whether past repair attempts have been successful;]

(d) [The degree to which the vehicle could be used while awaiting repair;]

(e) [The availability and cost of comparable transportation during the repairs;] [and]

(f) [*Insert other appropriate factor.***]**

New February 2005; Revised December 2005

Directions for Use

Some or all of the stated factors may not be necessary in every case. Depending on the facts of the case, other factors may be added as appropriate.

Sources and Authority

- "Whether the impairment is substantial is determined by an objective test, based on what a reasonable person would understand to be a defect. This test is applied, however, within the specific circumstances of the buyer." (*Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472, 478 [104 Cal.Rptr.2d 545], internal citations omitted.)
- "The issue of whether the problems constituted substantial impairment is one for the trier of fact." (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1250 [40 Cal.Rptr.2d 576], internal citations omitted.)
- "The term ['substantially'] modifies its object, 'impairment.' It injects an element of degree; not every impairment is sufficient to satisfy the statute. The most analogous definition of 'substantially' we have found in a context similar to its usage here is in the Uniform Commercial Code, section 2-608. Like the clause at issue here, this provision requires a determination of whether a defect 'substantially impairs' the value of goods sold to a buyer. Under it, the trier of fact may consider: 'the nature of the defects; the cost and length of time required for repair; whether past repair attempts have been successful; the degree to which the goods can be used while repairs are attempted; [inconvenience to buyer]; and the availability and cost of alternative goods pending repair . . . .' It may be that this term, like 'reasonable,' is incapable of precise definition. At the

least, the requirement is not satisfied by any impairment, however insignificant, that affects use, value, or safety." (*Lundy, supra,* 87 Cal.App.4th at p. 478, internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 323–330

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, §§ 91.12[2], 91.64 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.53 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, §§ 206.104, 206.127 (Matthew Bender)

3205. Failure to Begin Repairs Within Reasonable Time or to Complete Repairs Within 30 Days—Essential Factual Elements (Civ. Code, § 1793.2(b))

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed because [***name of defendant***] failed to [begin repairs on the [***consumer good/new motor vehicle***] in a reasonable time/ [or] repair the [***consumer good/new motor vehicle***] within 30 days]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [bought/leased] [a/an] [***consumer good/new motor vehicle***] [from/distributed by/manufactured by] [***name of defendant***];**
2. **That [***name of defendant***] gave [***name of plaintiff***] a written warranty that [***describe alleged express warranty***];**
3. **That the [***consumer good/new motor vehicle***] had [a] defect[s] that [was/were] covered by the warranty;**
4. **That [***name of defendant***] or its authorized repair facility failed to [begin repairs within a reasonable time/ [or] complete repairs within 30 days so as to conform to the applicable warranties].**

New December 2011; Revised December 2012

Directions for Use

Give this instruction for the defendant's alleged breach of Civil Code section 1793.2(b), which requires that repairs be commenced within a reasonable time and finished within 30 days unless the buyer otherwise agrees in writing. This instruction assumes that the statute contains two separate requirements, one for starting repairs and one for finishing them, either of which would be a violation.

The damages recoverable for unreasonable delay in repairs are uncertain. A violation of Civil Code section 1793.2(b) would not entitle the consumer to the remedies of restitution or replacement for a consumer good or new motor vehicle as provided in section 1793.2(d). Before those remedies are available, the manufacturer is entitled to a reasonable number of repair opportunities. (*Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1262 [13 Cal.Rptr.3d 793, 90 P.3d 752]; see Civ. Code, §§ 1793.2(d), 1793.22.) California Uniform Commercial Code remedies that are generally available under Song-Beverly permit the buyer to cancel the sale and recover the price paid, or to accept the goods and recover diminution in value. (See Civ. Code, § 1794(b); Cal. U. Com. Code, §§ 2711–2715.) It seems questionable, however, that a buyer could cancel the sale and get the purchase price back solely for delay in completing repairs, particularly if the repairs were ultimately successful.

Delay caused by conditions beyond the control of the defendant extends the 30-day requirement. (Civ. Code, § 1793.2(b).) It would most likely be the defendant's burden to prove that conditions beyond its control caused the delay.

Sources and Authority

- Song-Beverly Consumer Warranty Act: Right of Action. Civil Code section 1794(a).
- Repairs to Start Within Reasonable Time. Civil Code section 1793.2(b).
- "[T]he fifth cause of action in each complaint clearly stated a cause of action under Civil Code section 1794 . . . . Plaintiff had pleaded that he was such a buyer who was injured by a 'willful' violation of Civil Code section 1793.2, subdivision (b) which in pertinent part requires that with respect to consumer goods sold in this state for which the manufacturer has made an express warranty and service and repair facilities are maintained in this state (undisputed herein) and 'repair of the goods is necessary because they do not conform with the applicable express warranties, service and repair shall be commenced within a reasonable time by the manufacturer or its representative.' " (*Gomez v. Volkswagen of Am.* (1985) 169 Cal.App.3d 921, 925 [215 Cal.Rptr. 507], footnote omitted.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 324

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, § 91.14 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.103 (Matthew Bender)

30 California Legal Forms, Ch. 92, *Service Contracts*, § 92.52 (Matthew Bender)

3206. Breach of Disclosure Obligations—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] violated California's motor vehicle warranty laws. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] [bought/leased] a [*motor vehicle*] from [*name of defendant*];**
2. **[That the vehicle was returned by a previous [buyer/lessee] to [*name of manufacturer*] under [California/[*name of state*]]'s motor vehicle warranty laws; and]**

   [*or*]

   [That [*name of defendant*] knew or should have known that the vehicle had been returned to the manufacturer under [California/[*name of state*]]'s motor vehicle warranty laws; and]
3. **[That before the [sale/leasing], [*name of defendant*] failed to tell [*name of plaintiff*], in clear and simple language, about the nature of the defect experienced by the original [buyer/lessee] of the vehicle; [or]]**

   [That before the [sale/leasing] to [*name of plaintiff*], the defect experienced by the vehicle's original [buyer/lessee] was not fixed; [or]]

   [That [*name of defendant*] did not provide a written warranty to [*name of plaintiff*] that the vehicle would be free for one year of the defect experienced by the vehicle's original [buyer/lessee].]

New September 2003; Revised June 2011; Renumbered from CACI No. 3230 June 2012

Directions for Use

Use the first bracketed option in element 2 if the defendant is the manufacturer. Otherwise, use the second option.

This instruction is based on the disclosure and warranty obligations set forth in Civil Code section 1793.22(f). The instruction may be modified for use with claims involving the additional disclosure obligations set forth in California's Automotive Consumer Notification Act. (Civ. Code, §§ 1793.23, 1793.24.)

Sources and Authority

- Song-Beverly Consumer Warranty Act: Right of Action. Civil Code section 1794(a).

- Notice to Buyer on Resale of Nonconforming Motor Vehicle. Civil Code section 1793.22(f)(1).
- Automotive Consumer Notification Act. Civil Code section 1793.23.

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 330

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, § 91.19 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.08 et seq. (Matthew Bender)

30 California Legal Forms: Transaction Guide, Ch. 92, *Service Contracts*, § 92.53 (Matthew Bender)

California Civil Practice: Business Litigation § 53:29 (Thomson Reuters)

3207–3209. Reserved for Future Use

3210. Breach of Implied Warranty of Merchantability—Essential Factual Elements

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[*Name of plaintiff***] claims that the [***consumer good***] did not have the quality that a buyer would reasonably expect. This is known as "breach of an implied warranty." To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer good***] [from/manufactured by] [***name of defendant***];**
2. **That at the time of purchase [***name of defendant***] was in the business of [selling [***consumer goods***] to retail buyers/manufacturing [***consumer goods***]];**
3. **That the [***consumer good***] [***insert one or more of the following:***]**

   [was not of the same quality as those generally acceptable in the trade;] [or]

   [was not fit for the ordinary purposes for which the goods are used;] [or]

   [was not adequately contained, packaged, and labeled;] [or]

   [did not measure up to the promises or facts stated on the container or label;]
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s breach of the implied warranty was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2005, December 2014, November 2018

Directions for Use

If remedies are sought under the California Uniform Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that proof of notice is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] did not have the quality that a buyer would reasonably expect;

See also CACI No. 1243, *Notification/Reasonable Time*. Instructions on damages and causation may be necessary in actions brought under the California Uniform Commercial Code.

In addition to sales of consumer goods, the Consumer Warranty Act applies to

leases. (See Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving the implied warranty of merchantability in a lease of consumer goods.

Sources and Authority

- Buyer's Action for Breach of Implied Warranties. Civil Code section 1794(a).
- Damages. Civil Code section 1794(b).
- Implied Warranties. Civil Code section 1791.1(a).
- Duration of Implied Warranties. Civil Code section 1791.1(c).
- Remedies. Civil Code section 1791.1(d).
- Implied Warranty of Merchantability. Civil Code section 1792.
- Damages for Breach; Accepted Goods. California Uniform Commercial Code section 2714.
- "As defined in the Song-Beverly Consumer Warranty Act, 'an implied warranty of merchantability guarantees that 'consumer goods meet each of the following: [¶] (1) Pass without objection in the trade under the contract description. [¶] (2) Are fit for the ordinary purposes for which such goods are used. [¶] (3) Are adequately contained, packaged, and labeled. [¶] (4) Conform to the promises or affirmations of fact made on the container or label.' Unlike an express warranty, 'the implied warranty of merchantability arises by operation of law' and 'provides for a minimum level of quality.' 'The California Uniform Commercial Code separates implied warranties into two categories. An implied warranty that the goods "shall be merchantable" and "fit for the ordinary purposes" is contained in California Uniform Commercial Code section 2314. Whereas an implied warranty that the goods shall be fit for a particular purpose is contained in section 2315. [¶] Thus, there exists in every contract for the sale of goods by a merchant a warranty that the goods shall be merchantable. The core test of merchantability is fitness for the ordinary purpose for which such goods are used. (§ 2314.)' " (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 26–27 [65 Cal.Rptr.3d 695], internal citations omitted.)
- "Here the alleged wrongdoing is a breach of the implied warranty of merchantability imposed by the Song-Beverly Consumer Warranty Act. Under the circumstances of this case, which involves the sale of a used automobile, the element of wrongdoing is established by pleading and proving (1) the plaintiff bought a used automobile from the defendant, (2) at the time of purchase, the defendant was in the business of selling automobiles to retail buyers, (3) the defendant made express warranties with respect to the used automobile, and (4) the automobile was not fit for ordinary purposes for which the goods are used. Generally, '[t]he core test of merchantability is fitness for the ordinary purpose for which such goods are used.' " (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1246 [248 Cal.Rptr.3d 61] [citing this instruction], internal citations omitted.)
- "[T]he buyer of consumer goods must plead he or she was injured or damaged

by the alleged breach of the implied warranty of merchantability." (*Gutierrez*, *supra*, 19 Cal.App.5th at p. 1247.)

- "Unless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159].)
- The implied warranty of merchantability "does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295–1296 [44 Cal.Rptr.2d 526], internal citation omitted.)
- "The [Song Beverly] act provides for both express and implied warranties, and while under a manufacturer's express warranty the buyer must allow for a reasonable number of repair attempts within 30 days before seeking rescission, that is not the case for the implied warranty of merchantability's bulwark against fundamental defects." (*Brand v. Hyundai Motor America* (2014) 226 Cal.App.4th 1538, 1545 [173 Cal.Rptr.3d 454].)
- "The Song-Beverly Act incorporates the provisions of [California Uniform Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp., supra,* 37 Cal.App.4th at p. 1295, fn. 2, internal citation omitted.)
- "The implied warranty of merchantability may be breached by a latent defect undiscoverable at the time of sale. Indeed, '[u]ndisclosed latent defects . . . are the very evil that the implied warranty of merchantability was designed to remedy.' In the case of a latent defect, a product is rendered unmerchantable, and the warranty of merchantability is breached, by the existence of the unseen defect, not by its subsequent discovery." (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1304–1305 [95 Cal.Rptr.3d 285], internal citations omitted.)
- "[Defendant] suggests the 'implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation.' As the trial court correctly recognized, however, a merchantable vehicle under the statute requires more than the mere capability of 'just getting from point "A" to point "B." ' " (*Brand*, *supra*, 226 Cal.App.4th at p. 1546.)
- "[A]llegations showing an alleged defect that created a substantial safety hazard would sufficiently allege the vehicle was not 'fit for the ordinary purposes for which such goods are used' and, thus, breached the implied warranty of merchantability." (*Gutierrez*, *supra*, 19 Cal.App.5th at pp. 1247–1248.)
- "We recognize that 'an important consideration under the implied warranty is

consumer safety.' However, 'vehicle safety is [not] the sole or dispositive criterion in implied warranty cases, which may turn on other facts.' " (*DeNike v. Mathew Enterprise, Inc.* (2022) 76 Cal.App.5th 371, 384–385 [291 Cal.Rptr.3d 480].)

- "The notice requirement of [former Civil Code] section 1769 . . . is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. 'As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897], internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 71, 72

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.21–3.23, 3.25–3.26

2 California UCC Sales & Leases (Cont.Ed.Bar) Leasing of Goods, §§ 19.31–19.32

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31[2][a] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, Sales: *Warranties*, § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.106 (Matthew Bender)

California Civil Practice: Business Litigation §§ 53:5–53:7 (Thomson Reuters)

3211. Breach of Implied Warranty of Fitness for a Particular Purpose—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed because the [***consumer good***] was not suitable for [his/her/***nonbinary pronoun***] intended use. This is known as a "breach of an implied warranty." To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer good***] [from/manufactured by/distributed by] [***name of defendant***];**
2. **That, at the time of purchase, [***name of defendant***] knew or had reason to know that [***name of plaintiff***] intended to use the [***consumer good***] for a particular purpose;**
3. **That, at the time of purchase, [***name of defendant***] knew or had reason to know that [***name of plaintiff***] was relying on [his/her/***nonbinary pronoun***/its] skill and judgment to select or provide a [***consumer good***] that was suitable for that particular purpose;**
4. **That [***name of plaintiff***] justifiably relied on [***name of defendant***]'s skill and judgment;**
5. **That the [***consumer good***] was not suitable for the particular purpose;**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of defendant***]'s breach of the implied warranty was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised November 2018

Directions for Use

If remedies are sought under the California Uniform Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines such proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] was not suitable for its intended use;

See also CACI No. 1243, *Notification/Reasonable Time*.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect of the [*consumer good*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or

failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases of consumer goods—see Civil Code sections 1791(g)–(i) and 1795.4. This instruction may be modified for use in cases involving the implied warranty of fitness in a lease of consumer goods.

Sources and Authority

- "Implied Warranty of Fitness" Defined. Civil Code section 1791.1(b).
- Remedies for Breach of Warranty of Fitness. Civil Code section 1791.1(d).
- Waiver of Warranty of Fitness. Civil Code section 1792.3.
- Song-Beverly Consumer Warranty Act: Right of Action. Civil Code section 1794(a).
- Measure of Damages. Civil Code section 1794(b).
- Manufacturer's Implied Warranty of Fitness. Civil Code section 1792.1.
- Retailer's or Distributor's Implied Warranty of Fitness. Civil Code section 1792.2(a).
- Damages for Nonconforming Goods. California Uniform Commercial Code section 2714(1).
- Damages for Breach of Warranty. California Uniform Commercial Code section 2714(2).
- "The Consumer Warranty Act makes . . . an implied warranty [of fitness for a particular purpose] applicable to retailers, distributors, and manufacturers . . . . An implied warranty of fitness for a particular purpose arises only where (1) the purchaser at the time of contracting intends to use the goods for a particular purpose, (2) the seller at the time of contracting has reason to know of this particular purpose, (3) the buyer relies on the seller's skill or judgment to select or furnish goods suitable for the particular purpose, and (4) the seller at the time of contracting has reason to know that the buyer is relying on such skill and judgment." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 25 [220 Cal.Rptr. 392], internal citations omitted.)
- " 'A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295, fn. 2 [44 Cal.Rptr.2d 526], internal citation omitted.)
- "The reliance elements are important to the consideration of whether an implied warranty of fitness for a particular purpose exists . . . . The major question in

determining the existence of an implied warranty of fitness for a particular purpose is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs." (*Keith*, *supra*, 173 Cal.App.3d at p. 25, internal citations omitted.)

- "The question of reimbursement or replacement is relevant only under [Civil Code] section 1793.2 . . . . [T]his section applies only when goods cannot be made to conform to the 'applicable *express* warranties.' It has no relevance to the implied warranty of merchantability." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 620 [39 Cal.Rptr.2d 159].)
- "The Song-Beverly Act incorporates the provisions of [California Uniform Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp.*, *supra*, 37 Cal.App.4th at p. 1295, fn. 2, internal citation omitted.)
- "The notice requirement of [former Civil Code] section 1769 . . . is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897], internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 73, 78

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.33–3.40

2 California UCC Sales & Leases (Cont.Ed.Bar) Leasing of Goods, §§ 19.31–19.32

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31[2][b] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.64 et seq. (Matthew Bender)

California Civil Practice: Business Litigation §§ 53:5–53:7 (Thomson Reuters)

3212. Duration of Implied Warranty

An implied warranty is in effect for one year after the sale of the [*consumer good*], unless a shorter period is stated in a writing that comes with the [*consumer good*], provided that the shorter period is reasonable. In no event will an implied warranty be in effect for less than 60 days.

[The time period of an implied warranty is lengthened by the number of days that the [*consumer good*] was made available by [*name of plaintiff*] for repairs under the warranty, including any delays caused by circumstances beyond [*name of plaintiff*]'s control].

New September 2003

Directions for Use

If the consumer goods at issue are not new, the instruction must be modified to reflect the shorter implied warranty period provided in Civil Code section 1795.5(c) (i.e., no less than 30 days but no more than three months).

Sources and Authority

- Duration of Implied Warranties. Civil Code section 1791.1(c).
- Tolling of Warranty Period for Nonconforming Goods. Civil Code section 1795.6.
- Distributor or Seller of Used Consumer Goods. Civil Code section 1795.5.
- "On appeal, [defendants] concede that the duration provision is not a statute of limitations and that the applicable statute of limitations is four years. They argue, however, that the judgment can be affirmed on other grounds. Among other arguments, they contend that the duration provision of the Song-Beverly Act should be interpreted as barring an action for breach of the implied warranty of merchantability when the purchaser fails to discover and report the defect to the seller within the time period specified in that provision. We reject this argument because the plain language of the statute, particularly in light of the consumer protection policies supporting the Song-Beverly Act, make clear that the statute merely creates a limited, prospective duration for the implied warranty of merchantability; it does not create a deadline for discovering latent defects or for giving notice to the seller." (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1301 [95 Cal.Rptr.3d 285].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 335

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.17

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.51–502.52 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.117 (Matthew Bender)
California Civil Practice: Business Litigation § 53:7 (Thomson Reuters)

3213–3219. Reserved for Future Use

3220. Affirmative Defense—Unauthorized or Unreasonable Use

[*Name of defendant***] is not responsible for any harm to [***name of plaintiff***] if [***name of defendant***] proves that the [[***specify defect(s) in the consumer good***]/failure to match the [written/implied] warranty] [was/were] caused by unauthorized or unreasonable use of the [***consumer good***] after it was sold.**

New September 2003; Revised February 2005, November 2018

Sources and Authority

- Unauthorized or Unreasonable Use. Civil Code section 1794.3.
- "The Song-Beverly Act provides that a breach of the warranty of merchantability occurs when a good becomes unfit for the ordinary purpose for which it is used. An exception occurs when the defect or nonconformity is caused by the buyer's unauthorized or unreasonable use under Civil Code section 1794.3. 'It is a "familiar" and "longstanding" legal principle that " '[w]hen a proviso . . . carves an exception out of the body of a statute or contract those who set up such exception must prove it.' " [Citations.]' Defendant, as the party claiming the exemption from the Song-Beverly Act, had the burden to prove the exemption. . . . Plaintiff alleged the vehicle became unfit and presented uncontradicted evidence that the vehicle had ceased functioning; to avail itself of Civil Code section 1794.3, defendant had to allege and prove that, notwithstanding the unfitness, the Song-Beverly Act did not apply due to plaintiff's improper use or maintenance." (*Jones v. Credit Auto Center, Inc.* (2015) 237 Cal.App.4th Supp. 1, 10–11 [188 Cal.Rptr.3d 578], internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 321, 322

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07[7] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)

California Civil Practice: Business Litigation § 53:59 (Thomson Reuters)

3221. Affirmative Defense—Disclaimer of Implied Warranties

[*Name of defendant*] claims that it did not breach any implied warranties because the [*consumer good*] was sold on an "as is" or "with all faults" basis. To succeed, [*name of defendant*] must prove both of the following:

1. **That at the time of sale a clearly visible written notice was attached to the [*consumer good*]; and**
2. **That the written notice, in clear and simple language, told the buyer each of the following:**
   a. **That the [*consumer good*] was being sold on an "as is" or "with all faults" basis;**
   b. **That the buyer accepted the entire risk of the quality and performance of the [*consumer good*]; and**
   c. **That if the [*consumer good*] were defective, the buyer would be responsible for the cost of all necessary servicing or repair.**

New September 2003; Revised June 2010

Directions for Use

If the consumer goods in question were sold by means of a mail-order catalog, the instruction must be modified in accordance with Civil Code section 1792.4(b).

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases—see Civil Code sections 1791(g)–(i) and 1795.4. This instruction may be modified for use in cases involving leases of consumer goods.

If at the time of sale, or within 90 days thereafter, the defendant sold the plaintiff a service contract that applied to the product, the federal Magnuson-Moss Warranty—Federal Trade Commission Improvement Act preempts use of this defense. (See 15 U.S.C. § 2308.)

Sources and Authority

- Waiver of Implied Warranties. Civil Code section 1792.3.
- "As Is" Sale. Civil Code section 1791.3.
- Conspicuous Writing Required. Civil Code section 1792.4.
- Express Warranty Does Not Preempt Implied Warranty. Civil Code section 1793.
- When Waiver of Implied Warranties Allowed. Civil Code section 1792.5.
- Lessor's Disclaimer of Warranties on Re-lease. Civil Code section 1795.4(e).
- "Unless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39

Cal.Rptr.2d 159].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 91

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.53–3.61

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.34[3], Ch. 8, *Defenses*, § 8.07[5][c] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.72 et seq. (Matthew Bender)

California Civil Practice: Business Litigation §§ 53:8–53:9, 53:58 (Thomson Reuters)

3222. Affirmative Defense—Statute of Limitations (Cal. U. Com. Code, § 2725)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that**

[the date of [tender of] delivery occurred before [*insert date four years before filing of complaint***].]**

[*or***]**

[any breach was discovered or should have been discovered before [*insert date four years before filing of complaint***].]**

New June 2010; Renumbered from CACI No. 3213 June 2012

Directions for Use

Use this instruction to assert a limitation defense based on the four-year period of California Uniform Commercial Code section 2725. (See *Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1305 [95 Cal.Rptr.3d 285] [four-year statute of Cal. U. Com. Code, § 2725 applies to warranty claims under the Song-Beverly Consumer Warranty Act].)

A breach of warranty occurs when tender of delivery is made. (Cal. U. Com. Code, § 2725(2).) Include "tender of" if actual delivery was not made or if delivery was made after tender. If whether a proper tender was made is at issue, the jury should be instructed on the meaning of "tender." (See Cal. U. Com. Code, § 2503.)

Under the statute, a breach of warranty occurs when tender of delivery is made regardless of the aggrieved party's knowledge of the breach—that is, there is no delayed-discovery rule. However, if an express warranty explicitly extends to future performance of the goods (for example, a warranty to repair defects for three years or 30,000 miles) and discovery of the breach must await the time of the performance, the cause of action accrues when the breach is or should have been discovered. (Cal. U. Com. Code, § 2725(2).) In such a case, give the second option in the second sentence. If delayed discovery is alleged, CACI No. 455, *Statute of Limitations—Delayed Discovery,* may be adapted for use. (See *Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205, 215–220 [285 Cal.Rptr. 717].)

Under the California Uniform Commercial Code, by the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it. (Cal. U. Com. Code, § 2725(1).) Presumably, this provision does not apply to claims under the Song-Beverly Act. (See Civ. Code, §§ 1790.1 [buyer's waiver of rights under Song-Beverly Act is unenforceable], 1790.3 [in case of conflict, provisions of Song-Beverly Act control over Cal. U. Com. Code].)

Sources and Authority

- Statute of Limitations Under Commercial Code. California Uniform Commercial Code section 2725.
- Buyer's Waiver of Song-Beverly Protections Not Enforceable. Civil Code section 1790.1.
- Song-Beverly Does Not Preempt Commercial Code. Civil Code section 1790.3.
- "The [Song Beverly] Act was intended to supplement the provisions of the California Uniform Commercial Code, rather than to supersede the rights and obligations created by that statutory scheme. (See Civ. Code, § 1790.3.) California Uniform Commercial Code section 2725 specifically governs actions for breach of warranty in a sales context. We conclude that this special statute of limitations controls rather than the general provision of Code of Civil Procedure section 338, subdivision (a) for liabilities created by statute." (*Krieger, supra,* 234 Cal.App.3d at p. 215.)
- "[Defendants] now concede that the statute of limitations for an action for breach of warranty under the Song-Beverly Act is four years pursuant to section 2725 of the California Uniform Commercial Code. Under that statute, a cause of action for breach of warranty accrues, at the earliest, upon tender of delivery. Thus, the earliest date the implied warranty of merchantability regarding [plaintiff]'s boat could have accrued was the date [plaintiff] purchased it . . . . Because he filed this action three years seven months after that date, he did so within the four-year limitations period. Therefore, [plaintiff]'s action is not barred by a statute of limitations." (*Mexia, supra,* 174 Cal.App.4th at p. 1306.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 214

3 Witkin, California Procedure (6th ed. 2021) Actions, §§ 559, 566

1 California Products Liability Actions, Ch. 8, *Statute of Limitations*, § 8.02[2] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 500, *Sales Under the Commercial Code*, § 500.78 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, §§ 206.38, 206.61, 206.62 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action*, 4.05

3223–3229. Reserved for Future Use

3230. Continued Reasonable Use Permitted

The fact that [*name of plaintiff***] continued to use the [***consumer good/new motor vehicle***] after delivering it for repair does not waive [his/her/***nonbinary pronoun***] right to demand replacement or reimbursement. Nor does it reduce the amount of damages that you should award to [***name of plaintiff***] if you find that [he/she/***nonbinary pronoun***] has proved [his/her/***nonbinary pronoun***] claim against [***name of defendant***].**

New June 2012; Revised May 2020

Directions for Use

Give this instruction to make it clear to the jury that the fact that the buyer continued to use the product after delivering it for repair does not waive the buyer's right to reimbursement and damages. (See *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1240–1244 [13 Cal.Rptr.3d 679].) Continued use is relevant, however, to the jury's consideration of whether the vehicle was substantially impaired. See CACI No. 3204, *"Substantially Impaired" Explained*, factor (d).

There may be some uncertainty about the defendant's right to a damages offset for continued use. In an older case, the court held that principles of rescission under the Uniform Commercial Code survive under the Song-Beverly Consumer Warranty Act, and that the seller remains protected through a recoupment right of setoff for the buyer's use of the good beyond the time of revoking acceptance. (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 898 [263 Cal.Rptr. 64].) However, a more recent case rejected the proposition that pre Song-Beverly Commercial Code rules on continued use survive under Song-Beverly. (See *Jiagbogu, supra*, 118 Cal.App.4th at p. 1240.) The last sentence of this instruction is based on *Jiagbogu*, but in light of the potential uncertainty on the damages offset issue, the trial court will need to decide whether *Jiagbogu* or *Ibrahim* states the applicable rule.

Sources and Authority

- "[Defendant] contends that [plaintiff]'s request for restitution amounted to a rescission. But [Civil Code] section 1793.2 does not refer to rescission or any portion of the Commercial Code that discusses rescission. The [Song-Beverly] Act does not parallel the Commercial Code; it provides different and more extensive consumer protections. [Plaintiff] did not invoke rescission, or any of the common law doctrines or Commercial Code provisions relating to that remedy. It would not matter if he had referred to rescission in his buyback request, as long as he sought a remedy only under the Act, which contains no provision requiring formal rescission to obtain relief. [Defendant] acknowledges in its brief that [plaintiff] requested refund *or replacement*. That comports with a claim under the Act, not with a traditional cause of action for rescission."

(*Jiagbogu, supra*, 118 Cal.App.4th at p. 1240, original italics, internal citations omitted.)

- "Within the context of the California Uniform Commercial Code courts around the country are in general agreement that reasonable continued use of motorized vehicles does not, as a matter of law, prevent the buyer from asserting rescission (or its U.Com.Code equivalent, revocation of acceptance). This consensus is based upon the judicial recognition of practical realities—purchasers of unsatisfactory vehicles may be compelled to continue using them due to the financial burden to securing alternative means of transport for a substantial period of time. The seller remains protected through a recoupment right of setoff for the buyer's use of the good beyond the time of revoking acceptance." (*Ibrahim, supra,* 214 Cal.App.3d at pp. 897–898, internal citations omitted.)
- "Nothing in the language of either the Uniform Commercial Code or the Song-Beverly Act suggests that abrogation of the common law principles relating to continued use and waiver of a buyer's right to rescind was intended. The former expressly specifies that 'the principles of law and equity . . . shall supplement its provisions.' (Cal. U. Com. Code, § 1103.) The legal principles governing continued use quoted previously are thus still applicable, as are the rules regulating the equitable right of setoff." (*Ibrahim, supra*, 214 Cal.App.3d at p. 898, internal citations omitted.)
- "Since we reject [defendant]'s basic argument that a request for replacement or refund under the Act constitutes rescission, we find no error in the trial court's refusal to instruct on waiver of right to rescind or on statutory offsets for postrescission use." (*Jiagbogu, supra*, 118 Cal.App.4th at p. 1242.)
- "[Civil Code] Section 1793.2, subdivision (d)(2)(C), and (d)(2)(A) and (B) to which it refers, comprehensively addresses replacement and restitution; specified predelivery offset; sales and use taxes; license, registration, or other fees; repair, towing, and rental costs; and other incidental damages. None contains any language authorizing an offset in any situation other than the one specified. This omission of other offsets from a set of provisions that thoroughly cover other relevant costs indicates legislative intent to exclude [post-delivery use] offsets." (*Jiagbogu, supra*, 118 Cal.App.4th at pp. 1243–1244.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 199, 325 et seq.

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, § 91.18 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales*, § 502.42 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.102 et seq. (Matthew Bender)

30 California Legal Forms: Transaction Guide, Ch. 92, *Service Contracts*, § 92.53 (Matthew Bender)

3231. Continuation of Express or Implied Warranty During Repairs (Civ. Code, § 1795.6)

Regardless of what the warranty says, if a defect exists within the warranty period and the [*consumer good/new motor vehicle*] has been returned for repairs, the warranty will not expire until the defect has been fixed. [*Name of plaintiff*] must have notified [*name of defendant*] of the failure of the repairs within 60 days after they were completed. The warranty period will also be extended for the amount of time that the warranty repairs have not been performed because of delays caused by circumstances beyond the control of [*name of plaintiff*].

New June 2012

Directions for Use

Give this instruction if it might appear to the jury from the language of an express or implied warranty that the warranty should have expired during the course of repairs. By statute, the warranty cannot expire until the problem has been resolved as long as the defendant had notice that the defect had not been repaired. (Civ. Code, § 1795.6(b).)

Sources and Authority

- Continuation of Express Warranty During Repairs. Civil Code section 1795.6.
- Notice Required in Work Order or Repair Invoice. Civil Code section 1793.1(a)(2).
- "There is no support in the law for instructing the jury that if a defect exists within the warranty period, the warranty continues in perpetuity until the defect has been diagnosed and fixed. It was error to give the special instruction, an incomplete and misleading statement that does not comport with the law of express warranty or with the lemon law provision on tolling. The proper instruction was CACI No. 3231." (*Ruiz Nunez v. FCA US LLC* (2021) 61 Cal.App.5th 385, 396 [275 Cal.Rptr.3d 618].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 335

3 Witkin, California Procedure (6th ed. 2021) Actions, §§ 587, 821

44 California Forms of Pleading and Practice, Ch. 502, *Sales*, § 502.52 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.114 (Matthew Bender)

21 California Legal Forms: Transaction Guide, Ch. 52, *Sales of Goods Under the Uniform Commercial Code*, § 52.128 (Matthew Bender)

3232–3239. Reserved for Future Use

3240. Reimbursement Damages—Consumer Goods (Civ. Code, §§ 1793.2(d)(1), 1794(b))

If you decide that [*name of defendant*] or its representative failed to repair or service the [*consumer good*] to match the [written warranty/ represented quality] after a reasonable number of opportunities, then [*name of plaintiff*] is entitled to be reimbursed for the purchase price of the [*consumer good*], less the value of its use by [*name of plaintiff*] before discovering the defect.

[*Name of plaintiff*] must prove the amount of the purchase price, and [*name of defendant*] must prove the value of the use of the [*consumer good*].

New September 2003; Revised December 2011

Directions for Use

This instruction is intended for use with claims involving consumer goods under the Song-Beverly Consumer Warranty Act. The remedy is replacement of the goods or reimbursement measured by the purchase price minus the value of the plaintiff's use before discovery of the defect. (Civ. Code, § 1793.2(d)(1).) For claims involving new motor vehicles, see CACI No. 3241, *Restitution From Manufacturer—New Motor Vehicle*.

The basic measure of damages provided for in the Song-Beverly Act for all claims is replacement or reimbursement plus additional remedies provided by the California Uniform Commercial Code. (Civ. Code, § 1794(b); see Cal. U. Com. Code, §§ 2711–2715.) The remedies for consumer goods are also available for implied-warranty claims. (See Civ. Code, § 1791.1(d).) The first paragraph of this instruction can be modified if it is being used for claims other than those brought under Civil Code section 1793.2(d)(1). See also CACI No. 3242, *Incidental Damages*, and CACI No. 3243, *Consequential Damages*.

Sources and Authority

- Replacement or Reimbursement After Reasonable Number of Repair Attempts. Civil Code section 1793.2(d)(1).
- California Uniform Commercial Code Remedies Available. Civil Code section 1794(b).
- California Uniform Commercial Code Remedies for Breach of Implied Warranty. Civil Code section 1791.1(d).
- "The clear mandate of section 1794 . . . is that the compensatory damages recoverable for breach of the [Song-Beverly Consumer Warranty] Act are those available to a buyer for a seller's breach of a sales contract." (*Kwan v. Mercedes-Benz of N. Am.* (1994) 23 Cal.App.4th 174, 188 [28 Cal.Rptr.2d 371].)

- "[I]n the usual situation, emotional distress damages are *not* recoverable under the Song-Beverly Consumer Warranty Act." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15 [39 Cal.Rptr.2d 159]); see also *Kwan, supra,* 23 Cal.App.4th at pp. 187–192.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 331, 334

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.103 (Matthew Bender)

California Civil Practice: Business Litigation § 53:32 (Thomson Reuters)

3241. Restitution From Manufacturer—New Motor Vehicle (Civ. Code, §§ 1793.2(d)(2), 1794(b))

If you decide that [*name of defendant***] or its authorized repair facility failed to repair the defect(s) after a reasonable number of opportunities, then [***name of plaintiff***] is entitled to recover the amounts [he/she/***nonbinary pronoun***] proves [he/she/***nonbinary pronoun***] paid for the car, including:**

1. **The amount paid to date for the vehicle, including finance charges [and any amount still owed by [***name of plaintiff***]];**
2. **Charges for transportation and manufacturer-installed options; and**
3. **Sales tax, use tax, license fees, registration fees, and other official fees.**

In determining the purchase price, do not include any charges for items supplied by someone other than [*name of defendant***].**

[[*Name of plaintiff***]'s recovery must be reduced by the value of the use of the vehicle before it was [brought in/submitted] for repair. [***Name of defendant***] must prove how many miles the vehicle was driven between the time when [***name of plaintiff***] took possession of the vehicle and the time when [***name of plaintiff***] first delivered it to [***name of defendant***] or its authorized repair facility to fix the defect. [***Insert one of the following:***]**

> **[Using this mileage number, I will reduce [***name of plaintiff***]'s recovery based on a formula.]**
>
> **[Multiply this mileage number by the purchase price, including any charges for transportation and manufacturer-installed options, and divide that amount by 120,000. Deduct the resulting amount from [***name of plaintiff***]'s recovery.]]**

New September 2003; Revised February 2005, June 2005, December 2011, June 2012

Directions for Use

This instruction is intended for use with claims involving new motor vehicles under the Song-Beverly Consumer Warranty Act. The remedy is replacement of the vehicle or restitution. (Civ. Code, § 1793.2(d)(2).) For claims involving other consumer goods, see CACI No. 3240, *Reimbursement Damages—Consumer Goods*.

Incidental damages are recoverable as part of restitution. (Civ. Code, § 1793.2(d)(2)(B).) For an instruction on incidental damages, see CACI No. 3242, *Incidental Damages*. See also CACI No. 3243, *Consequential Damages*.

The remedies for new motor vehicles provided by Civil Code section 1793.2(d)(2) apply to all claims under the Song-Beverly Consumer Warranty Act. (Civ. Code, § 1794(b).) These remedies are also available for implied-warranty claims. (See Civ. Code, § 1791.1(d).) The first paragraph of this instruction can be modified if it is being used for claims other than those brought under Civil Code section 1793.2(d)(2).

Modify element 1 depending on whether plaintiff still has an outstanding obligation on the financing of the vehicle.

The last two bracketed options are intended to be read in the alternative. Use the last bracketed option if the court desires for the jury to make the calculation of the deduction. The "formula" referenced in the last bracketed paragraph can be found at Civil Code section 1793.2(d)(2)(C).

Additional remedies under the California Uniform Commercial Code are provided for "goods." (See Civ. Code, § 1794(b).) Although consumer goods and new motor vehicles are treated differently under Civil Code section 1793.2, "consumer goods" are defined broadly under Song-Beverly (see Civ. Code, § 1791(a) ["consumer goods" means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables]). At least one court has applied the California Uniform Commercial Code remedies for new motor vehicles. (See *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302 [45 Cal.Rptr.2d 10].)

Sources and Authority

- Measure of Buyer's Damages. Civil Code section 1794(b).
- Replacement or Reimbursement After Reasonable Number of Repair Attempts: New Motor Vehicle. Civil Code section 1793.2(d)(2).
- "[A]s the conjunctive language in Civil Code section 1794 indicates, the statute itself provides an additional measure of damages beyond replacement or reimbursement and permits, at the option of the buyer, the Commercial Code measure of damages which includes 'the cost of repairs necessary to make the goods conform.' " (*Krotin, supra*, 38 Cal.App.4th at p. 302, internal citation omitted.)
- "[I]n the usual situation, emotional distress damages are *not* recoverable under the Song-Beverly Consumer Warranty Act." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15 [39 Cal.Rptr.2d 159], emphasis in original; see also *Kwan v. Mercedes-Benz of N. Am.* (1994) 23 Cal.App.4th 174, 187–192 [28 Cal.Rptr.2d 371].)
- "[F]inding an implied prohibition on recovery of finance charges would be contrary to both the Song-Beverly Consumer Warranty Act's remedial purpose and section 1793.2(d)(2)(B)'s description of the refund remedy as restitution. A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute."

(*Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 37 [95 Cal.Rptr.2d 81].)

- "[Defendant] argues that [plaintiff] would receive a windfall if he is not required to pay for using the car after his buyback request. But to give [defendant] an offset for that use would reward it for its delay in replacing the car or refunding [plaintiff]'s money when it had complete control over the length of that delay, and an affirmative statutory duty to replace or refund promptly." (*Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1244 [13 Cal.Rptr.3d 679].)
- "We conclude that in an action pursuant to section 1794, neither a trade-in credit nor sale proceeds reduce the statutory restitution remedy set forth in section 1793.2, subdivision (d)(2) at least where, as here, a consumer has been forced to trade in or sell a defective vehicle due to the manufacturer's failure to comply with the Act." (*Niedermeier v. FCA US LLC* (2024) 15 Cal.5th 792, 801 [318 Cal.Rptr.3d 483, 543 P.3d 935].)
- "[T]he imposition of a requirement that [plaintiff] mitigate his damages so as to avoid rental car expenses—after [defendant] had a duty to respond promptly to [plaintiff]'s demand for restitution—would reward [defendant] for its delay in refunding [plaintiff]'s money." (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1053 [104 Cal.Rptr.3d 853].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 331, 334

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, § 91.18 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, §§ 206.127, 206.128 (Matthew Bender)

California Civil Practice: Business Litigation § 53:26 (Thomson Reuters)

3242. Incidental Damages

[*Name of plaintiff***] also claims additional reasonable expenses for [***list claimed incidental damages***].**

To recover these expenses, [*name of plaintiff***] must prove all of the following:**

1. **That the expense was actually charged;**
2. **That the expense was reasonable; and**
3. **That [***name of defendant***]'s [breach of warranty/[***other violation of Song-Beverly Consumer Warranty Act***]] was a substantial factor in causing the expense.**

New September 2003; Revised December 2011

Directions for Use

This instruction is for use if incidental damages are sought in an action under the Song-Beverly Consumer Warranty Act. Incidental damages are allowed as part of the restitution remedy for new motor vehicles. (Civ. Code, § 1793.2(d)(2)(B).) See also CACI No. 3241, *Restitution From Manufacturer—New Motor Vehicle*.

With regard to claims for consumer goods, the availability of incidental damages may be limited. If the plaintiff has elected to accept the goods, incidental damages under California Uniform Commercial Code section 2715 and the cost of repairs required to make the goods conform to the warranty are allowed. (Civ. Code, § 1794(b)(2).) If the buyer has rightfully rejected or justifiably revoked acceptance, incidental damages are allowed under California Uniform Commercial Code sections 2711, 2712, and 2713 for the seller's nondelivery or repudiation of the contract or in connection with cover (obtaining replacement goods from another seller). (Civ. Code, § 1794(b)(1).) If any of these matters are disputed, additional instructions will be required on these points.

If incidental damages are otherwise recoverable, they are recoverable regardless of the nature of the claim under Song-Beverly. (See Civ. Code, § 1794(b) [statute covers all Song-Beverly actions].)

Sources and Authority

- Measure of Buyer's Damages: Commercial Code Remedies Available. Civil Code section 1794(b).
- Restitution Includes Incidental Damages. Civil Code section 1793.2(d)(2)(B).
- Buyer's Remedies for Seller's Breach. California Uniform Commercial Code section 2711(1).
- Incidental Damages Recoverable. California Uniform Commercial Code sections 2712(2), 2713(1).

- "Incidental Damages" Defined. California Uniform Commercial Code section 2715(1).
- "In light of the relevant legislative history and express language in the Act, we conclude California Uniform Commercial Code section 2715's reference to losses must be construed and applied in the context of monetary losses *actually* incurred." (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 756 [52 Cal.Rptr.2d 134], original italics.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 325 et seq.

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.160 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.43 (Matthew Bender)

California Civil Practice: Business Litigation § 53:32 (Thomson Reuters)

3243. Consequential Damages

[*Name of plaintiff***] also claims additional amounts for [***list claimed consequential damages***].**

To recover these damages, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***]'s [***describe violation of Song-Beverly Consumer Warranty Act***] was a substantial factor in causing damages to [***name of plaintiff***];**
2. **That the damages resulted from [***name of plaintiff***]'s requirements and needs;**
3. **That [***name of defendant***] had reason to know of those requirements and needs at the time of the [sale/lease] to [***name of plaintiff***];**
4. **That [***name of plaintiff***] could not reasonably have prevented the damages; and**
5. **The amount of the damages.**

New September 2003; Revised December 2011

Directions for Use

This instruction is for use if the plaintiff claims consequential damages under the Song-Beverly Consumer Warranty Act based on the plaintiff's foreseeable needs or requirements. (See Civ. Code, § 1794(b); Cal. U. Com. Code, § 2715(2)(a).)

The availability of consequential damages under Song-Beverly may be limited. If the plaintiff has elected to accept the goods, consequential damages under California Uniform Commercial Code section 2715 and the cost of repairs required to make the goods conform to the warranty are allowed. (Civ. Code, § 1794(b)(2).) If the buyer has rightfully rejected or justifiably revoked acceptance, consequential damages are allowed under California Uniform Commercial Code sections 2711, 2712, and 2713 for the seller's nondelivery or repudiation of the contract or in connection with cover (obtaining replacement goods from another seller). (Civ. Code, § 1794(b)(1).)

If consequential damages are otherwise recoverable, they are recoverable regardless of the nature of the claim under Song-Beverly. (See Civ. Code, § 1794(b) [statute covers all Song-Beverly actions].)

Sources and Authority

- Measure of Buyer's Damages: California Uniform Commercial Code Remedies Available. Civil Code section 1794(b).

- Buyer's Remedies for Seller's Breach. California Uniform Commercial Code section 2711(1).
- Consequential Damages Recoverable. California Uniform Commercial Code sections 2712(2), 2713(1).
- "Consequential Damages" Defined. California Uniform Commercial Code section 2715(2).
- "In light of the relevant legislative history and express language in the Act, we conclude California Uniform Commercial Code section 2715's reference to losses must be construed and applied in the context of monetary losses *actually* incurred." (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 756 [52 Cal.Rptr.2d 134], original italics.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 207

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.160 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.43 et seq. (Matthew Bender)

California Civil Practice: Business Litigation § 53:32 (Thomson Reuters)

3244. Civil Penalty—Willful Violation (Civ. Code, § 1794(c))

[*Name of plaintiff***] claims that [***name of defendant***]'s failure to [***describe obligation under Song-Beverly Consumer Warranty Act, e.g., repurchase or replace the vehicle after a reasonable number of repair opportunities***] was willful and therefore asks that you impose a civil penalty against [***name of defendant***]. A civil penalty is an award of money in addition to a plaintiff's damages. The purpose of this civil penalty is to punish a defendant or discourage [him/her/***nonbinary pronoun***/it] from committing violations in the future.**

If [*name of plaintiff***] has proved that [***name of defendant***]'s failure was willful, you may impose a civil penalty against [him/her/***nonbinary pronoun***/it]. The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [***name of plaintiff***]'s actual damages.**

"Willful" means that [*name of defendant***] knew of [his/her/***nonbinary pronoun***/its] legal obligations and intentionally declined to follow them. However, a violation is not willful if you find that [***name of defendant***] reasonably and in good faith believed that the facts did not require [***describe statutory obligation, e.g., repurchasing or replacing the vehicle***].**

New September 2003; Revised February 2005, December 2005, December 2011, May 2018, November 2018

Directions for Use

This instruction is intended for use when the plaintiff requests a civil penalty under Civil Code section 1794(c). In the opening paragraph, set forth all claims for which a civil penalty is sought.

An automobile buyer may also obtain a penalty of two times actual damages without a showing of willfulness under some circumstances. (See Civ. Code, § 1794(e).) However, a buyer who recovers a civil penalty for a willful violation may not also recover a second civil penalty for the same violation. (Civ. Code, § 1794(e)(5).) If the buyer seeks a penalty for either a willful or a nonwillful violation in the alternative, the jury must be instructed on both remedies. (See *Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 11 [28 Cal.Rptr.2d 133].) A special instruction will be needed for the nonwillful violation. (See *Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1322 [46 Cal.Rptr.2d 507] (*Suman II*) [setting forth instructions to be given on retrial].)

Depending on the nature of the claim at issue, factors that the jury may consider in determining willfulness may be added. (See, e.g., *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 136 [41 Cal.Rptr.2d 295] [among factors to be considered by the jury are whether (1) the manufacturer knew the vehicle had not

been repaired within a reasonable period or after a reasonable number of attempts, and (2) whether the manufacturer had a written policy on the requirement to repair or replace].)

Sources and Authority

- Civil Penalty for Willful Violation. Civil Code section 1794(c).
- "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507].)
- "Whether a manufacturer willfully violated its obligation to repair the car or refund the purchase price is a factual question for the jury that will not be disturbed on appeal if supported by substantial evidence." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1104 [109 Cal.Rptr.2d 583].
- " 'In civil cases, the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.' " (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 [263 Cal.Rptr. 64], internal citations omitted.)
- "In regard to the *willful* requirement of Civil Code section 1794, subdivision (c), a civil penalty may be awarded if the jury determines that the manufacturer 'knew of its obligations but intentionally declined to fulfill them. There is no requirement of blame, malice or moral delinquency. However, '. . . a violation is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present.' " (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249–1250 [40 Cal.Rptr.2d 576], original italics, internal citations omitted; see also *Bishop v. Hyundai Motor Am.* (1996) 44 Cal.App.4th 750, 759 [52 Cal.Rptr.2d 134] [defendant agreed that jury was properly instructed that it "acted 'willfully' if you determine that it knew of its obligations under the Song-Beverly Act but intentionally declined to fulfill them"].)
- "[A] violation . . . is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product did conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund. [¶] Our interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions. Unlike a standard requiring the plaintiff to prove the defendant actually knew of its

obligation to refund or replace, which would allow manufacturers to escape the penalty by deliberately remaining ignorant of the facts, the interpretation we espouse will not vitiate the intended deterrent effect of the penalty. And unlike a simple equation of willfulness with volition, which would render 'willful' virtually all cases of refusal to replace or refund, our interpretation preserves the Act's distinction between willful and nonwillful violations. Accordingly, '[a] decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision.' " (*Lukather v. General Motors,* LLC (2010) 181 Cal.App.4th 1041, 1051 [104 Cal.Rptr.3d 853], original italics, internal citation omitted.)

- "[Defendant] was entitled to an instruction informing the jury its failure to refund or replace was not willful if it reasonably and in good faith believed the facts did not call for refund or replacement. Such an instruction would have given the jury legal guidance on the principal issue before it in determining whether a civil penalty could be awarded." (*Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 186–187 [28 Cal.Rptr.2d 371], fn. omitted.)
- "There is evidence [defendant] was aware that numerous efforts to find and fix the oil leak had been unsuccessful, which is evidence a jury may consider on the question of willfulness. Additionally, the jury could conclude that [defendant]'s policy, which requires a part be replaced or adjusted before [defendant] deems it a repair attempt but excludes from repair attempts any visit during which a mechanic searches for but is unable to locate the source of the problem, is unreasonable and not a good faith effort to honor its statutory obligations to repurchase defective cars. Finally, there was evidence that [defendant] adopted internal policies that erected hidden obstacles to the ability of an unwary consumer to obtain redress under the Act. This latter evidence would permit a jury to infer that [defendant] impedes and resists efforts by a consumer to force [defendant] to repurchase a defective car, regardless of the presence of an unrepairable defect, and that [defendant]'s decision to reject [plaintiff]'s demand was made pursuant to [defendant]'s policies rather than to its good faith and reasonable belief the car did not have an unrepairable defect covered by the warranty or that a reasonable number of attempts to effect a repair had not yet occurred." (*Oregel, supra*, 90 Cal.App.4th at pp. 1104–1105, internal citations omitted.)
- "[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages. Neither punishment nor deterrence is ordinarily called for if the defendant's actions proceeded from an honest mistake or a sincere and reasonable difference of factual evaluation. As our Supreme Court recently observed, '. . . courts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions.' " (*Kwan*, *supra*, 23 Cal.App.4th at pp. 184–185, internal citation omitted.)
- "Thus, when the trial court concluded that subdivision (c)'s requirement of

willfulness applies also to subdivision (e), and when it, in effect, instructed the jury that subdivision (c)-type willfulness is the sole basis for awarding civil penalties, the court ignored a special distinction made by the Legislature with respect to the seller of new automobiles. In so doing, the court erred. The error was prejudicial because it prevented the jurors from considering the specific penalty provisions in subdivision (e) and awarding such penalties, in their discretion, if they determined the evidence warranted such an award." (*Suman, supra,* 23 Cal.App.4th at p. 11.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.30 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.53[1][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.129 (Matthew Bender)

California Civil Practice: Business Litigation § 53:32 (Thomson Reuters)

3245–3299. Reserved for Future Use

VF-3200. Failure to Repurchase or Replace Consumer Good After Reasonable Number of Repair Opportunities (Civ. Code, § 1793.2(d))

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] buy [a/an] [***consumer good***] [from/distributed by/manufactured by] [***name of defendant***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] give [***name of plaintiff***] a warranty?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did the [***consumer good***] fail to perform as represented in the warranty?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] or its authorized repair facility repair the [***consumer good***] to conform to the [written statement/represented quality] after a reasonable number of opportunities?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] fail to replace the [***consumer good***] or reimburse [***name of plaintiff***] the appropriate amount of money?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What amount is [***name of plaintiff***] entitled to receive as**

reimbursement for the [*consumer good*]? Calculate as follows:

Determine:	**Purchase price of the [*consumer good*]:**	**$_____**
Subtract:	**Value of use by [*name of plaintiff*] before [he/she/*nonbinary pronoun*/it] discovered the defect:**	**$_____**
Subtract:	**The amount, if any, that [*name of defendant*] previously reimbursed [*name of plaintiff*] for the [*consumer good*]**	**$_____**
	TOTAL	**$_____**

[7. What amount is plaintiff entitled to recover for [*insert item(s) of claimed incidental damages*]? $_____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised June 2005, October 2008, December 2010, December 2011, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3200, *Failure to Repurchase or Replace Consumer Good After Reasonable Number of Repair Opportunities—Essential Factual Elements*, and CACI No. 3240, *Reimbursement Damages—Consumer Goods*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the plaintiff was unable to deliver the good, modify question 4 as in element 4 of CACI No. 3200. See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages. Question 7 can be used to account for claimed incidental damages included under CACI No. 3242, *Incidental Damages*.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801,

814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3201. Consequential Damages

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*]'s conduct a substantial factor in causing damages to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did the damages result from [*name of plaintiff*]'s requirements and needs?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] have reason to know of those requirements and needs at the time of the [sale/lease] to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Could [*name of plaintiff*] reasonably have prevented the damages?**

   _____ Yes _____ No

   If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What is the amount of [*name of plaintiff*]'s damages?**
   $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 3243, *Consequential Damages.*

Normally, this verdict form would be combined with verdict forms containing the underlying cause(s) of action.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

VF-3202. Failure to Repurchase or Replace Consumer Good After Reasonable Number of Repair Opportunities—Affirmative Defense—Unauthorized or Unreasonable Use (Civ. Code, § 1793.2(d))

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] buy [a/an] [***consumer good***] [from/distributed by/manufactured by] [***name of defendant***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] give [***name of plaintiff***] a warranty?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did the [***consumer good***] fail to perform as represented in the warranty?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the failure to comply with the warranty caused by unauthorized or unreasonable use of the [***consumer good***] following its sale?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] or its authorized repair facility repair the [***consumer good***] to conform to the [written statement/represented quality] after a reasonable number of opportunities?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of defendant*] fail to replace the [*consumer good*] or reimburse [*name of plaintiff*] the appropriate amount of money?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What amount is [*name of plaintiff*] entitled to receive as reimbursement for the [*consumer good*]? Calculate as follows:

Determine:	**Purchase price of the [*consumer good*]:**	**$_____**
Subtract:	**Value of use by [*name of plaintiff*] before [he/she/*nonbinary pronoun*/it] discovered the defect:**	**$_____**
Subtract:	**The amount, if any, that [*name of defendant*] previously reimbursed [*name of plaintiff*] for the [*consumer good*]**	**$_____**
	TOTAL	**$_____**

[Answer question 8.]

[8. What amount is [*name of plaintiff*] entitled to recover for [*insert item(s) of claimed incidental damages*]? $_____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised June 2005, October 2008, December 2010, December 2011, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3200, *Failure to Repurchase or Replace Consumer Good After Reasonable Number of Repair Opportunities—Essential Factual Elements*, CACI No. 3220, *Affirmative Defense—Unauthorized or Unreasonable Use*, and CACI No. 3240, *Reimbursement Damages—Consumer Goods*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the plaintiff was unable to deliver the good, modify question 4 as in element 4 of CACI No. 3200. See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages. Question 8 can be used to account for claimed incidental damages included under CACI No. 3242, *Incidental Damages*.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3203. Breach of Express Warranty—New Motor Vehicle—Civil Penalty Sought

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [buy/lease] [a/an] [***new motor vehicle***] [from/ distributed by/manufactured by] [***name of defendant***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] give [***name of plaintiff***] a written warranty?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did the vehicle have a defect covered by the warranty that substantially impaired the vehicle's use, value, or safety to a reasonable [buyer/lessee] in [***name of plaintiff***]'s situation?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] or its authorized repair facility fail to repair the vehicle to match the written warranty after a reasonable number of opportunities to do so?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] fail to promptly replace or repurchase the vehicle?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages? Calculate as follows:

Add the following amounts:

a. The purchase price of the vehicle itself: **$_____**

b. Charges for transportation and manufacturer-installed options: **$_____**

c. Finance charges actually paid by [*name of plaintiff*]: **$_____**

d. Sales tax, license fees, registration fees, and other official fees: **$_____**

e. Incidental and consequential damages: **$_____**

[SUBTOTAL/TOTAL DAMAGES:] $_____

[Calculate the value of the use of the vehicle before it was [brought in/submitted] for repair as follows:

1. Add dollar amounts listed in lines a and b above: **$_____**

2. Multiply the result in step 1 by the number of miles the vehicle was driven before it was [brought in/submitted] for repair: **$_____**

3. Divide the dollar amount in step 2 by 120,000 and insert result in VALUE OF USE below:

VALUE OF USE: $_____

Subtract the VALUE OF USE from the SUBTOTAL above and insert result in TOTAL DAMAGES below:

TOTAL DAMAGES: $_____]

[What is the number of miles that the vehicle was driven between the time when [*name of plaintiff*] took possession of the vehicle and the time when [he/she/*nonbinary pronoun*/it] first delivered the vehicle to [*name of defendant*] or its authorized repair facility to fix the problem?

Answer: _____ miles]

Answer question 7.

7. Did [*name of defendant*] willfully fail to repurchase or replace the [*new motor vehicle*]?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What amount, if any, do you impose as a penalty? [You may not exceed two times the "TOTAL DAMAGES" that you entered in question 6.] $_____

PENALTY: $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised February 2005, June 2005, December 2005, February 2007, December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. Items of damages that do not apply to the facts of the case may be omitted.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This verdict form is based on CACI No. 3201, *Failure to Promptly Repurchase or Replace New Motor Vehicle After Reasonable Number of Repair Opportunities—Essential Factual Elements*, CACI No. 3241, *Restitution From Manufacturer—New Motor Vehicle*, and CACI No. 3244, *Civil Penalty—Willful Violation*. See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages.

If plaintiff was unable to deliver the vehicle, modify question 4 as in element 4 of CACI No. 3201. In question number 6, users have the option of either allowing the jury to calculate the deduction for value of use or asking the jury for the relevant mileage number only. The bracketed sentence in question 8 is intended to be given only if the jury has been asked to calculate the deduction for value of use.

VF-3204. Breach of Implied Warranty of Merchantability

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] buy a[n] [***consumer good***] [manufactured by/from] [***name of defendant***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **At the time of purchase, was [***name of defendant***] in the business of [selling [***consumer goods***] to retail buyers] [manufacturing [***consumer goods***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the [***consumer good***] of the same quality as those generally acceptable in the trade?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What amount is [***name of plaintiff***] entitled to receive as restitution to [him/her/***nonbinary pronoun***] for the [***consumer good***]?**
   $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 3210, *Breach of Implied Warranty of Merchantability—Essential Factual Elements.* See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages.

Depending on the facts, question 3 can be modified to cover other grounds for breach of the warranty, as in element 3 of CACI No. 3210. Omit questions 4 if the plaintiff is not seeking consequential damages.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

VF-3205. Breach of Implied Warranty of Merchantability—Affirmative Defense—Disclaimer of Implied Warranties

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] buy a[n] [***consumer good***] [manufactured by/from] [***name of defendant***]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **At the time of purchase, was [***name of defendant***] in the business of [selling [***consumer goods***] to retail buyers] [manufacturing [***consumer goods***]]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the [***consumer good***] of the same quality as those generally acceptable in the trade?**

   _____ Yes _____ No

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **At the time of sale, was the [***consumer good***] sold on an "as is" or "with all faults" basis?**

   _____ Yes _____ No

   If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What amount is [***name of plaintiff***] entitled to receive as restitution to [him/her/***nonbinary pronoun***] for the [***consumer good***]?**
   $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 3210, *Breach of Implied Warranty of Merchantability—Essential Factual Elements*, and CACI No. 3221, *Affirmative Defense—Disclaimer of Implied Warranties.* See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages.

Depending on the facts, question 3 can be modified to cover other grounds for breach of the warranty, as in element 3 of CACI No. 3210.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

VF-3206. Breach of Disclosure Obligations

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [buy/lease] a [***motor vehicle***] from [***name of defendant***]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] know or should [he/she/***nonbinary pronoun***/it] have known that the vehicle had been returned to the manufacturer under [California's/[***name of state***]'s] motor vehicle warranty laws?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Prior to the [sale/leasing], did [***name of defendant***] fail to disclose to [***name of plaintiff***], in clear and simple language, the nature of the defect experienced by the original [buyer/lessee] of the vehicle?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s failure to clearly disclose the defect a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify

the [clerk/bailiff/court attendant].

New September 2003; Revised June 2005, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3206, *Breach of Disclosure Obligations—Essential Factual Elements*. See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If defendant is a manufacturer, substitute question 2 with a question modeled after the first bracketed option in element 2. Depending on the facts, question 4 can be modified to cover other grounds for breach of the warranty, as in elements 5 and 6 of CACI No. 3206. Make sure that the "yes" and "no" directions match appropriately.

Omit question 4 if the plaintiff is not seeking consequential damages.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3207–VF-3299. Reserved for Future Use

UNFAIR PRACTICES ACT

3300. Locality Discrimination—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] engaged in unlawful locality discrimination. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [offered to sell/sold/furnished] [***product/service***] at a lower price in one [location/section/community/city] in California than in another [location/section/community/city] in California;**
2. **That [***name of defendant***] intended to destroy competition from an established dealer [or to prevent competition from any person who in good faith intended and attempted to become such a dealer];**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

The word "price" as used here should be read sufficiently broadly to include "special rebates, collateral contracts, or any device of any nature whereby such discrimination is in substance or fact effected." (Bus. & Prof. Code, § 17049.) To the extent the circumstances of the case warrant it, the word "price" in the instruction may be supplemented or supplanted by other price-related terms.

Business and Professions Code sections 17071 and 17071.5 create rebuttable presumptions regarding the purpose or intent to injure competitors or destroy competition. The Supreme Court has observed: "The obvious and only effect of this provision is to require the defendants to go forward with such proof as would bring them within one of the exceptions or which would negative the prima facie showing of wrongful intent." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114 [153 P.2d 9].)

Sources and Authority

- "Locality Discrimination" Defined. Business and Professions Code section 17031.
- Locality Discrimination Prohibited. Business and Professions Code section 17040.
- "Article or Product" Defined. Business and Professions Code section 17024.
- Actual Damages or Injury Not Required. Business and Professions Code section 17082.

- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431–432 [88 Cal.Rptr.2d 118], internal citations omitted.)
- "Sections 17031 and 17040 are tailored to address the problem of a distributor, typically a retailer, selling out of many locations, who might use geographical price discrimination as a predatory practice against its own competitors." (*ABC International Traders, Inc. v. Matsushita Electric Corp. of America* (1997) 14 Cal.4th 1247, 1266 [61 Cal.Rptr.2d 112, 931 P.2d 290].)
- "As section 17031 is presently worded, we conclude that the smallest geographic unit it envisages is the individual store or outlet, not the individual purchaser regardless of location." (*Harris v. Capitol Records Distributing Corp.* (1966) 64 Cal.2d 454, 460 [50 Cal.Rptr. 539, 413 P.2d 139].)
- "[T]o fall within [the] prohibition a seller must have at least two different places of business and must sell at a lower price in one than in the other." (*Harris, supra,* 64 Cal.2d at p. 460.)
- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811], internal citations omitted.)
- The federal law most comparable to the Unfair Practices Act is the Robinson-Patman Act (15 U.S.C. § 13 et seq.); that act differs substantially from the Unfair Practices Act, however. For a discussion of this subject, see *Turnbull & Turnbull v. ARA Transportation* (1990) 219 Cal.App.3d 811 [268 Cal.Rptr. 856]. One notable difference is that the Robinson-Patman Act requires at least two actual sales. Thus, mere offers to sell cannot violate that act.

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 623–629

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.52 (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition*, § 235.22

(Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.44, 5.46[2], 5.47[1]

3301. Below Cost Sales—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] engaged in unlawful sales below cost. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of defendant***] [offered to sell/sold] [***product/service***] at a price that was below cost;]**

   [or]

   [That [*name of defendant***] gave away [***product/service***];]**

2. **That [***name of defendant***]'s purpose was to injure competitors or destroy competition;**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

If [*name of plaintiff***] proves that [***name of defendant***] [[offered to sell/sold] [***product/service***] at a price that was below cost/ [or] gave away [***product/service***]] and that [***name of defendant***]'s acts harmed [***name of plaintiff***], you may assume that [***name of defendant***]'s purpose was to injure competitors or destroy competition. To overcome this presumption, [***name of defendant***] must present evidence of a different purpose. [***Name of defendant***] has presented evidence that [his/her/*nonbinary pronoun*/its] purpose was [*specify other purpose*]. Considering all of the evidence presented, you must decide whether [***name of plaintiff***] proved that [***name of defendant***]'s purpose was to injure competitors or destroy competition.**

New September 2003; Revised June 2011

Directions for Use

The word "price" as used here should be read sufficiently broadly to include "special rebates, collateral contracts, or any device of any nature whereby such sale below cost is in substance or fact effected." (Bus. & Prof. Code, § 17049.) To the extent the circumstances of the case warrant it, the word "price" in the instruction may be supplemented or supplanted by other such price-related terms.

For instructions on "cost," see CACI No. 3303, *Definition of "Cost,"* CACI No. 3304, *Presumptions Concerning Costs—Manufacturer*, CACI No. 3305, *Presumptions Concerning Costs—Distributor*, and CACI No. 3306, *Methods of Allocating Costs to an Individual Product.*

Business and Professions Code sections 17071 and 17071.5 create a rebuttable presumption of the purpose or intent to injure competitors or destroy competition.

The presumption requires the defendants to go forward with evidence that would establish an affirmative defense or otherwise rebut the presumption of wrongful intent. (See *People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114 [153 P.2d 9].) The plaintiff is entitled to an instruction on the presumption. (See *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 465 [114 Cal.Rptr.3d 392.) For possible affirmative defenses, see CACI No. 3331, *Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims—Closed-out, Discontinued, Damaged, or Perishable Items*, CACI No. 3332, *Affirmative Defense to Locality Discrimination, Below Cost Sales, Loss Leader Sales, and Secret Rebates—Functional Classifications*, and CACI No. 3333, *Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims—Meeting Competition*.

Sources and Authority

- Below-Cost Sales Prohibited. Business and Professions Code section 17043.
- "Article or Product" Defined. Business and Professions Code section 17024.
- Presumption of Intent to Injure Competitors or Destroy Competition. Business and Professions Code section 17071.
- Actual Damages or Injury Not Required. Business and Professions Code section 17082.
- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431–432 [88 Cal.Rptr.2d 118], internal citations omitted.)
- "Section 17043 uses the word 'purpose,' not 'intent,' not 'knowledge.' We therefore conclude that to violate section 17043, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 174–175 [83 Cal.Rptr.2d 548, 973 P.2d 527].)
- "Proof that a defendant sold or distributed articles or products below cost will be 'presumptive evidence of the purpose or intent to injure competitors or destroy competition.' " (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, internal citation omitted.)
- "[W]e conclude that the section 17071 presumption is properly categorized as one that affects the burden of proof rather than merely the burden of persuasion. 'A presumption affecting the burden of proof shifts the burden of persuasion on an ultimate fact to the party against whom the presumption operates upon a finding of the predicate facts.' 'A presumption meant to establish or implement

some public policy other than facilitation of the particular action in which it applies is a presumption affecting the burden of proof.' As we view section 17071, the presumption is indicative of an effort by the Legislature to implement the public policy of facilitating proof of unlawful purpose of below-cost sales which injure a competitor by shifting the burden of proof to the party more in possession of relevant evidence demonstrating the true intent associated with the pricing scheme." (*Bay Guardian Co.*, *supra*, 187 Cal.App.4th at p. 464, internal citations omitted.)

- " '[T]he allocation of evidentiary burdens [under section 17071 is] as follows: "Assuming proof of injury to a competitor has been made, California law allows plaintiffs to establish a prima facie case with proof of prices below average total cost. The defendant then has the burden of negating the inference of illegal intent or establishing an affirmative defense." . . . [Citation.]' The presumption 'may be rebutted by establishing one of the statute's affirmative defenses, such as meeting competition, see Cal.Bus. & Prof.Code § 17050, or by showing that the sales "were made in good faith and not for the purpose of injuring competitors or destroying competition." [Citation.]' 'After proof of the sales below cost and injury resulting therefrom, there is no undue hardship cast upon the defendants to require them to come forward with evidence of their true intent as against the prima facie showing, or with evidence which will bring them within a specified exception in the act.' Once the presumption is rebutted, 'the burden shifts back to the moving party to offer actual proof of injurious intent.' " (*Bay Guardian Co.*, *supra*, 187 Cal.App.4th at pp. 464–465, internal citations omitted; but see *Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1492 [28 Cal.Rptr.2d 248] [Evid. Code § 606 indicates that a presumption affecting the burden of proof imposes upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact].)
- "The section 17071 presumption, being one that in both nature and consequence alters the burden of proof, did ' "*not* disappear in the face of evidence as to the *nonexistence* of the presumed fact . . . ." [Citations.]' Therefore, the fact that defendants denied any purpose to harm competition, and produced some evidence of good faith efforts to compete in the marketplace, did not negate plaintiff's right to an instruction on a presumption affecting the burden of proof of unlawful purpose. Defendants may have offered rebuttal evidence, but they did not negate the presumption by conclusive proof that negated unlawful purpose as a matter of law or compelled a finding on the issue in their favor based on this record." (*Bay Guardian Co.*, *supra*, 187 Cal.App.4th at p. 465, original italics.)
- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432.)
- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the

anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811], internal citations omitted.)

- "Even the objectives of the [federal and state] laws, though certainly similar, are not identical. The Sherman Act and Robinson-Patman Act (15 U.S.C. § 13(a)) seek to prevent anticompetitive acts that impair competition or harm competitors, whereas the UPA reflects a broader '[l]egislative concern not only with the maintenance of competition, but with the maintenance of "*fair and honest* competition." [Citations.]' We disagree with defendants' characterization of the UPA as legislation that was merely 'intended to protect the public, not individual competitors.' The UPA has been described by our high court 'as a legislative attempt "to regulate business as a whole by prohibiting practices which the legislature has determined constitute unfair trade practices." ' " (*Bay Guardian Co.*, *supra*, 187 Cal.App.4th at p. 457, original italics, internal citations omitted.)
- "In light of the distinctions we discern, some glaring, some subtle, between section 17043 and the federal or other state predatory pricing laws, and particularly in light of the conspicuous focus of section 17043 upon the mental state of defendants' purpose rather than ultimate impact of below-cost pricing, we decline to imply a recoupment element in the statute where none has been expressed." (*Bay Guardian Co.*, *supra*, 187 Cal.App.4th at p. 459, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 623–629

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.52 (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition*, § 235.22 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.46[3], 5.47[2]

3302. Loss Leader Sales—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [offered to sell/sold/offered the use of] [***product/service***] as an unlawful loss leader. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [offered to sell/sold/offered the use of] [***product/service***] at prices that were below [his/her/***nonbinary pronoun***/its] costs;**
2. **[***Insert one or more of the following:***]**

   [That [*name of defendant***]'s purpose was to influence, promote, or encourage the purchase of other merchandise from [him/her/***nonbinary pronoun***/it]; [or]]**

   [That the [offer/sale] had a tendency or capacity to mislead or deceive purchasers or potential purchasers; [or]]

   [That the [offer/sale] took business away from or otherwise injured competitors;]
3. **That [***name of defendant***]'s intent was to injure competitors or destroy competition;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

The word "price" as used here should be read sufficiently broadly to include "special rebates, collateral contracts, or any device of any nature whereby such sale below cost is in substance or fact effected." (Bus. & Prof. Code, § 17049.) To the extent the circumstances of the case warrant it, the word "price" in the instruction may be supplemented or supplanted by other price-related terms.

For instructions on "cost," see CACI No. 3303, *Definition of "Cost"*; CACI No. 3304, *Presumptions Concerning Costs—Manufacturer*; CACI No. 3305, *Presumptions Concerning Costs—Distributor*; and CACI No. 3306, *Methods of Allocating Costs to an Individual Product.*

Business and Professions Code sections 17071 and 17071.5 create rebuttable presumptions regarding the purpose or intent to injure competitors or destroy competition. The Supreme Court has observed: "The obvious and only effect of this provision is to require the defendants to go forward with such proof as would bring them within one of the exceptions or which would negative the prima facie showing

of wrongful intent." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114 [153 P.2d 9].)

Sources and Authority

- "Loss Leader" Sales Prohibited. Business and Professions Code section 17044.
- "Loss Leader" Defined. Business and Professions Code section 17030.
- "Article or Product" Defined. Business and Professions Code section 17024.
- Actual Damages or Injury Not Required. Business and Professions Code section 17082.
- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431–432 [88 Cal.Rptr.2d 118], internal citations omitted.)
- "[N]otwithstanding the absence of any language to this effect in either section 17044 or section 17030, intent to injure competitors or to destroy competition is required for violation of section 17044. In other words, for competition to be unfair under the Act, the person engaging in the challenged practice must possess an intent to injure his competitors or destroy his competition." (*Dooley's Hardware Mart v. Food Giant Markets, Inc.* (1971) 21 Cal.App.3d 513, 517 [98 Cal.Rptr. 543].)
- "We conclude that to violate sections 17043 and 17044, part of the Unfair Practices Act, which prohibit below-cost sales and loss leaders, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 169 [83 Cal.Rptr.2d 548, 973 P.2d 527].)
- It has been held by one federal district court interpreting California's loss leader statute that it applies only to product sales, not giveaways. (*Co-Opportunities, Inc. v. National Broadcasting Co., Inc.* (N.D. Cal. 1981) 510 F.Supp. 43, 50.)
- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811], internal citations omitted.)
- The federal law most comparable to the Unfair Practices Act is the Robinson-

Patman Act (15 U.S.C. § 13 et seq.); that act differs substantially from the Unfair Practices Act, however. For a discussion of this subject, see *Turnbull & Turnbull v. ARA Transportation* (1990) 219 Cal.App.3d 811 [268 Cal.Rptr. 856]. One notable difference is that the Robinson-Patman Act requires at least two actual sales. Thus, mere offers to sell cannot violate that act.

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 628

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.52 (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition*, § 235.22 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.46[4], 5.47[3]

3303. Definition of "Cost"

The term "cost" means all costs of doing business, including fixed costs that do not tend to change with sales, such as heat and light, as well as variable costs that do tend to change with sales, such as sales commissions.

Costs of doing business may include the following:

1. **Labor, including salaries of executives and officers;**
2. **Rent and utilities;**
3. **Interest on loans;**
4. **Depreciation;**
5. **Selling cost;**
6. **Maintenance of equipment;**
7. **Delivery costs;**
8. **Credit losses;**
9. **Advertising costs;**
10. **Licenses, taxes; [and]**
11. **Insurance; [and]**
12. **[***Insert other cost(s).***]**

[The term "cost" as applied to warranty service agreements also includes the cost of parts and delivery of the parts.]

[The term "cost" as applied to distribution also includes either the invoice cost or replacement cost of the product, whichever is lower.]

[The term "cost" as applied to services also includes the prevailing wage at the time and place these services were provided if [*name of defendant***] was paying less than the prevailing wage.]**

Any discounts given for cash payments may not be used to lower costs.

New September 2003

Directions for Use

The bracketed paragraphs should be inserted as appropriate to the facts.

In cases involving the sale of cellular telephones and cigarettes, Business and Professions Code sections 17026.1 and 17026.5 measure "cost" somewhat differently.

Sources and Authority

- "Cost" Defined. Business and Professions Code section 17026.
- "Cost of Doing Business" or "Overhead" Defined. Business and Professions Code section 17029.
- Prevailing Wage Used to Determine Cost. Business and Professions Code section 17076.
- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 433 [88 Cal.Rptr.2d 118].)
- "These statutes embody California's fully allocated cost standard, that is, a fair allocation of all fixed or variable costs associated with production of the article or product." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, footnote omitted.)
- "Cost is to be measured as 'the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion.' " (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, fn. 6, internal citation omitted.)
- "Variable costs are costs that vary with changes in output, while fixed costs are those that do not vary with changes in output." (*Turnbull & Turnbull v. ARA Transportation Inc.* (1990) 219 Cal.App.3d 811, 820 [268 Cal.Rptr. 856].)
- "California employs a fully allocated cost standard to determine whether a sale has violated section 17043. Under sections 17026 and 17029 . . . cost means invoice cost plus the vendor's full cost of doing business or six percent." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 275 [195 Cal.Rptr. 211], internal citations omitted.)
- "We find the use of the fully allocated cost method, when viewed in conjunction with the injurious intent requirement of section 17043, is rationally related to the valid legislative purpose . . . as it assists in preventing the creation or perpetuation of monopolies." (*Turnbull & Turnbull, supra,* 219 Cal.App.3d at p. 822.)
- "To be legally acceptable, the allocation of indirect or fixed overhead costs to a particular product or service must be reasonably related to the burden such product or service imposes on the overall cost of doing business." (*Turnbull & Turnbull, supra,* 219 Cal.App.3d at p. 822.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 623–629

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.52 (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition*, § 235.22 et seq. (Matthew Bender)

3304. Presumptions Concerning Costs—Manufacturer

A manufacturer's costs include the cost of raw materials and the cost of manufacturing.

The cost of manufacturing is the average cost of manufacture over a reasonable time, rather than the cost of one item at a particular time.

[If [*name of defendant*]'s cost for raw materials cannot be computed, the cost is presumed to be the prevailing price for similar raw materials at the time and place those materials would usually be purchased.]

[If [*name of defendant*]'s trade or industry has an established cost study or survey for the geographic area in this case, that cost survey may be considered in calculating [*name of defendant*]'s costs.]

[[*Name of defendant*]'s delivery costs are presumed to be the tariffs set by the California Public Utilities Commission, but this presumption may be overcome by other evidence.]

New September 2003

Directions for Use

The bracketed sentences should be inserted as necessary.

Sources and Authority

- "Cost" Defined. Business and Professions Code section 17026.
- Cost Survey Is Competent Evidence. Business and Professions Code section 17072.
- Presumptive Evidence of Cost. Business and Professions Code section 17073.
- Transportation Tariffs Are Presumptive Evidence of Delivery Costs. Business and Professions Code section 17074.
- Prevailing Market Price Is Presumptive Evidence of Cost of Raw Materials. Business and Professions Code section 17077.
- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 432 [88 Cal.Rptr.2d 118].)
- "California appears to have adopted a very expansive approach to the evidence that may be used to establish cost; no formula has been expressly sustained or denounced." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 436.)
- "These statutes embody California's fully allocated cost standard, that is, a fair allocation of all fixed or variable costs associated with production of the article or product." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, footnote omitted.)

- "Cost is to be measured as 'the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion.' " (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, fn. 6, internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 623–629

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.52 (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition*, § 235.22 et seq. (Matthew Bender)

3305. Presumptions Concerning Costs—Distributor

A distributor's costs include the cost of the product being distributed and the cost of doing business as a distributor.

The cost of the product being distributed is the amount [*name of defendant***] paid for the product or [his/her/***nonbinary pronoun***/its] cost of replacing the product, whichever is less.**

[*Name of defendant***]'s cost of doing business as a distributor is the average cost of distribution over a reasonable time, rather than the cost of distributing one item at a particular time.**

[If [*name of defendant***]'s trade or industry has an established cost study or survey for the geographic area in this case, that cost survey may be considered in calculating [***name of defendant***]'s costs.]**

[If there is no other proof of the cost of doing business, a markup of six percent on the invoice or replacement cost of an article or product is presumed to be [*name of defendant***]'s additional cost of doing business.]**

[[*Name of defendant***]'s delivery costs are presumed to be the tariffs set by the California Public Utilities Commission, but this presumption may be overcome by other evidence.]**

New September 2003

Directions for Use

Presumably, this instruction would also apply to sellers that are denominated "retailers."

The bracketed sentences should be inserted as necessary.

There is an additional presumption regarding costs in Business and Professions Code section 17026 for warranty service providers: " 'Cost' as applied to warranty service agreements includes the cost of parts, transporting the parts, labor, and all overhead expenses of the service agency."

Sources and Authority

- Cost of Distribution. Business and Professions Code section 17026.
- Cost Survey Is Evidence of Cost. Business and Professions Code section 17072.
- Presumptive Evidence of Distribution Costs. Business and Professions Code section 17073.
- Transportation Tariffs Presumptive Evidence of Delivery Costs. Business and Professions Code section 17074.
- "Determination of the defendant's cost has always been treated as an issue of

fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 432 [88 Cal.Rptr.2d 118].)

- "California appears to have adopted a very expansive approach to the evidence that may be used to establish cost; no formula has been expressly sustained or denounced." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 436.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 623–629

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.52 (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition*, § 235.22 (Matthew Bender)

3306. Methods of Allocating Costs to an Individual Product

Although no formula for determining the appropriate cost of a particular [product/service] is set by law, [*insert one of the following:***]**

[the determination of the appropriate cost of [manufacture/distribution] of a particular product must be reasonably related to the burden the product puts on [*name of defendant***]'s overall cost of doing business.]**

[the determination of the cost of providing particular services must be reasonably related to the burden the service puts on [*name of defendant***]'s overall cost of doing business.]**

New September 2003

Directions for Use

Regarding the first bracketed sentence, if all of the defendant's products are approximately the same, there is no need to allocate the indirect expense, i.e., overhead, according to the unique "burden" each product generates. In such cases, this paragraph could unnecessarily confuse the jury and should be modified or deleted.

Sources and Authority

- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 432 [88 Cal.Rptr.2d 118].)
- "These statutes embody California's fully allocated cost standard, that is, a fair allocation of all fixed or variable costs associated with production of the article or product." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, footnote omitted.)
- "Cost is to be measured as 'the fair average cost of production over a reasonable time, rather than the cost of one item on a particular occasion.' " (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, fn. 6, internal citation omitted.)
- "Variable costs are costs that vary with changes in output, while fixed costs are those that do not vary with changes in output." (*Turnbull & Turnbull v. ARA Transportation Inc.* (1990) 219 Cal.App.3d 811, 820 [268 Cal.Rptr. 856].)
- "California employs a fully allocated cost standard to determine whether a sale has violated section 17043. Under sections 17026 and 17029 . . . cost means invoice cost plus the vendor's full cost of doing business or six percent." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 275 [195 Cal.Rptr. 211], internal citations omitted.)
- "We find the use of the fully allocated cost method, when viewed in conjunction

with the injurious intent requirement of section 17043, is rationally related to the valid legislative purpose . . . as it assists in preventing the creation or perpetuation of monopolies." (*Turnbull & Turnbull, supra,* 219 Cal.App.3d at p. 822.)

- "To be legally acceptable, the allocation of indirect or fixed overhead costs to a particular product or service must be reasonably related to the burden such product or service imposes on the overall cost of doing business." (*Turnbull & Turnbull, supra,* 219 Cal.App.3d at p. 822.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 623–629

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153[3] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.52[2] (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition*, § 235.23 (Matthew Bender)

3307–3319. Reserved for Future Use

3320. Secret Rebates—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [***insert one or both of the following:***]**

> **[secretly [gave/received] [payments/rebates/refunds/ commissions/ unearned discounts;]] [or] [secretly [gave to some buyers/received] services or privileges that were not given to other buyers purchasing on like terms and conditions.]**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] secretly [[gave/received] [payments/rebates/refunds/commissions/unearned discounts]] [or] [[gave to some buyers/received] services or privileges that were not given to other buyers purchasing on like terms and conditions];**
2. **That a competitor was harmed;**
3. **That the [payment/allowance] had a tendency to destroy competition;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

Element 2 should be omitted if the plaintiff is a competitor of the defendant; that issue is covered by element 4.

Sources and Authority

- Secret Rebates Prohibited. Business and Professions Code § 17045.
- Actual Damages or Injury Not Required. Business and Professions Code section 17082.
- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431–432 [88 Cal.Rptr.2d 118], internal citations omitted.)

- "[T]here are three elements to a violation of section 17045. First, there must be a 'secret' allowance of an 'unearned' discount. Second, there must be 'injury' to a competitor. Third, the allowance must tend to destroy competition." (*Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego* (1993) 16 Cal.App.4th 202, 212 [20 Cal.Rptr.2d 62].)
- "By its terms, section 17045 requires the plaintiff to prove not only injury to a competitor, but, *in addition*, a tendency 'to destroy competition.' " (*ABC International Traders, Inc. v. Matsushita Electric Corp. of America* (1997) 14 Cal.4th 1247, 1262 [61 Cal.Rptr.2d 112, 931 P.2d 290], original italics.)
- "[P]roof of a knowing or intentional receipt by a buyer of a secret, unearned discount is not required under section 17045." (*Diesel Elec. Sales & Serv., Inc., supra,* 16 Cal.App.4th at p. 214, fn. 4.)
- "[S]ection 17045 does not require a proof of an 'intent' to destroy competition, but only that the secret, unearned discount had a *tendency* to destroy competition." (*Diesel Elec. Sales & Serv., Inc., supra,* 16 Cal.App.4th at p. 215, original italics.)
- Those competing against a seller who provides the secret rebate, on the "primary line," have standing to sue under the statute. Likewise, a customer of the seller who is disfavored by that seller providing a secret rebate to competitors of that customer, creating so-called "secondary line" injury, also has standing to sue. (*ABC International Traders, supra,* 14 Cal.4th at p. 1257.)
- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 623–629

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.52 (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition*, § 235.29 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.46[5], 5.47[4]

3321. Secret Rebates—Definition of "Secret"

[Rebates/Refunds/Commissions/Unearned discounts/Services or privileges] are "secret" if they are concealed from or not disclosed to other buyers.

New September 2003

Sources and Authority

- "Viewing the evidence most favorably to [plaintiff], the nondisclosure of [defendant]'s receipt of maximum discounts to which it was not entitled certainly could be construed as a 'secret' allowance." (*Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego* (1993) 16 Cal.App.4th 202, 212 [20 Cal.Rptr.2d 62].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 623–629

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.52[4] (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition*, § 235.29 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.46[5], 5.47[4]

3322–3329. Reserved for Future Use

3330. Affirmative Defense to Locality Discrimination Claim—Cost Justification

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[*Name of defendant***] claims that any locality discrimination proven by [***name of plaintiff***] is within the law. To succeed, [***name of defendant***] must prove that the difference in [his/her/***nonbinary pronoun***/its] price is justified by: [***insert one or more of the following:***]**

[A difference in the [grade/quality/quantity] of the [*product***] [he/she/***nonbinary pronoun***/it] sold in the different locations;] [or]**

[The difference in the cost of the [manufacture/sale/delivery] of [his/her/*nonbinary pronoun***/its] [***product***] in the different locations;] [or]**

[A difference in the actual cost of transportation from the place the [*product***] was [produced/manufactured/shipped] to the place where the [***product***] was sold.]**

New September 2003

Directions for Use

This defense applies to locality discrimination only.

Sources and Authority

- Costs Justification for Locality Discrimination. Business and Professions Code section 17041.
- "We . . . conclude that appellants are not required to negative the exception for differences in grade or other enumerated factors found in section 17041, and deem the complaint sufficient to withstand demurrer without such allegations." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 273 [195 Cal.Rptr. 211], internal citations and footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 623–629

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.53 (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition*, § 235.20 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.46[2], 5.100[2]

3331. Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims—Closed-out, Discontinued, Damaged, or Perishable Items

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[*Name of defendant***] claims that any [locality discrimination/below cost sales/loss leader sales] proven by [***name of plaintiff***] [is/are] within the law because the [***product***] was being sold as [a close-out/seasonal goods/damaged goods/perishable goods]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [his/her/***nonbinary pronoun***/its] sales were [***insert one or more of the following:***]**

   [in the course of closing out, in good faith, all or any part of [his/her/*nonbinary pronoun***/its] supply of [***product***], in order to stop trade in [***product***];] [or]**

   [of seasonal goods to prevent loss by depreciation;] [or]

   [of perishable goods to prevent loss by spoilage or depreciation;] [or]

   [of goods that were damaged or deteriorated in quality;] and

2. **That [***name of defendant***] gave sufficient notice of the sale to the public.**

Notice is sufficient only if:

1. **The sale goods are kept separate from other goods;**
2. **The sale goods are clearly marked with the reason[s] for the sales; and**
3. **Any advertisement of such goods sets forth the reason[s] for the sale and indicates the number of items to be sold.**

New September 2003

Directions for Use

This defense applies to locality discrimination, below cost sales, and loss leader sales only.

Sources and Authority

- Exceptions for Close-out, Discontinued, Damaged, or Perishable Items. Business and Professions Code section 17050.

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 623–629

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.53 (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition*, § 235.20 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.100[3]

3332. Affirmative Defense to Locality Discrimination, Below Cost Sales, Loss Leader Sales, and Secret Rebates—Functional Classifications

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[*Name of defendant*] claims that any [locality discrimination/below cost sales/loss leader sales/secret rebates] proven by [*name of plaintiff*] [is/are] within the law because they apply to different classes of customers. To succeed, [*name of defendant*] must prove all of the following:

1. **That [*name of defendant*] created different classes of customers, such as [broker/jobber/wholesaler/retailer/[*insert other*]];**
2. **That customers in the different classes performed different functions and assumed the risk, investment, and costs involved;**
3. **That the difference in [price/rebate/discount/special services/privileges] for [*product/service*] was given only in those sales where the favored buyer performed the function on which the claim of a different class is based; and**
4. **That the difference in price was reasonably related to the value of such function.**

New September 2003

Directions for Use

This defense applies to locality discrimination, sales below cost, loss leader sales, and secret rebates.

Sources and Authority

- Functional Classifications. Business and Professions Code section 17042.
- " '[T]he law should tolerate no subterfuge. For instance, where a wholesaler-retailer buys only part of his goods as a wholesaler, he must not claim a functional discount on all. Only to the extent that a buyer actually performs certain functions, assuming all the risk, investment, and costs involved, should he legally qualify for a functional discount. Hence a distributor should be eligible for a discount corresponding to any part of the function he actually performs on that part of the goods for which he performs it.' " (*Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego* (1993) 16 Cal.App.4th 202, 217 [20 Cal.Rptr.2d 62], internal citations omitted.)
- "[A] pricing structure in which a distributor sells to a retailer at one discount and to a rack-jobber at another is expressly permitted by section 17042." (*Harris v. Capitol Records Distributing Corp.* (1966) 64 Cal.2d 454, 463 [50 Cal.Rptr. 539, 413 P.2d 139], footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 623–629

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.53 (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition*, § 235.20 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.100[4]

3333. Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims—Meeting Competition

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[*Name of defendant*] claims that any [locality discrimination/below cost sales/loss leader sales] proven by [*name of plaintiff*] [is/are] justified by the need to meet competition. To succeed, [*name of defendant*] must prove that the sales of [*product/service*] were made in an attempt, in good faith, to meet the legal prices of a competitor selling the same [*product/service*] in the ordinary course of business in the same area.

To meet legal prices means to lower the price to a point that the seller believes in good faith is at or above the legal price of the competitor it is trying to meet. That is, a seller may attempt to "meet," but not "beat," what in good faith it believes to be that competitor's legal price.

New September 2003

Directions for Use

This defense applies to locality discrimination, sales below cost, and loss leader sales only.

Sources and Authority

- Good-Faith Price to Meet Competition Permitted. Business and Professions Code section 17050(d).
- "It is safe to assume that merchants generally know who are their competitors, and from what locality or trade area they draw their customers." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 116 [153 P.2d 9].)
- "The requirement [to ascertain the 'legal prices' of competitors] is not absolute. It is merely that the defendants shall have endeavored 'in good faith' to meet the legal prices of a competitor." (*Pay Less Drug Store, supra,* 25 Cal.2d at p. 117.)
- "The operator of a service industry cannot legally reduce its prices to a below-cost figure with intent to injure another or offer free service to prevent further loss of business to a competitor 'who is indiscriminately and deliberately offering free service and below cost prices to such operator's customers.' Each side must obey the law; the fact that one competing party disregards the statute does not give the other side a legal excuse to do so." (*G.B. Page v. Bakersfield Uniform & Towel Supply Co.* (1966) 239 Cal.App.2d 762, 770 [49 Cal.Rptr. 46].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 623–629

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.53 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.100[5]

3334. Affirmative Defense to Locality Discrimination Claim—Manufacturer Meeting Downstream Competition

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[*Name of defendant*] claims that any locality discrimination proven by [*name of plaintiff*] was justified by the need to meet competition. To succeed, [*name of defendant*] must prove that [his/her/*nonbinary pronoun*/its] sales of [*product/service*] to [*name of reselling customer*] were made in an attempt, in good faith, to meet the legal prices of [*name of competitor's reseller*] selling in the ordinary course of business in the same locality or trade area.

To meet legal prices means to lower the price to a point that the seller believes in good faith is at or above the legal price of the competitor of the reseller whose price it is trying to meet. That is, a seller may attempt to "meet," but not "beat," what in good faith it believes to be that competitor's legal price.

New September 2003

Directions for Use

This defense applies to locality discrimination when the manufacturer is providing a lower price to its reseller, so that the reseller can compete fairly against the lower prices charged by the reseller of another manufacturer.

Sources and Authority

- Manufacturer's Good-Faith Price to Meet Downstream Competition Permitted. Business and Professions Code section 17050(e).
- "The requirement [to ascertain the 'legal prices' of competitors] is not absolute. It is merely that the defendants shall have endeavored 'in good faith' to meet the legal prices of a competitor." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 117 [153 P.2d 9].)
- "The operator of a service industry cannot legally reduce its prices to a below-cost figure with intent to injure another or offer free service to prevent further loss of business to a competitor 'who is indiscriminately and deliberately offering free service and below cost prices to such operator's customers.' Each side must obey the law; the fact that one competing party disregards the statute does not give the other side a legal excuse to do so." (*G.B. Page v. Bakersfield Uniform & Towel Supply Co.* (1966) 239 Cal.App.2d 762, 770 [49 Cal.Rptr. 46].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 623–629

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*,

§ 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.53 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.100[6]

3335. Affirmative Defense—"Good Faith" Explained

In deciding whether [*name of defendant***] acted in good faith in attempting to meet competition, you must decide whether [his/her/***nonbinary pronoun***/its] belief was based on facts that would lead a reasonable person to believe that the price [***name of defendant***] was offering would meet the legal price of [***name of defendant***]'s competitor. You must consider all of the facts and circumstances present, including, but not limited to:**

1. **The nature and source of the information on which [***name of defendant***] relied;**
2. **[***Name of defendant***]'s prior experience, if any, with similar information or with persons who provided the information;**
3. **[***Name of defendant***]'s prior pricing practices; and**
4. **[***Name of defendant***]'s general business practices.**

[*Name of defendant***] does not have to prove that [his/her/***nonbinary pronoun***/its] price did actually meet the legal price of its competitor; only that [he/she/***nonbinary pronoun***/it] reasonably believed that [he/she/***nonbinary pronoun***/it] was offering a price that would meet the competitor's price.**

New September 2003; Revised May 2020

Directions for Use

This instruction provides the jury with a general listing of circumstances against which it might consider evidence in the record to decide whether a defendant's attempts to meet competition were in good faith. The final paragraph eases the defendant's burden of proof with respect to the "meet but don't beat" element because a defendant is required only to prove its reasonable belief that its prices would meet, but not beat, a competitor's prices.

Sources and Authority

- Good-Faith Price to Meet Competition Permitted. Business and Professions Code section 17050(d), (e).
- "The requirement [to ascertain the 'legal prices' of competitors] is not absolute. It is merely that the defendants shall have endeavored 'in good faith' to meet the legal prices of a competitor." (*People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 117 [153 P.2d 9].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 623–629

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.53 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.46[2], 5.51, 5.100[7]

3336–3399. Reserved for Future Use

VF-3300. Locality Discrimination

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [offer to sell/sell/furnish] [*product/service*] at a lower price in one [location/section/community/city] in California than in another [location/section/ community/city] in California?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] intend to destroy competition from an established dealer [or to prevent competition from any person who in good faith intended and attempted to become such a dealer]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [*name of plaintiff*]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3300, *Locality Discrimination—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3301. Locality Discrimination Claim—Affirmative Defense—Cost Justification

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [offer to sell/sell/furnish] [***product/service***] at a lower price in one [location/section/community/city] in California than in another [location/section/ community/city] in California?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was the locality discrimination within the law?**

   _____ Yes _____ No

   If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] intend to destroy competition from an established dealer [or to prevent competition from any person who in good faith intended and attempted to become such a dealer]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify

the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3300, *Locality Discrimination—Essential Factual Elements*, and CACI No. 3330, *Affirmative Defense to Locality Discrimination Claim—Cost Justification*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If other affirmative defenses are asserted, this form can be modified accordingly. See other Unfair Practices Act verdict forms for examples.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3302. Below Cost Sales

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [offer to sell/sell] [*product/service*] at a price that was below cost?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of defendant*]'s purpose to injure competitors or destroy competition?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [*name of plaintiff*]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3301, *Below Cost Sales—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the facts involve a gift rather than a sale, question 1 can be modified according to

the second alternative in element 1 of CACI No. 3301.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3303. Below Cost Sales Claim—Affirmative Defense—Closed-out, Discontinued, Damaged, or Perishable Items

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We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [offer to sell/sell] [*product/service*] at a price that was below cost?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Were [his/her/*nonbinary pronoun*/its] sales in the course of closing out, in good faith, all or any part of [his/her/*nonbinary pronoun*/its] supply of [*product*], in order to stop trade in [*product*]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. **Did [*name of defendant*] give sufficient notice of the sale to the public?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s purpose to injure competitors or destroy competition?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [*name of plaintiff*]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3301, *Below Cost Sales—Essential Factual Elements*, and CACI No. 3331, *Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims—Closed-out, Discontinued, Damaged, or Perishable Items.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If other grounds for this defense are asserted, question 2 should be modified according to question 2 in CACI No. 3331. If other affirmative defenses are asserted, this form can be modified accordingly. See other Unfair Practices Act verdict forms for examples.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3304. Loss Leader Sales

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [offer to sell/sell/offer the use of] [***product/service***] at prices that were below [his/her/***nonbinary pronoun***/its] costs?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of defendant***]'s purpose to influence, promote, or encourage the purchase of other merchandise from [***name of defendant***]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s intent to injure competitors or destroy competition?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify

the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3302, *Loss Leader Sales—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If other grounds of liability are asserted, question 2 can be modified according to the bracketed alternatives in element 2 of CACI No. 3302.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3305. Loss Leader Sales Claim—Affirmative Defense—Meeting Competition

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [offer to sell/sell/offer the use of] [***product/service***] at prices that were below [his/her/***nonbinary pronoun***/its] costs?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Were the sales of [***product/service***] made in an attempt, in good faith, to meet the legal prices of a competitor selling the same [***product/service***] in the ordinary course of business in the same area?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s purpose to influence, promote, or encourage the purchase of other merchandise from [***name of defendant***]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s intent to injure competitors or destroy competition?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have

the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3302, *Loss Leader Sales—Essential Factual Elements*, and CACI No. 3333, *Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims—Meeting Competition*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If other grounds of liability are asserted, question 3 can be modified according to the alternative brackets in element 2 of CACI No. 3302. If other affirmative defenses are asserted, this form can be modified accordingly. See other Unfair Practices Act verdict forms for examples.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3306. Secret Rebates

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] secretly [[give/receive] [payments/rebates/refunds/commissions/unearned discounts]] [or] [[give to some buyers/receive] services or privileges that were not given to other buyers purchasing on like terms and conditions]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was a competitor harmed?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did the [payment/allowance] have a tendency to destroy competition?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s harm?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3320, *Secret Rebates—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Question 2 should be omitted if the plaintiff is a competitor of the defendant, because that issue is covered by question 4.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3307. Secret Rebates Claim—Affirmative Defense—Functional Classifications

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We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] secretly [[give/receive] [payments/rebates/refunds/commissions/unearned discounts]/ [or] [give to some buyers/receive] services or privileges that were not given to other buyers purchasing on like terms and conditions]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] create different classes of customers, such as [broker/jobber/wholesaler/retailer/[*insert other*]]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, skip questions 3, 4, and 5 and answer question 6.

3. **Did customers in the different classes perform different functions and assume the risk, investment, and costs involved?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, skip questions 4 and 5 and answer question 6.

4. **Was the difference in [price/rebate/discount/special services/privileges] for [*product/service*] given only in those sales where the favored buyer performed the function on which the claim of a different class is based?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. **Was the difference in price reasonably related to the value of such function?**

   _____ Yes _____ No

   If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was a competitor harmed?**

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did the [payment/allowance] have a tendency to destroy competition?

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3320, *Secret Rebates—Essential Factual Elements*, and CACI No. 3332, *Affirmative Defense to Locality Discrimination, Below Cost Sales, Loss Leader Sales, and Secret Rebates—Functional Classifications*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Question 6 should be omitted if the plaintiff is a competitor of the defendant, because that issue is covered by question 8.

If other affirmative defenses are asserted, this form can be modified accordingly. See other Unfair Practices Act verdict forms for examples.

If there are multiple causes of action, users may wish to combine the individual

forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3308–VF-3399. Reserved for Future Use

CARTWRIGHT ACT

3400. Horizontal and Vertical Restraints (Use for Direct Competitors)—Price Fixing—Essential Factual Elements

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[*Name of plaintiff*] claims [*name of defendant*] was involved in price fixing. Price fixing is an agreement to set, raise, lower, maintain, or stabilize the prices or other terms of trade charged or to be charged for a product or service, whether the prices agreed on were high or low, reasonable or unreasonable. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [and [*name(s) of alleged coparticipant(s)*]] agreed to fix [or] [set/raise/lower/maintain/stabilize] prices [or other terms of trade] charged or to be charged for [*product/service*];**
2. **That [*name of plaintiff*] was harmed; and**
3. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

This instruction is intended to apply to both actual and potential competitors. For cases involving vertical restraints, use this instruction but see additional special vertical restraint instructions contained in this series (CACI No. 3409, *Vertical Restraints—Termination of Reseller*, and CACI No. 3410, *Vertical Restraints—Agreement Between Seller and Reseller's Competitor*).

In addition to price, price fixing includes any combination that "tampers with price structures." Like its federal counterpart, the Cartwright Act would seem to prohibit combinations that fix aspects of price such as costs, discounts, credits, financing, warranty, and delivery terms. Therefore, if this case concerns the fixing of an aspect of price, other than price itself, this instruction and those that are related to it should be adapted accordingly.

Sources and Authority

- Trusts Unlawful and Void. Business and Professions Code section 16726.
- "Trust" Defined. Business and Professions Code section 16720.
- Private Right of Action for Antitrust Violations. Business and Professions Code section 16750(a).
- " ' "To state a cause of action for conspiracy, the complaint must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts." ' Thus, the Supreme Court applied the pleading requirements for a civil conspiracy action

under common law to a statutory action under the Cartwright Act for antitrust conspiracies." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1236 [18 Cal.Rptr.2d 308], quoting *Chicago Title Insurance Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 316 [70 Cal.Rptr. 849, 444 P.2d 481].)

- "A complaint for unlawful price fixing must allege facts demonstrating that separate entities conspired together. Only separate entities pursuing separate economic interests can conspire within the proscription of the antitrust laws against price fixing combinations." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 188–189 [91 Cal.Rptr.2d 534], internal citations omitted.)
- "The Cartwright Act prohibits every trust, defined as 'a combination of capital, skill or acts by two or more persons' for specified anticompetitive purposes. The federal Sherman Act prohibits every 'contract, combination . . . or conspiracy, in restraint of trade.' The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 369 [113 Cal.Rptr.2d 175], internal citations omitted.)
- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)
- "Two forms of conspiracy may be used to establish a violation of the antitrust laws: a horizontal restraint, consisting of a collaboration among competitors; or a vertical restraint, based upon an agreement between business entities occupying different levels of the marketing chain." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 267 [195 Cal.Rptr. 211], internal citations omitted.)
- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1680–1681 [60 Cal.Rptr.2d 195], internal citations and footnote omitted.)
- "In general, a Cartwright Act price fixing complaint must allege specific facts in addition to stating the purpose or effect of the price fixing agreement and that the accused was a member of or acted pursuant to the price fixing agreement." (*Cellular Plus, Inc., supra*, 14 Cal.App.4th at p. 1237.)
- "[W]hile some sort of concerted activity is necessary for an antitrust claim, it is

well settled that an explicit or formal agreement is not required. . . . [A]ll that is required from an antitrust plaintiff is ' "direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " ' " (*In re Automobile Antitrust Cases I & II* (2016) 1 Cal.App.5th 127, 152–153 [204 Cal.Rptr.3d 330].)

- "[A] conspiracy among competitors to restrict output and/or raise prices [is] unlawful per se without regard to any of its effects . . . ." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851 [107 Cal.Rptr.2d 841, 24 P.3d 493].)
- " 'Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.' 'The "per se" doctrine means that a particular practice and the setting in which it occurs is sufficient to compel the conclusion that competition is unreasonably restrained and the practice is consequently illegal.' " (*Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Construction Co.* (1971) 4 Cal.3d 354, 361–362 [93 Cal.Rptr. 602, 482 P.2d 226], internal citations omitted.)
- "It has long been settled that an agreement to fix prices is unlawful per se. It is no excuse that the prices fixed are themselves reasonable." (*Catalano Inc. v. Target Sales, Inc.* (1980) 446 U.S. 643, 647 [100 S.Ct. 1925, 64 L.Ed.2d 580].)
- "Under both California and federal law, agreements fixing or tampering with prices are illegal per se." (*Oakland-Alameda County Builders' Exchange, supra*, 4 Cal.3d at p. 363.)
- "These rules apply whether the price-fixing scheme is horizontal or vertical; that is, whether the price is fixed among competitors or businesses at different economic levels." (*Mailand v. Burckle* (1978) 20 Cal.3d 367, 377 [143 Cal.Rptr. 1, 572 P.2d 1142], internal citations omitted.)
- "Under the authorities . . . the agreement between plaintiffs and defendants and between defendants and Powerine were unlawful per se. It is, therefore, not necessary to inquire whether these arrangements had an actual anticompetitive effect." (*Mailand, supra*, 20 Cal.3d at p. 380.)
- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)
- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts

unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "We acknowledge that a plaintiff . . . must often rely on inference rather than evidence since, usually, unlawful conspiracy is conceived in secrecy and lives its life in the shadows. But, when he does so, he must all the same rely on an inference implying unlawful conspiracy *more likely than* permissible competition, either in itself or together with other inferences or evidence." (*Aguilar, supra*, 25 Cal.4th at p. 857, internal citations omitted.)
- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc., supra*, 14 Cal.App.4th at p. 1234.)
- "Should an antitrust conspirator be permitted to raise as a defense that the direct purchaser passed on some or all of the overcharge to indirect purchasers downstream in the chain of distribution? [¶¶] We conclude that under the Cartwright Act, as under federal law, generally no pass-on defense is permitted." (*Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 763 [111 Cal.Rptr.3d 666, 233 P.3d 1066].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

6 Antitrust Laws and Trade Regulation, Ch. 105, *California*, § 105.02[1] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[2] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77[2] (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 1, *Elements of Unfair Competition and Business Torts Causes of Action*, 1.05[4][a], Ch. 5, *Antitrust*, 5.04, 5.08, 5.09[1], 5.12

3401. Horizontal Restraints (Use for Direct Competitors)—Allocation of Trade or Commerce—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] agreed to allocate or divide [customers/territories/products]. An agreement to allocate [customers/territories/products] is an agreement between two or more competitors not to compete [for the business of particular customers/with each other in particular territories/in the sale of a particular product]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] and [***name of alleged coparticipant***] were or are competitors in the same or related markets;**
2. **That [***name of defendant***] and [***name alleged coparticipant***] agreed to allocate or divide [customers/territories/products];**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s [and [***name of alleged coparticipant***]'s] conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

The appropriate bracketed option(s) should be selected and the balance deleted, depending on the specific facts.

Sources and Authority

- Trusts Unlawful and Void. Business and Professions Code section 16726.
- "Trust" Defined. Business and Professions Code section 16720(a).
- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)
- "[B]usinesses may not engage in a horizontal allocation of markets, with would-be competitors dividing up territories or customers. Such allocations afford each participant an 'enclave . . . , free from the danger of outside incursions,' in which to exercise monopoly power and extract monopoly premiums." (*In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 148 [187 Cal.Rptr.3d 632, 348 P.3d 845], internal citations omitted.)
- "It is settled that distributors cannot lawfully agree to divide territories or

customers. Such conduct is sometimes called a 'horizontal restraint,' and is a per se violation of the Sherman Act." (*Guild Wineries & Distilleries v. J. Sosnick and Son* (1980) 102 Cal.App.3d 627, 633 [162 Cal.Rptr. 87], internal citations omitted.)

- " 'One of the classic examples of a per se violation . . . is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition . . . . This Court has reiterated time and time again that "[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition." Such limitations are per se violations of the Sherman Act.' " (*Palmer v. BRG of Georgia, Inc.* (1990) 498 U.S. 46, 49 [111 S.Ct. 401, 112 L.Ed.2d 349], internal citations omitted.)
- "Two forms of conspiracy may be used to establish a violation of the antitrust laws: a horizontal restraint, consisting of a collaboration among competitors; or a vertical restraint, based upon an agreement between business entities occupying different levels of the marketing chain." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 267 [195 Cal.Rptr. 211], internal citations omitted.)
- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1680–1681 [60 Cal.Rptr.2d 195], internal citations and footnote omitted.)
- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)
- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)
- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

- Business and Professions Code section 16750(a) confers a private right of action for treble damages and attorneys fees on "[a]ny person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter."
- "The Cartwright Act prohibits every trust, defined as 'a combination of capital, skill or acts by two or more persons' for specified anticompetitive purposes. The federal Sherman Act prohibits every 'contract, combination . . . or conspiracy, in restraint of trade.' The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 369 [113 Cal.Rptr.2d 175], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

6 Antitrust Laws and Trade Regulation, Ch. 105, *California*, § 105.02[2] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[3] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.52 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 1, *Elements of Unfair Competition and Business Torts Causes of Action*, 1.05[4][b]

3402. Horizontal Restraints—Dual Distributor Restraints—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] [stopped doing business with/refused to deal with/restrained] [[him/her/***nonbinary pronoun***/it]/a reseller]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] sold [***products***] directly in competition with [[***name of plaintiff***]/a reseller] to a significant portion of [[***name of plaintiff***]/the reseller]'s customers or potential customers;**
2. **That [***name of defendant***] [stopped doing business with/refused to deal with/restrained] [[***name of plaintiff***]/the reseller];**
3. **That a motivating reason for the decision to [end business with/refuse to deal with/restrain] [[***name of plaintiff***]/the reseller] was [his/her/***nonbinary pronoun***/its] refusal to agree to [***name of defendant***]'s [***specify the claimed restraint, e.g., territorial or customer restrictions***];**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

The appropriate bracketed options should be selected and the balance deleted depending on the specific facts. For example, the word "reseller" should be used instead of plaintiff if the plaintiff is not the reseller—such as, when the plaintiff is a government enforcer.

Sources and Authority

- Trusts Unlawful and Void. Business and Professions Code section 16726.
- "Trust" Defined. Business and Professions Code section 16720(a).
- "We hold that it is unlawful for a manufacturer who also distributes its own products in one geographic area to terminate an independent distributor when a substantial factor in bringing about the termination is the distributor's refusal to accept the manufacturer's attempt to enforce or impose territorial or customer restrictions among distributors." (*Guild Wineries & Distilleries v. J. Sosnick and Son* (1980) 102 Cal.App.3d 627, 630 [162 Cal.Rptr. 87].)
- " '[A] refusal of a manufacturer to deal with a distributor can constitute a

"combination" in restraint of trade within the purview' of the Sherman Act . . . . We conclude that this case . . . is governed by a per se principle." (*Guild Wineries & Distilleries, supra,* 102 Cal.App.3d at p. 633.)

- In *Dimidowich v. Bell & Howell* (9th Cir. 1986) 803 F.2d 1473, 1482–1484, opn. mod. (9th Cir. 1987) 810 F.2d 1517, the Ninth Circuit Court of Appeals rejected the holding in *Guild Wineries, supra,* that the per se standard applied, and predicted that the California Supreme Court would overrule *Guild Wineries*. This has not yet occurred. In the meantime, the decision in the *Guild* court remains binding on all subordinate state courts. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].)
- "It is settled that distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a 'horizontal restraint,' and is a per se violation of the Sherman Act . . . . When Guild became a distributor the same rule became applicable to it. Guild could not lawfully coerce a fellow distributor into allocating customers any more than Sosnick and other distributors could lawfully agree to such an allocation." (*Guild Wineries & Distilleries, supra,* 102 Cal.App.3d at p. 633.)
- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)
- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)
- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

6 Antitrust Laws and Trade Regulation, Ch. 105, *California*, § 105.02 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77[3] (Matthew Bender)

3403. Horizontal Restraints (Use for Direct Competitors)—Group Boycott—Per Se Violation—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] agreed not to deal with [him/her/***nonbinary pronoun***/it] [or to deal with [him/her/***nonbinary pronoun***/it] only on specified terms]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [and [***name of alleged coparticipant[s]***]] agreed to [***specify claimed refusal to deal, e.g., "refuse to sell to [name of plaintiff]"***];**
2. **That [***name of plaintiff***] was harmed; and**
3. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

This instruction applies to agreements between competitors that are directly intended to affect competition facing them. In determining whether to give this per se instruction or the rule of reason instructions, it is important whether the challenged combination was horizontal (between competitors), vertical (between sellers and buyers), or some combination of the two. Horizontal combinations are subject to per se instructions; vertical combinations to the rule of reason instructions. Those combinations falling in between must be carefully scrutinized to determine whether their principal purpose is to restrain competition between competitors or to downstream resellers by the seller.

Sources and Authority

- Trusts Unlawful and Void. Business and Professions Code section 16726.
- "Trust" Defined. Business and Professions Code section 16720(c).
- "The antitrust laws do not preclude a party from unilaterally determining the parties with which, or the terms on which, it will transact business. However, it is a violation of the antitrust laws for a group of competitors with separate and independent economic interests, or a single competitor with sufficient leverage, to force another to boycott a competitor at the same level of distribution." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 195 [91 Cal.Rptr.2d 534], internal citation omitted.)
- "It is well settled that the antitrust laws do not preclude a trader from unilaterally determining the parties with whom it will deal and the terms on which it will transact business. An antitrust case must be based upon conspiratorial rather than unilateral conduct. Thus, only group boycotts are

unlawful under the Sherman and Cartwright Acts." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 267–268 [195 Cal.Rptr. 211], internal citations omitted.)

- " 'Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." Even when they operated to lower prices or temporarily to stimulate competition they were banned. For . . . such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' " (*Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Construction Co.* (1971) 4 Cal.3d 354, 365 [93 Cal.Rptr. 602, 482 P.2d 226], internal citations omitted.)
- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)
- " '[T]there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' Among these per se violations is the concerted refusal to deal with other traders, or, as it is often called, the group boycott." (*Marin County Bd. of Realtors v. Palsson* (1976) 16 Cal.3d 920, 930–931 [130 Cal.Rptr. 1, 549 P.2d 833], internal citation omitted.)
- In *Marin County Bd. of Realtors, supra,* the Supreme Court explained that there is a distinction between "direct boycotts aimed at coercing parties to adopt noncompetitive practices and indirect boycotts which result in refusals to deal only as a by-product of the agreement." (*Marin County Bd. of Realtors, supra,* 16 Cal.3d at p. 932.)
- Not all group boycotts are evaluated as per se violations: "This limitation on the per se rule is particularly applicable to trade association agreements not directly aimed at coercing third parties and eliminating competitors. In cases involving such agreements, courts have generally applied the rule of reason test." (*Marin County Bd. of Realtors, supra,* 16 Cal.3d at p. 932.)
- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)
- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust

laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

6 Antitrust Laws and Trade Regulation, Ch. 105, *California*, § 105.02[3] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[5] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77[5] (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.08, 5.09[3], 5.14

3404. Horizontal Restraints—Group Boycott—Rule of Reason—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] agreed to [***describe conduct, e.g., "formulate an arbitrary membership limitation rule with [identify other participant[s]]"***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] and [***name of alleged coparticipant[s]***] agreed to [***describe conduct, e.g., "formulate an arbitrary membership limitation rule"***];**
2. **That the purpose or effect of [***name of defendant***]'s conduct was to restrain competition;**
3. **That the anticompetitive effect of the restraint[s] outweighed any beneficial effect on competition;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

This instruction applies to agreements between competitors that are directly intended to affect competition facing them. In determining whether to give this per se instruction or the rule of reason instructions, it is important whether the challenged combination was horizontal (between competitors), vertical (between sellers and buyers), or some combination of the two. Horizontal combinations are subject to per se instructions; vertical combinations to the rule of reason instructions. Those combinations falling in between must be carefully scrutinized to determine whether their principal purpose is to restrain competition between competitors or to downstream resellers by the seller.

For additional instructions regarding the rule of reason, see CACI Nos. 3411 through 3414.

Sources and Authority

- Trusts Unlawful and Void. Business and Professions Code section 16726.
- "Trust" Defined. Business and Professions Code section 16720(c).
- Trade Groups Not Unlawful. Business and Professions Code section 16725.
- "A group boycott can involve an agreement that a group of buyers will purchase only from a designated seller . . . . [A]n unlawful group boycott requires an express or implicit agreement among competitors to restrict commerce in some

manner." (*UAS Management, Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal.App.4th 357, 365–366 [87 Cal.Rptr.3d 81].)

- "It is well settled that the antitrust laws do not preclude a trader from unilaterally determining the parties with whom it will deal and the terms on which it will transact business. An antitrust case must be based upon conspiratorial rather than unilateral conduct. Thus, only group boycotts are unlawful under the Sherman and Cartwright Acts." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 267–268 [195 Cal.Rptr. 211], internal citations omitted.)
- In *Marin County Bd. of Realtors v. Palsson* (1976) 16 Cal.3d 920, 931 [130 Cal.Rptr. 1, 549 P.2d 833], the Supreme Court explained that there is a distinction between "direct boycotts aimed at coercing parties to adopt noncompetitive practices and indirect boycotts which result in refusals to deal only as a by-product of the agreement."
- Not all group boycotts are evaluated as per se violations: "This limitation on the per se rule is particularly applicable to trade association agreements not directly aimed at coercing third parties and eliminating competitors. In cases involving such agreements, courts have generally applied the rule of reason test." (*Marin County Bd. of Realtors, supra,* 16 Cal.3d at p. 932.)
- "Although the Sherman Act and the Cartwright Act by their express terms forbid all restraints on trade, each has been interpreted to permit by implication those restraints found to be reasonable." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 853 [94 Cal.Rptr. 785, 484 P.2d 953], internal citation omitted.)
- "To determine whether the restrictions are reasonable, 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts.' The court should consider 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize . . . .' Whether a restraint of trade is reasonable is a question of fact to be determined at trial." (*Corwin, supra,* 4 Cal.3d at pp. 854–855, internal citations omitted.)
- "Generally, in determining whether conduct unreasonably restrains trade, '[a] rule of reason analysis requires a determination of whether . . . its anti-competitive effects outweigh its pro-competitive effects.' " (*Bert G. Gianelli Distrib. Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1048 [219 Cal.Rptr. 203], internal citation omitted, overruled on other grounds in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56].)
- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)

- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones Co.* (1982) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)
- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

6 Antitrust Laws and Trade Regulation, Ch. 105, *California*, § 105.02[3] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[5] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.05, 5.11, 5.17–5.22

3405. Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)—Other Unreasonable Restraint of Trade—Rule of Reason—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] agreed to [***insert unreasonable restraint of trade***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [and [***name of alleged coparticipant[s]***]] agreed to [***describe conduct constituting an unreasonable restraint of trade***];**
2. **That the purpose or effect of [***name of defendant***]'s conduct was to restrain competition;**
3. **That the anticompetitive effect of the restraint[s] outweighed any beneficial effect on competition;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

This instruction is intended for actions that are limited only by the bounds of human ingenuity. Any such conduct, if it does not fit into a per se category, is judged under the rule of reason. Thus, the illegality of a termination that results from a buyer's disobedience with a seller's exclusive "dealing," territorial location, or customer restrictions, unless ancillary to price fixing, should be resolved under the rule of reason. For cases involving vertical restraints, see also the vertical restraint instructions contained in this series.

It is possible for a complaint to include both per se and rule of reason claims. Also, per se claims alternatively may be tested under the rule of reason if there is reason to believe that proof of the per se claims may fall short. If either is the case, connecting language between the pertinent instructions should be provided, such as: "If you find that [*name of defendant*]'s conduct did not amount to an agreement to [*specify conduct, e.g., "fix resale prices," "boycott," "allocate markets"*], [*name of plaintiff*] may still prove that the conduct otherwise lessened competition."

For additional instructions regarding the rule of reason, see CACI Nos. 3411 through 3414.

Sources and Authority

- Trusts Unlawful and Void. Business and Professions Code section 16726.

- "Trust" Defined. Business and Professions Code section 16720(a).
- Trade Groups Not Unlawful. Business and Professions Code section 16725.
- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)
- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1680–1681 [60 Cal.Rptr.2d 195], internal citations and footnote omitted.)
- "Although the Sherman Act and the Cartwright Act by their express terms forbid all restraints on trade, each has been interpreted to permit by implication those restraints found to be reasonable." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 853 [94 Cal.Rptr. 785, 484 P.2d 953], internal citation omitted.)
- "To determine whether the restrictions are reasonable, 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts.' The court should consider 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize . . . .' Whether a restraint of trade is reasonable is a question of fact to be determined at trial." (*Corwin, supra,* 4 Cal.3d at pp. 854–855, internal citations omitted.)
- "Generally, in determining whether conduct unreasonably restrains trade, '[a] rule of reason analysis requires a determination of whether . . . its anti-competitive effects outweigh its pro-competitive effects.' " (*Bert G. Gianelli Distrib. Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1048 [219 Cal.Rptr. 203], internal citation omitted, overruled on other grounds, *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56].)
- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)
- "The plaintiff in a Cartwright Act proceeding must show that an antitrust

violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- "The exact parameters of 'antitrust injury' under section 16750 have not yet been established through either court decisions or legislation." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234 [18 Cal.Rptr.2d 308].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

1 Antitrust Laws and Trade Regulation, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.165[2] (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.05, 5.11, 5.17–5.22

3406. Horizontal and Vertical Restraints—"Agreement" Explained

An agreement exists if two or more persons or companies combine or join together for a common purpose. No written document or specific understanding is necessary for an agreement to exist. For [*name of defendant***] to be part of an agreement, [he/she/***nonbinary pronoun***/it] must have known [he/she/***nonbinary pronoun***/it] was joining in an agreement, even if [he/she/***nonbinary pronoun***/it] was not aware of all of its aspects.**

[An agreement also may exist if a [person/company] unwillingly participates-that is, if another person coerces [him/her/*nonbinary pronoun***/it] to join the agreement against [his/her/***nonbinary pronoun***/its] wishes.]**

[To prove the existence of an agreement, [*name of plaintiff***] must show more than a similarity between [***name of defendant***]'s conduct and the conduct of others. Independent business judgment in response to market forces sometimes leads competitors to act in a similar way because of their individual self-interests. That conduct alone is not enough to prove an agreement. However, similar behavior, along with other evidence suggesting joint conduct, may be used to decide whether there was an agreement.]**

In deciding whether [*name of defendant***]'s conduct was the result of an agreement, you may consider, among other factors, the following:**

(a) The nature of the acts;

(b) The relationship between the parties;

(c) Whether the conduct was contrary to the best interests of some of the persons or companies in question;

(d) Whether the conduct lacked a legitimate business purpose; and

(e) Whether the conduct occurred following communications concerning the subject of the conduct.

New September 2003

Directions for Use

The third paragraph should be read only where a horizontal agreement is involved.

Sources and Authority

- "Trust" Defined. Business and Professions Code section 16720(a).
- "The Cartwright Act, like the Sherman Act, requires an illegal 'combination' or 'conspiracy' to restrain trade." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 720 [187 Cal.Rptr. 797], internal citations omitted.)

- " '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)
- "[A] necessary 'conspiracy' or 'combination' cognizable as an antitrust action is formed where a trader uses coercive tactics to impose restraints upon otherwise uncooperative businesses. If a 'single trader' pressures customers or dealers into pricing arrangements, an unlawful combination is established, irrespective of any monopoly or conspiracy, and despite the recognized right of a trader to determine with whom it will deal." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 268 [195 Cal.Rptr. 211], internal citations omitted.)
- "In *United States v. International Harvester Co.,* 274 U.S. 693, 47 S.Ct. 748, 71 L.Ed. 1302 (1927), the Court acknowledged as lawful, competitors' practice of independently, and as a matter of business judgment, following the prices of an industry leader. '[T]he fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination.' " (*Wilcox v. First Interstate Bank of Oregon* (9th Cir. 1987) 815 F.2d 522, 526.)
- "[P]arallel changes in prices and exchanges of price information by competitors may be motivated by legitimate business concerns." (*City of Long Beach v. Standard Oil Co.* (9th Cir. 1989) 872 F.2d 1401, 1406.)
- "Price information published without 'plus factors,' which indicate an agreement, is judged under the rule of reason. If the exchange of price information constitutes reasonable business behavior the exchange is not an illegal agreement. In order to prevail, 'plaintiff must demonstrate that the allegedly parallel acts were against each conspirator's self interest, that is, that the decision to act was not based on a good faith business judgment.' " (*Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors* (9th Cir. 1986) 786 F.2d 1400, 1407, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.160[2] (Matthew Bender)

3407. Horizontal and Vertical Restraints—Agreement Between Company and Its Employee

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[*Name of plaintiff***] claims that [***name of defendant's agent/employee/officer***], who is an [agent/employee/officer] of [***name of defendant***], had an agreement with [***name of defendant***]. You may find that [***name of defendant's agent/employee/officer***] and [***name of defendant***] had the required agreement only if you decide that [he/she/***nonbinary pronoun***] had a separate economic interest from [***name of defendant***] and acted in [his/her/***nonbinary pronoun***] own separate interest.**

New September 2003

Directions for Use

This instruction is intended to clarify the circumstances under which an employee, agent, or officer can form an unlawful agreement. The parties may wish to develop an example to illuminate the issue, such as an employee running a side business that may combine with the business of his employer to restrain trade.

Sources and Authority

- "[T]he Act prohibits the combination of resources of two or more independent interests for the purpose of restraining commerce and preventing market competition in the variety of ways listed in the statute." (*Lowell v. Mother's Cake and Cookie Co.* (1978) 79 Cal.App.3d 13, 23 [144 Cal.Rptr. 664], internal citation omitted.)
- "[A] corporation cannot conspire with itself or its agents for purposes of the antitrust laws." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 720 [187 Cal.Rptr. 797], internal citation omitted.)
- "It is also held that an individual acting alone through his agent or a corporation acting alone through its officers is not a combination in restraint of trade proscribed by the statute. The rationale of these decisions is that the acts of the agents or employees in the operation of the business are the acts of the principal . . . . We are of the opinion that the language of section 16720 of the Business and Professions Code contemplates concert of action by separate individuals or entities maintaining separate and independent interests . . . ." (*Bondi v. Jewels by Edwar, Ltd.* (1968) 267 Cal.App.2d 672, 677–678 [73 Cal.Rptr. 494], internal citations omitted.)
- "[I]t is well settled that a complaint for antitrust violations which fails to allege such concerted action by separate entities maintaining separate and independent interests is subject to demurrer." (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 266 [195 Cal.Rptr. 211], internal citations omitted.)
- "[Under the Sherman Act,] [t]he officers of a single firm are not separate

economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." (*Copperweld Corp. v. Independence Tube Corp.* (1984) 467 U.S. 752, 769 [104 S.Ct. 2731, 81 L.Ed.2d 628], footnote omitted.)

- "[M]any courts have created an exception for corporate officers acting on their own behalf." (*Copperweld Corp., supra,* 467 U.S. at p. 769, fn. 15.)
- "We . . . need not reach the broader issue extensively argued in the amicus brief, i.e., whether the *Copperweld* rule would apply to the Cartwright Act when the conspiracy or combination in restraint of trade is purely intra-enterprise and there is no coerced or unwitting compliance by the victim in the forbidden activity." (*MacManus v. A. E. Realty Partners* (1987) 195 Cal.App.3d 1106, 1111, fn. 4 [241 Cal.Rptr. 315].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

3408. Vertical Restraints—"Coercion" Explained

Coercion is conduct that interferes with the freedom of a reseller to sell in accordance with the reseller's own judgment. [It may include a threat by [*name of defendant*] to stop doing business with [[*name of plaintiff*]/a reseller] or to hold back any product or service important to [his/her/*nonbinary pronoun*/its] competition in the market.] A unilateral decision to deal or refuse to deal with a particular reseller does not constitute coercion.

Coercion may be proven directly or indirectly. In deciding whether there was coercion, you may consider, among other factors, the following:

(a) Whether [*name of defendant*] penalized or threatened to penalize [*name of plaintiff*] for not following [his/her/*nonbinary pronoun*/its] suggestions;

(b) Whether [*name of defendant*] made or threatened to make an important benefit depend on [*name of plaintiff*] following [his/her/*nonbinary pronoun*/its] suggestions;

(c) Whether [*name of defendant*] required [*name of plaintiff*] to get approval before doing something other than what [he/she/*nonbinary pronoun*/it] suggested; and

(d) The relative bargaining power of [*name of defendant*] and [*name of plaintiff*].

New September 2003; Revised May 2020

Directions for Use

In the bracketed portion of the first paragraph, the word "reseller" should be used if the plaintiff is not the reseller.

Sources and Authority

- "[T]he 'conspiracy' or 'combination' necessary to support an antitrust action can be found where a supplier or producer, by coercive conduct, imposes restraints to which distributors involuntarily adhere. If a 'single trader' pressures customers or dealers into adhering to resale price maintenance, territorial restrictions, exclusive dealing arrangements or illegal 'tie-ins,' an unlawful combination is established, irrespective of any monopoly or conspiracy, and despite the recognized right of a producer to determine with whom it will deal." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 720 [187 Cal.Rptr. 797], internal citations omitted.)
- "If a seller does no more than announce a policy designed to restrain trade, and declines to sell to those who fail to adhere to the policy, no illegal combination

is established." (*Kolling, supra,* 137 Cal.App.3d at p. 721, internal citations omitted.)

- "A manufacturer may choose those with whom it wishes to deal and unilaterally may refuse to deal with a distributor or customer for business reasons without running afoul of the antitrust laws. It will thus be rare for a court to infer a vertical combination solely from a business's unilateral refusal to deal with distributors or customers who do not comply with certain conditions. Nonetheless, there is a line of cases that supports the proposition that a manufacturer may form a 'conspiracy' or 'combination' under the antitrust laws if it imposes restraints on dealers or customers by coercive conduct and they involuntarily adhere to those restraints." (*Dimidowich v. Bell & Howell* (9th Cir. 1986) 803 F.2d 1473, 1478, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.52[5] (Matthew Bender)

3409. Vertical Restraints—Termination of Reseller

A supplier, acting independently, may choose those resellers to which it wishes to sell or not sell. It may announce to those resellers the terms of resale, including resale prices, in advance. The supplier may terminate those resellers that do not follow these terms as long as the supplier acts independently in doing so.

However, if a supplier coerces a reseller to follow its suggested terms of resale, and the reseller does so, this conduct is an agreement to restrain competition.

New September 2003

Directions for Use

There are circumstances where the terminated party that has combined with the supplier, other than as a buyer, may have a claim. For example, a customer that leases the supplier's product and then subleases it may also invoke this law. In such cases, this instruction should be adapted accordingly.

Sources and Authority

- "If a seller does no more than announce a policy designed to restrain trade, and declines to sell to those who fail to adhere to the policy, no illegal combination is established. Also, a supplier may suggest policies and use persuasion to obtain adherence. At the same time, an illegal combination may be found where a supplier secures compliance with announced policies in restraint of trade by means which go beyond mere announcement of policy and the refusal to deal. If, for example, the supplier takes 'affirmative action' to bring about the involuntary acquiescence of its dealers, an unlawful combination exists." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 721 [187 Cal.Rptr. 797], internal citations omitted.)
- "[A] manufacturer's announcement of a resale price policy and its refusal to deal with dealers who do not comply coupled with the dealers' voluntary acquiescence in the policy does not constitute an implied agreement or an unlawful combination as a matter of law. An unlawful combination arises, however, if the manufacturer goes beyond those measures by seeking communication of a dealer's acquiescence or agreement to secure the dealer's compliance, such as by means of coercion, and the dealer so communicates." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 372–373 [113 Cal.Rptr.2d 175], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.02 (Matthew

Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[3] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77 (Matthew Bender)

3410. Vertical Restraints—Agreement Between Seller and Reseller's Competitor

If a reseller coerces a supplier to refuse to do business with a competing reseller, and the supplier does so, this conduct is an agreement to restrain competition.

Refusing to do business with a reseller after receiving complaints by a competing reseller is not, by itself, an agreement to restrain competition. However, if a supplier receives such complaints and then agrees with the complaining reseller to act on them, that becomes an agreement to restrain competition.

New September 2003

Directions for Use

If the complaining competitor is also a named defendant, this instruction must be rewritten to reflect that circumstance.

Sources and Authority

- In *Bert G. Gianelli Distrib. Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1043–1044 [219 Cal.Rptr. 203], overruled on other grounds, *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 [46 Cal.Rptr.3d 668, 139 P.3d 56], the Court of Appeal held that proof that the reseller competing against the plaintiff complained to the seller about plaintiff's pricing and that the seller then took action against the plaintiff reseller in response to the complaint was sufficient to support a finding of a combination.
- "[T]he plaintiff must present evidence that tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently rather than collusively. Insufficient is a mere assertion that a reasonable trier of fact might disbelieve any denial by the defendants of an unlawful conspiracy." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 852 [107 Cal.Rptr.2d 841, 24 P.3d 493].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.02 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)

3411. Rule of Reason—Anticompetitive Versus Beneficial Effects

In deciding whether [*name of defendant*]'s challenged restraint had an anticompetitive or beneficial purpose or effect on competition, you should consider the results the restraint was intended to achieve or actually did achieve. In balancing these purposes or effects, you also may consider, among other factors, the following:

(a) The nature of the restraint;

(b) The probable effect of the restraint on the business involved;

(c) The history of the restraint;

(d) The reasonableness of the stated purpose for the restraint;

(e) The availability of less restrictive means to accomplish the stated purpose;

(f) The portion of the market affected by the restraint; [and]

(g) The extent of [*name of defendant*]'s market power; [and]

(h) [*Insert other relevant consideration*].

New September 2003

Sources and Authority

- "The basic purpose of the antitrust laws is to prevent undue restraints upon trade which have a significant effect on competition. A contract, combination, or conspiracy is an illegal restraint of trade if it constitutes a per se violation of the statute or has as its *purpose* or *effect* an unreasonable restraint of trade. The determination of the existence of such an illegal restraint of trade turns upon findings of fact and involves 'weigh[ing] all of the circumstances of a case.' " (*Corwin v. Los Angeles Newspaper Service Bur.* (1978) 22 Cal.3d 302, 314–315 [148 Cal.Rptr. 918, 583 P.2d 777], internal citations omitted and footnotes.)
- "Under the rule of reason, the court inquires into the nature and history of the restraint, as well as other relevant considerations." (*Reynolds v. California Dental Service* (1988) 200 Cal.App.3d 590, 596–597 [246 Cal.Rptr. 331], internal citations omitted.)
- "The 'rule of reason' permits certain restraints upon trade to be found reasonable. In order to determine whether the restrictions are reasonable, 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.' 'Whether a

restraint of trade is reasonable is a question of fact to be determined at trial.' " (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 727 [187 Cal.Rptr. 797], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

1 Antitrust Laws & Trade Regulation, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.74 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.05, 5.11, 5.17–5.22

3412. Rule of Reason—"Market Power" Explained

Market power is the ability to increase prices or reduce output without losing market share. The higher a seller's market share, the more likely it has market power.

In deciding whether a seller has market power, you should consider how difficult it is for a potential competitor to successfully enter the market. The more difficult it is to successfully enter a market, the more likely a seller has market power within that market. Market power is less likely to exist if it is not difficult for potential competitors to enter a market successfully.

Each market has two components: a product market and a geographic market.

New September 2003

Directions for Use

See instructions that follow explaining the concepts of product market and geographic market: CACI Nos. 3413, *Rule of Reason—"Product Market" Explained,* and 3414, *Rule of Reason—"Geographic Market" Explained.*

Sources and Authority

- "Proving that a restraint has anticompetitive effects often requires the plaintiff to ' "delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly," ' i.e., has market power." (*In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 157 [187 Cal.Rptr.3d 632, 348 P.3d 845].)
- " 'To meet his initial burden in establishing that the practice is an unreasonable restraint of trade, plaintiff must show that the activity is the type that restrains trade and that the restraint is likely to be of significant magnitude . . . . Ordinarily, a plaintiff to do this must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 542 [30 Cal.Rptr.2d 706], internal citations omitted.)
- "As a practical matter, market power is usually equated with market share. 'Since market power can rarely be measured directly by the methods of litigation, it is normally inferred from possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography.' " (*Redwood Theatres, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 704 [248 Cal.Rptr. 189], internal citation omitted.)
- "By reducing the substitutability of products, a high level of product differentiation results in relative inelasticity of cross-product demand. This

inelasticity creates opportunities for suppliers to manipulate the price and quantity of goods sold or to entrench their market position by creating barriers to entry in a market." (*Redwood Theatres, Inc., supra,* 200 Cal.App.3d at pp. 706–707, footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.74 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.05, 5.11, 5.17–5.22

3413. Rule of Reason—"Product Market" Explained

[*Name of plaintiff***] claims that the product market is [***insert claimed product market, e.g., "paper clips"***]. [***Name of defendant***] claims that the product market is [***insert claimed product market, e.g., "all paper fasteners"***].**

To define the product market, you must determine which [products/services] are in the market in which [*name of defendant***] is claimed to have carried out its restraint of trade.**

A product market consists of all [products/services] that can reasonably be used for the same purpose. [Products/services] are not in the same product market if users are not likely to substitute one for the other.

In deciding whether products are reasonable substitutes, you may consider whether a small increase in the price of one product would cause a considerable number of customers of that product to switch to a second product. If so, these two products are likely to be in the same market. If a significant increase in the price of one product does not cause a significant number of consumers to switch to a second product, these products are not likely to be in the same market.

New September 2003

Directions for Use

The word "services" should be substituted for "products" wherever that word appears if the case concerns services instead of products.

In some cases, an example may be helpful to illustrate the principle of "reasonable interchangeability," such as the following. Of course, this example may be modified to best suit the facts of the case.

> If the price of a loaf of whole wheat bread increases by 10 or 15 cents, a considerable number of customers may decide to purchase white bread instead. Although these products are somewhat different, they may be reasonably interchangeable for purposes of making toast and sandwiches. They are likely then to be in the same relevant product market. However, the relationship between whole wheat bread and other bread products may be different. Thus, customers may not believe hot dog buns as quite so interchangeable. Therefore, a 10, 15, or even 50-cent increase in the price of a loaf of wheat bread is not likely to cause too many customers to buy hot dog buns instead. These two products, then, are not likely to be in the same relevant market.

Sources and Authority

- "The United States Supreme Court has declared that the relevant market is determined by considering 'commodities reasonably interchangeable by

consumers for the same purposes.' Or, in other words, the relevant market is composed of products that have reasonable interchangeability for the purpose for which they are produced." (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1682 [60 Cal.Rptr.2d 195], internal citations omitted.)

- " 'Defining the market is not the aim of antitrust law; it merely aids the search for competitive injury. Once defined, the relevant market demarcates "objective benchmarks" for separating reasonable and unreasonable restraints . . . . It requires the claimant to demonstrate harm to the economy beyond the claimants' own injury . . . . In so doing, market definition furthers antitrust policy: the protection of competitive processes and not individual competitors.' " (*Marsh v. Anesthesia Services Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 496 [132 Cal.Rptr.3d 660].)
- "In antitrust law, the interchangeability of products is usually considered in the definition of markets; the boundary of a relevant market is defined by a significant degree of product differentiation." (*Redwood Theatres, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 705 [248 Cal.Rptr. 189].)
- "The definition of the relevant market is a question of fact for the jury." (*Theme Promotions, Inc. v. News Am. Mktg. FSI* (9th Cir. 2008) 546 F.3d 991, 1002.)

Secondary Sources

1 Antitrust Laws & Trade Regulation, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.74 (Matthew Bender)

3414. Rule of Reason—"Geographic Market" Explained

[*Name of plaintiff***] claims that the relevant geographic market is [***identify area, e.g., "the city of Los Angeles"***]. [***Name of defendant***] claims that the relevant geographic market is [***identify area, e.g., "the state of California"***].**

A geographic market is the area where buyers turn for alternate sources of supply or where sellers normally sell. The geographic market may or may not be the same as the area where the parties in this case currently compete or do business. It may be smaller or larger than that area.

A geographic market may be limited to the area where a product can be shipped and sold profitably. You may consider whether purchasing patterns are so different in the two areas that products sold in one area tend not to be sold in another. For example, this might occur if the cost of transporting a product into or out of the claimed geographic market is large compared to the value of the product.

In deciding whether products are in the same geographic market, you may consider whether a small increase in the price of the product in one area would cause a considerable number of customers in that area to buy the product in another area. If so, these two areas are likely to be in the same geographic market. If a significant increase in the price in one area does not cause a significant number of consumers to buy the product in another area, these areas are not likely to be in the same geographic market.

New September 2003

Directions for Use

The word "service" should be substituted for "product" wherever that word appears if the case concerns services rather than products.

In some cases an example may be helpful to illustrate the terms used. Regarding the significance of price increases, an example like that given in the Directions for Use in CACI No. 3413, *Rule of Reason—"Product Market" Explained*, may be adapted. Regarding the significance of customer purchasing patterns, the following example may suffice:

> Retail customers are not likely to travel too far to buy shoes. So, a product market defined as "shoe stores" is not likely to include shoe stores in two towns that are 25 miles from each other. However, if the product market is for an inventory of shoes purchased by shoe stores at wholesale, the geographic market is likely to be nationwide, since shoe stores are likely to purchase shoes no matter where companies distributing shoes are located.

Regarding the significance of transporting costs, the following example may suffice:

> Gravel, which is relatively cheap but heavy, and therefore relatively costly to ship, is likely to compete in a narrower geographic market than computer software, which, if valued by weight, is more costly per pound than gravel but also much less costly to ship per unit. Accordingly, a geographic market defined as a city or a region may be appropriate for assessing gravel competition, while a nationwide, or even worldwide, geographic market may be more appropriate for assessing the competition between software sellers.

Sources and Authority

- The "area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." (*U.S. v. Philadelphia National Bank* (1963) 374 U.S. 321, 359 [83 S.Ct. 1715, 10 L.Ed.2d 915].)
- "The term 'relevant market' encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the ' " 'area of effective' " competition . . . where buyers can turn for alternate sources of supply.' " (*Oltz v. St. Peter's Community Hospital* (9th Cir. 1988) 861 F.2d 1440, 1446, internal citations omitted.)

Secondary Sources

1 Antitrust Laws & Trade Regulation, Ch. 12, *The Per Se Rule and the Rule of Reason*, § 12.03 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.74 (Matthew Bender)

3415–3419. Reserved for Future Use

3420. Tying—Real Estate, Products, or Services—Essential Factual Elements (Bus. & Prof. Code, § 16720)

[*Name of plaintiff*] claims that there is an unlawful tying arrangement in which [*specify the particular real estate, product, or services*] is the tying product and [*specify the particular real estate, product, or services*] is the tied product. A "tying arrangement" is the sale of one product, called the "tying product," in which the buyer is required or coerced to also purchase a different, separate product, called the "tied product." For example, if a supermarket sells flour only if its customers also buy sugar, that supermarket would be engaged in tying. Flour would be the tying product and sugar the tied product.

To establish this claim against [*name of defendant*], [*name of plaintiff*] must prove all of the following:

1. **That [*tying item*] and [*tied item*] are separate and distinct;**
2. **That [*name of defendant*] will sell [*tying item*] only if the buyer also purchases [*tied item*], or that [*name of defendant*] sold [*tying item*] and required or otherwise coerced buyers to [also purchase [*tied item*]] [agree not to purchase [*tied item*] from any other supplier];**
3. **That [*name of defendant*] has sufficient economic power in the market for [*tying item*] to coerce at least some buyers of [*tying item*] into [purchasing [*tied item*]] [agreeing not to purchase [*tied item*] from a competitor of [*name of defendant*]];**
4. **That the conduct involves a substantial amount of sales, in terms of the total dollar value of [*tied item*];**
5. **That [*name of plaintiff*] was harmed; and**
6. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised October 2008

Directions for Use

This instruction is written for claims brought under Business and Professions Code section 16720. A claim under this section may involve products, land, or services as the tying item and products, land, or services as the tied item. Section 16720 applies a stricter test for unlawful tying than does Business and Professions Code section 16727. (See CACI No. 3421, *Tying—Products or Services—Essential Factual Elements*.) Therefore, if products are the tying item and products or services the tied item, CACI No. 3421 should be used instead.

The example given in the instruction involving flour and sugar was used in two

federal cases, *Northern Pacific Railway Co. v. United States* (1958) 356 U.S. 1, 5–6 [78 S.Ct. 514, 2 L.Ed.2d 545] and *Jefferson Parish Hospital District No. 2 v. Hyde* (1984) 466 U.S. 2, 12 [104 S.Ct. 1551, 80 L.Ed.2d 2], but also can help explain the Cartwright Act. The terms "product," "sell," and "purchase" used in this instruction may need to be modified to reflect the facts of the particular case, since tying arrangements challenged under Business and Professions Code section 16720 may involve services, real property, intangibles, leases, licenses, and the like.

An unlawful tying arrangement may also be shown if the buyer agrees not to purchase the tied product or service from any other supplier as a condition of obtaining the tying product. If the tying claim involves such a "tie-out" agreement, select the appropriate options in elements 2 and 3.

If the "tying product" is land and the "tied product" is a service or a commodity, logic suggests that the first element, i.e., their distinctness, is beyond dispute and that including this element may create confusion. In such a case, the court may recite this element and then advise the jury that it has been established by the plaintiff or is undisputed by the defendant. The word "parcels," "lots," or similar terms should be used if both items are land, as in these cases the separateness of the tying and tied land could be in dispute.

Sources and Authority

- "Trust" Defined. Business and Professions Code section 16720.
- "It is unlawful under California's Cartwright Act, as relevant here, for a seller to use its market power in one market to force or coerce a buyer to purchase its product or service in a distinct market in which the seller does not have such market power or to refrain from buying from the seller's competitor. The result of such coercion is called a tying arrangement, in which the market controlled by the seller consists of sales of the 'tying' product or service, and the market over which derivative power is exercised consists of sales of the 'tied' product or service. Where such an arrangement is found, it is illegal per se; that is, the seller's justifications for the arrangement are not measured by a rule of reasonableness." (*UAS Management, Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal.App.4th 357, 368–369 [87 Cal.Rptr.3d 81].)
- "Antitrust laws against tying arrangements seek to eradicate the evils that (1) competitors are denied free access to the market for the tied product not because the seller imposing the tying requirement has a better or less expensive tied product, but because of the seller's power or leverage in the market for the tying product; and (2) buyers are forced to forego their free choice between competing tied products. Tying arrangements are illegal per se 'whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product' and when 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.' " (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 184 [91 Cal.Rptr.2d 534], internal citations omitted.)

- "Even when not per se illegal, a tying arrangement violates the Cartwright Act if it unreasonably restrains trade." (*Morrison v. Viacom, Inc.* (1997) 52 Cal.App.4th 1514, 1524 [61 Cal.Rptr.2d 544], internal citations omitted.)
- "The threshold element for a tying claim is the existence of separate products or services in separate markets. Absent separate products in separate markets, the alleged tying and tied products are in reality a single product." (*Freeman, supra,* 77 Cal.App.4th at p. 184, internal citations omitted.)
- "Plaintiff alleged the conspiratorial agreement among defendants constituted an illegal tying arrangement per se pursuant to Business and Professions Code section 16720. 'The elements of a per se tying arrangement violative of section 16720 are: "(1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product or service; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; (3) a substantial amount of sale was affected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act." ' " (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 86 [76 Cal.Rptr.3d 73], footnotes and internal citations omitted.)
- " ' "[T]ying agreements serve hardly any purpose beyond the suppression of competition." They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." ' " (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 542 [161 Cal.Rptr. 811], internal citations omitted.)
- "[T]he burden of proving an illegal tying arrangement differs somewhat under section 16720 and section 16727. Under section 16727 the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if either the seller enjoys sufficient economic power in the tying product to appreciably restrain competition in the tied product or if a not insubstantial volume of commerce in the tied product is restrained. Under section 16720 standard, both conditions must be met." (*Suburban Mobile Homes, supra,* 101 Cal.App.3d at p. 549, internal citation omitted.)
- "The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury." (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

6 Antitrust Laws and Trade Regulation, Ch. 105, *California*, § 105.04 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[4] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.09[4], 5.15, 5.81, 5.82

3421. Tying—Products or Services—Essential Factual Elements (Bus. & Prof. Code, § 16727)

[*Name of plaintiff***] claims that there is an unlawful tying arrangement in which [***specify the particular product***] is the tying product and [***specify the particular product or services***] is the tied product. A "tying arrangement" is the sale of one product, called the "tying product," where the buyer is required or coerced to also purchase a different, separate product, called the "tied product." For example, if a supermarket sells flour only if its customers also buy sugar, that supermarket would be engaged in tying. Flour would be the tying product and sugar the tied product.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***tying product***] and [***tied product or service***] are separate and distinct;**
2. **That [***name of defendant***] will sell [***tying product***] only if the buyer also purchases [***tied product or service***], or that [***name of defendant***] sold [***tying product***] and required or otherwise coerced buyers to [also purchase [***tied product or service***]] [agree not to purchase [***tied product or service***] from any other supplier];**
3. **That [***insert one or both of the following***]:**

   [[*name of defendant***] has sufficient economic power in the market for [***tying product***] to coerce at least some consumers into purchasing [***tied product or service***];] [or]**

   [the claimed tying arrangement has restrained competition for a substantial amount of sales, in terms of total dollar volume of [*tied product or service***]];**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003

Directions for Use

This instruction applies to claims under Business and Professions Code section 16727, which applies only where the tying product consists of "goods, merchandise, machinery, supplies, [or] commodities" and the tied product consists of "goods, merchandise, supplies, commodities, or services." Section 16727 does not apply if the tying product is land or services, nor does it apply if the tied product is land.

The example given was used in two federal cases, *Northern Pacific Railway Co. v.*

United States (1958) 356 U.S. 1, 5–6 [78 S.Ct. 514, 2 L.Ed.2d 545] and *Jefferson Parish Hospital District No. 2 v. Hyde* (1984) 466 U.S. 2, 12 [104 S.Ct. 1551, 80 L.Ed.2d 2], but also can help explain the Cartwright Act. The terms "product," "sell," and "purchase" used in this instruction may need to be modified to reflect the facts of the particular case, since tying arrangements challenged under Business and Professions Code section 16720 may involve services, real property, intangibles, leases, licenses, and the like.

Also, an unlawful tying arrangement may be shown where the buyer agrees not to purchase the tied product or service from any other supplier as a condition of obtaining the tying product. If the tying claim involves such a "tie-out" agreement, this instruction must be modified accordingly.

Sources and Authority

- Covenants Prohibiting Dealing With Competitors Unlawful. Business and Professions Code section 16727.
- "It is unlawful under California's Cartwright Act, as relevant here, for a seller to use its market power in one market to force or coerce a buyer to purchase its product or service in a distinct market in which the seller does not have such market power or to refrain from buying from the seller's competitor. The result of such coercion is called a tying arrangement, in which the market controlled by the seller consists of sales of the 'tying' product or service, and the market over which derivative power is exercised consists of sales of the 'tied' product or service. Where such an arrangement is found, it is illegal per se; that is, the seller's justifications for the arrangement are not measured by a rule of reasonableness." (*UAS Management, Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal.App.4th 357, 368–369 [87 Cal.Rptr.3d 81].)
- "[T]he specific elements of an unlawful tying cause of action have been stated as follows: '(1) a tying agreement, arrangement or condition . . . whereby the sale of the tying product [or service] was linked to the sale of the tied product or service; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; (3) a substantial amount of sale was effected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act.' " (*UAS Management, Inc., supra*, 169 Cal.App.4th at p. 369, internal citation omitted.)
- "[T]he burden of proving an illegal tying arrangement differs somewhat under section 16720 and section 16727. Under section 16727 the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if either the seller enjoys sufficient economic power in the tying product to appreciably restrain competition in the tied product or if a not insubstantial volume of commerce in the tied product is restrained. Under the section 16720 standard, both conditions must be met." (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 549 [161 Cal.Rptr. 811], internal citation omitted.)
- "Case law construing Business and Professions Code section 16727 defines a

tying arrangement as 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.' Tying arrangements are illegal per se if the party has sufficient economic power and substantially forecloses competition in the relevant market. Even when not per se illegal, a tying arrangement violates the Cartwright Act if it unreasonably restrains trade." (*Morrison v. Viacom, Inc.* (1997) 52 Cal.App.4th 1514, 1524 [61 Cal.Rptr.2d 544], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

6 Antitrust Laws and Trade Regulation, Ch. 105, *California*, § 105.04 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[4] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.09[4], 5.15, 5.81, 5.82

3422. Tying—"Separate Products" Explained

In deciding whether [*tying product or service***] and [***tied product or service***] are separate and distinct, you should consider, among other factors, the following:**

(a) Whether competitors offer to sell [*tied product or service***] separately from [***tying product or service***] or only as a unit;**

(b) Whether the combined product is composed of varying assortments of component parts;

(c) Whether buyers are or can be charged separately for the [products/services]; and

(d) Whether [*name of defendant***] ever sells or offers to sell [***tied product or service***] separate from [***tying product or service***].**

Not all of these factors need be present in order for you to conclude that [*tying product or service***] and [***tied product or service***] are separate and distinct [***products or services, etc.***].**

New September 2003

Directions for Use

If an example is thought to be in order, users may wish to consider the following:

> For example, even though belt buckles are sometimes sold separately from belts, a belt buckle is normally considered a component of a belt. Therefore, a belt and buckle would normally be considered one product under the law in this case. On the other hand, while belts and wallets are sometimes packaged and sold together, they are not normally considered components of a single product and are normally purchased separately. Therefore, belts and wallets would normally be considered two separate products under the law in this case.

Sources and Authority

- "Although we have not found . . . any definitive test for the determination of this question, the following factors should be taken into account: (1) Whether competitors offer to sell the products or services separately or only as a unit. (2) Whether the combined product or service is composed of varying assortments of component parts. (3) Whether buyers are or can be charged separately for the allegedly separate products or services. (4) Whether the defendant ever sells or offers to sell the products or services separately." (*Corwin v. Los Angeles Newspaper Services Bur.* (1971) 4 Cal.3d 842, 858–859 [94 Cal.Rptr. 785, 484 P.2d 953], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.04 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[4] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.09[4], 5.15, 5.81, 5.82

3423. Tying—"Economic Power" Explained

In determining whether [*name of defendant*] has sufficient economic power in the market for [*tying item*], you may consider whether [*name of defendant*] has such a large share of the market for [*tying item*] that buyers do not have alternate sources of [*tying item*] or a reasonably available substitute. If [*name of defendant*] has economic power, it may be established even though it exists with respect to some, but not all, buyers.

You may also consider whether a buyer would be unable to easily locate a similar or equally desirable product in the marketplace. If buyers do not generally consider other products to be substitutes, this fact may give [*name of defendant*] economic power over its [*tied item*]. The fact that [*name of defendant*] can produce [*tying item*] in an efficient manner or at a high level of quality does not, by itself, mean that competitors do not offer a similar product.

New September 2003

Directions for Use

This instruction assumes that the plaintiff is seeking relief under Business and Professions Code section 16720. If the plaintiff is instead seeking relief under Business and Professions Code section 16727, this element is not required, so long as the plaintiff proves that the claimed tie-in affected a "not insubstantial amount" of sales of the tied product. If that proof is note summarily established or agreed to, then this instruction also must be read in such cases.

Sources and Authority

- "[W]e emphasize that the power over the tying product . . . can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some buyers in the market. As the cases unanimously underline, such crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." (*Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 544 [161 Cal.Rptr. 811], internal citations omitted.)
- "Decisions of the United States Supreme Court 'have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market.' " (*Corwin v. Los Angeles Newspaper Services Bur.* (1971) 4 Cal.3d 842, 858 [94 Cal.Rptr. 785, 484 P.2d 953], internal citation omitted.)
- "Tying arrangements are illegal per se 'whenever a party has sufficient economic

power with respect to the tying product to appreciably restrain free competition in the market for the tied product' and when 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.' " (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 184 [91 Cal.Rptr.2d 534], internal citations omitted.)

- "To plead this element, appellants must allege facts to show that 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.' " (*Morrison v. Viacom, Inc.* (1998) 66 Cal.App.4th 534, 542 [78 Cal.Rptr.2d 133], internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.04 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[4] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.09[4], 5.15, 5.81, 5.82

3424–3429. Reserved for Future Use

3430. "Noerr-Pennington" Doctrine

[*Name of defendant*] claims that [his/her/*nonbinary pronoun*/its] agreement with [*name of alleged coparticipant*] did not violate the law because [he/she/*nonbinary pronoun*/it] was trying in good faith to influence government action. [*Name of plaintiff*] claims that this action was a sham or a pretext to restrain competition.

To establish [his/her/*nonbinary pronoun*/its] claim, [*name of plaintiff*] must prove both of the following:

1. **That [*name of defendant*]'s actions before [*name of governmental body*] were undertaken without regard to the merits; and**
2. **That the reason [*name of defendant*] engaged in [*specify the petitioning activity, e.g., "filing an objection to an environmental impact report"*] was to use the [*specify the claimed process, e.g., "environmental agency approval"*] process to harm [*name of plaintiff*] by [*specify the manner of harm, e.g., "delaying [name of plaintiff]'s entry into the market"*], rather than to obtain a successful outcome from that process.**

New September 2003

Sources and Authority

- "The *Noerr-Pennington* doctrine provides that there is no antitrust liability under the Sherman Act for efforts to influence government which are protected by the First Amendment right to petition for redress of grievances, even if the motive behind the efforts is anticompetitive." (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 678 [156 Cal.Rptr.3d 90].)
- "The *Noerr-Pennington* doctrine immunizes legitimate efforts to influence a branch of government from virtually all forms of civil liability. The doctrine originated in the context of federal antitrust litigation. Stated generally, it was initially intended to ensure that 'efforts to influence government action are not within the scope of the Sherman Act, regardless of anticompetitive purpose or effect. [Citations.]' The *Noerr-Pennington* doctrine is reinforced by two constitutional considerations: 'the First Amendment right to petition the government . . . and comity, i.e., noninterference on the part of the courts with governmental bodies that may validly cause otherwise anticompetitive effects and with efforts intended to influence such bodies [citations].' " (*People ex rel. Harris v. Aguayo* (2017) 11 Cal.App.5th 1150, 1160–1161 [218 Cal.Rptr.3d 221], internal citations omitted.)
- "Stated most generally, the *Noerr-Pennington* doctrine declares that efforts to influence government action are not within the scope of the Sherman Act,

regardless of anticompetitive purpose or effect." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 320 [216 Cal.Rptr. 718, 703 P.2d 58], internal citations omitted.)

- " 'The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.' " (*Hi-Top Steel Corp. v. Lehrer* (1994) 24 Cal.App.4th 570, 576 [29 Cal.Rptr.2d 646], internal citations omitted.)
- "[B]ecause *Noerr-Pennington* protects federal constitutional rights, it applies in all contexts, even where a state law doctrine advances a similar goal." (*Theme Promotions, Inc. v. News Am. Mktg. FSI* (9th Cir. 2008) 546 F.3d 991, 1007.)
- "While the *Noerr-Pennington* doctrine was 'formulated in the context of antitrust cases,' it has been applied in cases involving other types of civil liability, including liability for interference with contractual relations or prospective economic advantage or unfair competition." (*Hernandez, supra*, 215 Cal.App.4th at p. 679, internal citations omitted.)
- "The *Noerr-Pennington* doctrine has been extended to preclude virtually all civil liability for a defendant's petitioning activities before not just courts, but also before administrative and other governmental agencies." (*People ex rel. Harris, supra,* 11 Cal.App.5th at p. 1161.)
- "An exception to the doctrine arises when efforts to influence government are merely a sham; such efforts are not protected by the *Noerr-Pennington* doctrine and are subject to antitrust liability." (*Hi-Top Steel Corp., supra,* 24 Cal.App.4th at pp. 574–575, internal citations omitted.)
- "Efforts to influence governmental agencies ' "amount to a sham when though 'ostensibly directed toward influencing governmental action, . . . [they are] actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . ." [Citation.]' " (*People ex rel. Harris, supra,* 11 Cal.App.5th at p. 1161.)
- "[T]he sham exception 'encompasses situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.' It 'involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, not one "who 'genuinely seeks to achieve his governmental result, but does so through improper means.' " ' " (*Hi-Top Steel Corp., supra,* 24 Cal.App.4th at p. 577, internal citations omitted.)
- "[W]e hold the sham exception to the *Noerr-Pennington* doctrine is applicable in California." (*Hi-Top Steel Corp., supra,* 24 Cal.App.4th at p. 579.)
- "[W]e identified three circumstances in which the sham litigation exception might apply: first, where the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful; second, where the conduct involves a series

of lawsuits 'brought pursuant to a policy of starting legal proceedings without regard to the merits' and for an unlawful purpose; and third, if the allegedly unlawful conduct 'consists of making intentional misrepresentations to the court, litigation can be deemed a sham if 'a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.' " (*Sosa v. DIRECTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 938, internal citations omitted.)

- "The United States Supreme Court has set forth a two-part test for determining whether a defendant's petitioning activities fall within the so-called 'sham exception' to the *Noerr-Pennington* doctrine: 'first, it "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; second, the litigant's subjective motivation must "conceal an attempt to interfere *directly with the business relationships of a competitor . . . through the use [of] the governmental process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." [Citation.]' " (*People ex rel. Harris, supra,* 11 Cal.App.5th at p. 1161, original italics.)
- "Even though [plaintiff] must ultimately prove the existence of a 'sham' by clear and convincing evidence, it need only show that there is a genuine issue of material fact to avoid summary judgment." (*Kaiser Found. Health Plan, Inc. v. Abbott Labs, Inc.* (9th Cir. 2009) 552 F.3d 1033, 1044.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.10[1][h] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.164[5][a] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.73 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.41

3431. Affirmative Defense—*In Pari Delicto*

[*Name of defendant*] claims that [*name of plaintiff*] may not recover because [*name of plaintiff*] is equally responsible for the harmful conduct. To succeed, [*name of defendant*] must prove all of the following:

1. **That [*name of plaintiff*] and [*name of defendant*] have substantially equal economic strength;**
2. **That [*name of plaintiff*] is at least equally responsible for the harmful conduct as [*name of defendant*]; and**
3. **That [*name of plaintiff*] was not compelled by economic pressure to engage in the harmful conduct.**

New September 2003

Sources and Authority

- "Cases . . . have declared that if a plaintiff does not bear equal responsibility for establishing the illegal scheme, or if he is compelled by economic pressures to accept such an agreement, he cannot be barred from recovering because he participated therein." (*Mailand v. Burckle* (1978) 20 Cal.3d 367, 381 [143 Cal.Rptr. 1, 572 P.2d 1142], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 602–621

8 Antitrust Laws & Trade Regulation, Ch. 164, *Pleadings in Antitrust Actions*, § 164.05[2][b] (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.91

3432–3439. Reserved for Future Use

3440. Damages

If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***/its] claim against [***name of defendant***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

The amount of damages must include an award for all harm that was caused by [*name of defendant***], even if the particular harm could not have been anticipated.**

[*Name of plaintiff***] must prove the amount of [his/her/***nonbinary pronoun***/its] damages. However, [***name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of damages claimed by [*name of plaintiff***]:**

1. **[Loss of reasonably anticipated sales and profits];**
2. **[An increase in [***name of plaintiff***]'s expenses];**
3. **[***Insert other applicable item of damage***].**

New September 2003

Sources and Authority

- Private Right of Action for Antitrust Violation. Business and Professions Code section 16750(a).
- "The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated 'standing to sue' requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the 'target area' of the antitrust violation, and not by one incidentally injured thereby. An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723–724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)
- " '[D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts . . . . [I]n the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in

prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." ' " (*Diesel Elec. Sales and Serv., Inc. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 219–220 [20 Cal.Rptr.2d 62], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 615

6 Antitrust Laws and Trade Regulation, Ch. 105, *California*, § 105.09 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.172 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.34[3] (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.45, 5.48–5.50, 5.66[5], 5.67–5.75

3441–3499. Reserved for Future Use

VF-3400. Horizontal and Vertical Restraints (Use for Direct Competitors)—Price Fixing

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [and [***name(s) of alleged coparticipant(s)***]] agree to fix [or] [set/raise/lower/maintain/stabilize] prices [or other terms of trade] charged or to be charged for [***product/service***]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **What are [***name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3400, *Horizontal and Vertical Restraints (Use for Direct Competitors)—Price Fixing—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award

prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3401. Horizontal Restraints (Use for Direct Competitors)—Allocation of Trade or Commerce

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We answer the questions submitted to us as follows:

1. **Were or are [***name of defendant***] and [***name of alleged coparticipant***] competitors in the same or related markets?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] and [***name of alleged coparticipant***] agree to allocate or divide [customers/territories/products]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s and [***name of alleged coparticipant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [***name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3401, *Horizontal Restraints (Use for Direct Competitors)—Allocation of Trade or Commerce—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may

need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3402. Horizontal Restraints (Use for Direct Competitors)—Allocation of Trade or Commerce—Affirmative Defense—*In Pari Delicto*

We answer the questions submitted to us as follows:

1. **Were or are [***name of defendant***] and [***name of alleged coparticipant***] competitors in the same or related markets?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] and [***name of alleged coparticipant***] agree to allocate or divide [customers/territories/products]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] and [***name of defendant***] have substantially equal economic strength?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, skip questions 4 and 5 and answer question 6.

4. **Was [***name of plaintiff***] at least equally responsible for the harmful conduct as [***name of defendant***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. **Was [***name of plaintiff***] compelled by economic pressure to enter into the agreement?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3401, *Horizontal Restraints (Use for Direct Competitors)—Allocation of Trade or Commerce—Essential Factual Elements,* and CACI No. 3431, *Affirmative Defense—In Pari Delicto.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories.*

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest.* This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] sell [***products***] directly in competition with [***name of plaintiff***] to a significant portion of [***name of plaintiff***]'s customers or potential customers?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] [stop doing business with/refuse to deal with/restrain] [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of plaintiff***]'s refusal to agree to [***name of defendant***]'s [***specify the claimed restraint, e.g., territorial or customer restrictions***] a motivating reason for the decision to [end business with/refuse to deal with/restrain] [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3402, *Horizontal Restraints—Dual Distributor Restraints—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories.*

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest.* This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3404. Horizontal Restraints (Use for Direct Competitors)—Group Boycott—Per Se Violation

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [and [***name of alleged coparticipant***]] agree to [***specify claimed refusal to deal, e.g., "refuse to sell to [name of plaintiff]"***]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **What are [***name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3403, *Horizontal Restraints (Use for Direct Competitors)—Group Boycott—Per Se Violation—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801,

814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [and [***name of alleged coparticipant***]] agree to [***describe conduct, e.g., "formulate an arbitrary membership limitation rule with [identify other participant[s]]"***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was the purpose or effect of [***name of defendant***]'s conduct to restrain competition?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did the anticompetitive effect of the restraint[s] outweigh any beneficial effect on competition?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff***]'s damages? $**_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3404, *Horizontal Restraints—Group Boycott—Rule of Reason—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3406. Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)—Other Unreasonable Restraint of Trade—Rule of Reason

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [and [***name of alleged coparticipant[s]***]] agree to [***describe conduct constituting an unreasonable restraint of trade***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was the purpose or effect of [***name of defendant***]'s conduct to restrain competition?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did the anticompetitive effect of the restraint[s] outweigh any beneficial effect on competition?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff***]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify

the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3405, *Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)—Other Unreasonable Restraint of Trade—Rule of Reason—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3407. Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)—Other Unreasonable Restraint of Trade—Rule of Reason Affirmative Defense—"Noerr-Pennington" Doctrine

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [and [***name of alleged coparticipant***]] agree to [***describe conduct constituting an unreasonable restraint of trade***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Were [***name of defendant***]'s actions before [***name of governmental body***] undertaken without regard to the merits?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then skip question 3 and answer question 4. If you answered no, answer question 3.

3. **Was the reason [***name of defendant***] engaged in [***specify the petitioning activity, e.g., "filing an objection to an environmental impact report"***] to use the [***specify the claimed process, e.g., "environmental agency approval"***] process to harm [***name of plaintiff***] by [***specify the manner of harm, e.g., "delaying [name of plaintiff]'s entry into the market"***], rather than to obtain a successful outcome from that process?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was the purpose or effect of [***name of defendant***]'s conduct to restrain competition?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did the anticompetitive effect of the restraint[s] outweigh any beneficial effect on competition?**

   _____ **Yes** _____ **No**

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. **What are [*name of plaintiff*]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3405, *Horizontal and Vertical Restraints (Use for Direct Competitors or Supplier/Reseller Relations)—Other Unreasonable Restraint of Trade—Rule of Reason—Essential Factual Elements,* and CACI No. 3430, *"Noerr-Pennington" Doctrine.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3408. Tying—Real Estate, Products, or Services (Bus. & Prof. Code, § 16720)

We answer the questions submitted to us as follows:

1. **Are [*tying item*] and [*tied item*] separate and distinct?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] sell [*tying item*] only if the buyer also purchased [*tied item*], or did [*name of defendant*] sell [*tying item*] and require or otherwise coerce buyers to [also purchase [*tied item*]] [agree not to purchase [*tied item*] from any other supplier]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] have sufficient economic power in the market for [*tying item*] to coerce at least some buyers of [*tying item*] into [purchasing [*tied item*]] [agreeing not to purchase [*tied item*] from a competitor of [*name of defendant*]]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did the conduct involve a substantial amount of sales, in terms of the total dollar value of [*tied product or service*]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3420, *Tying—Real Estate, Products, or Services—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories.*

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest.* This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3409. Tying—Products or Services (Bus. & Prof. Code, § 16727)

We answer the questions submitted to us as follows:

1. **Are [*tying item*] and [*tied product or service*] separate and distinct?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] sell [*tying product*] only if the buyer also purchased [*tied product or service*], or did [*name of defendant*] sell [*tying product*] and require or otherwise coerce buyers [to also purchase [*tied product or service*]] [to agree not to purchase [*tied product or service*] from any other supplier]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Does [*name of defendant*] have sufficient economic power in the market for [*tying product*] to coerce at least some consumers into purchasing [*tied product or service*]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [*name of plaintiff*]'s damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify

the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3421, *Tying-Products or Services—Essential Factual Elements.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If alternative grounds are asserted regarding question 3, this question can be modified according to element 3 of CACI No. 3421.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3410–VF-3499. Reserved for Future Use

EMINENT DOMAIN

3500. Introductory Instruction

Public agencies such as the [*name of condemnor*] have the right to take private property for public use if they pay the owner just compensation.

New September 2003

Sources and Authority

- Constitutional Right of Eminent Domain. Article I, section 19, of the California Constitution.
- Just Compensation. The Fifth Amendment of the U.S. Constitution.
- Acquisition of Property for Public Use. Code of Civil Procedure section 1240.010.
- "The power of eminent domain arises as an inherent attribute of sovereignty that is necessary for government to exist. Properly exercised, the eminent domain power effects a compromise between the public good for which private land is taken, and the protection and indemnification of private citizens whose property is taken to advance that public good. The Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, and California Constitution, article I, section 19 require this protection of private citizens' property." (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (2000) 83 Cal.App.4th 556, 561 [99 Cal.Rptr.2d 729], internal citation omitted.)
- "Our Constitution thus guarantees landowners the right to have a jury determine the amount of just compensation owed for a taking." (*City of Perris v. Stamper* (2016) 1 Cal.5th 576, 593 [205 Cal.Rptr.3d 797, 376 P.3d 1221].)
- "This 'just compensation' clause in the California Constitution applies to the state's exercise of its eminent domain power, constraining it by requiring that when the state takes private property for public use, the private property owner is justly compensated." (*City of Oroville v. Superior Court* (2019) 7 Cal.5th 1091, 1102 [250 Cal.Rptr.3d 803, 446 P.3d 304].)
- " 'An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemner. The principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action.' " (*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 377, fn. 4 [41 Cal.Rptr.2d 658, 895 P.2d 900], internal citations omitted.)
- "The principle sought to be achieved by this concept 'is to reimburse the owner for the property interest taken and to place the owner in as good a position pecuniarily as if the property had not been taken.' " (*Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach* (1983) 140 Cal.App.3d 690, 705 [189 Cal.Rptr. 749], internal citation omitted, disapproved

on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp*. (1997) 16 Cal.4th 694, 720–721 [66 Cal.Rptr.2d 630, 941 P.2d 809].)

- "We have long held that this jury right applies only to determining the appropriate amount of compensation, not to any other issues that arise in the course of condemnation proceedings." (*City of Perris, supra,* 1 Cal.5th at p. 593.)
- "Although the measure of compensation that is 'just' for purposes of both the federal and state takings clause is often determined by the 'fair market value' of what has been lost, both federal and state takings cases uniformly recognize that the fair market value standard is not applicable in all circumstances and that there is no rigid or fixed standard that is appropriate in all settings." (*Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 203–204 [204 Cal.Rptr.3d 770, 375 P.3d 887].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1360, 1367

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 4.1

1 Nichols on Eminent Domain, Ch. 1, *The Nature, Origin, Evolution and Characteristics of the Power*, §§ 1.1, 1.11 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.12 (Matthew Bender)

3501. "Fair Market Value" Explained

Just compensation includes the fair market value of the property as of [*insert date of valuation*]. Fair market value is the highest price for the property that a willing buyer would have paid in cash to a willing seller, assuming that:

1. **There is no pressure on either one to buy or sell; and**
2. **The buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.**

New September 2003; Revised June 2015

Directions for Use

Do not give this instruction if there is no relevant market for the property. Instead, instruct on the appropriate alternative method of valuation.

The jury determines the fair market value of the property based on the highest and best use for which the property is geographically and economically adaptable. (See *San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1288 [175 Cal.Rptr.3d 858].) If the highest and best use is disputed, give CACI No. 3502, *"Highest and Best Use" Explained*.

Sources and Authority

- "Fair Market Value" Defined. Code of Civil Procedure section 1263.320.
- Property With No Relevant Market. Evidence Code section 823.
- "The measure of compensation in a condemnation case 'is the fair market value of the property taken.' 'The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.' 'A jury should consider all those factors, including lawful legislative and administrative restrictions on property, which a buyer would take into consideration in arriving at the fair market value.' " (*City of Perris v. Stamper* (2016) 1 Cal.5th 576, 598–599 [205 Cal.Rptr.3d 797, 376 P.3d 1221].)
- " 'Market value,' in turn, traditionally has been defined as 'the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.' " (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43 [104 Cal.Rptr. 1, 500 P.2d 1345], internal citation omitted.)

- "Recognized alternatives to the market data approach to valuation are reproduction or replacement costs less depreciation or obsolescence." (*Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach* (1983) 140 Cal.App.3d 690, 698 [189 Cal.Rptr. 749], internal citation omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 720–721 [66 Cal.Rptr.2d 630, 941 P.2d 809].)
- Alternative methods of valuation particularly apply to properties such as schools, churches, cemeteries, parks, and utilities for which there is no relevant market; therefore these properties may be valued on any basis that is just and equitable. (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1060 [20 Cal.Rptr.2d 675].)
- "However, when there is 'a market for this property in the private marketplace as demonstrated by the evidence,' the trial court errs in admitting evidence of a valuation methodology that ignores the developed market for a particular type of property." (*Central Valley Gas Storage, LLC v. Southam* (2017) 11 Cal.App.5th 686, 692 [217 Cal.Rptr.3d 715].)
- "[T]he fair market value of property taken has not been limited to the value of the property as used at the time of the taking, but has long taken into account the 'highest and most profitable use to which the property might be put in the reasonable near future, to the extent that the probability of such a prospective use affects the market value.' " (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 744 [25 Cal.Rptr.2d 480, 863 P.2d 725], internal citations omitted.)
- "In condemnation actions, California courts have long recognized what has been referred to as the 'appraisal trinity.' This term encompasses three methods or approaches used by appraisers to determine the fair market value of real estate: (1) the current cost of reproducing (or replacing) the property less depreciation from all sources; (2) the 'market data' value as indicated by recent sale of comparable properties; and (3) the 'income approach,' or the value of which the property's net earning power will support based upon the capitalization of net income. In 1965, the state Legislature codified these three approaches in Evidence Code section 815–820. A qualified appraiser in an eminent domain proceeding may use one or more of these valuation techniques to ascertain the fair market value of the condemned property." (*Redevelopment Agency of the City of Long Beach, supra*, 140 Cal.App.3d at p. 705, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1368

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.1–4.2

4 Nichols on Eminent Domain, Ch. 12, *Valuation Generally*, §§ 12.01–12.05, Ch. 13, *Fair Market Value—Physical Character*, § 13.01 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.135 (Matthew Bender)

3502. "Highest and Best Use" Explained

You must determine fair market value based on the property's highest and best use. The highest and best use is the most profitable legally permissible use for which the property is physically, geographically, and economically adaptable.

Do not consider any personal value of the property to [*name of property owner***] or [his/her/***nonbinary pronoun***/its] need for the property. Also, do not consider the particular need of [***name of condemnor***] for the property.**

New September 2003; Revised June 2015

Directions for Use

Give this instruction if the owner claims that the property's fair market value should be determined based on some use for which the property is geographically and economically adaptable other than the current use. (See *San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1288 [175 Cal.Rptr.3d 858].)

Sources and Authority

- "The property taken is valued based on the highest and best use for which it is geographically and economically adaptable." (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1058 [20 Cal.Rptr.2d 675], internal citation omitted.)
- "The highest and best use is defined as 'that use, among the possible alternative uses, that is physically practical, legally permissible, market supportable, and most economically feasible . . . . The appraiser must make a determination of highest and best use as part of the appraisal process.' " (*San Diego Gas & Electric Co.*, *supra*, 228 Cal.App.4th at p. 1289.)
- "It is long settled that the condemned property may not be valued based on its special value to the property owner . . . . Thus, the cases have generally held that a property owner may not value his property based upon its use for a projected special purpose or for a hypothetical business." (*County of San Diego, supra*, 16 Cal.App.4th at pp. 1058–1059.)
- "Just as the property may not be valued based on its special value to the owner, the property may not be valued on the basis of its special value to the government." (*County of San Diego, supra*, 16 Cal.App.4th at p. 1061, internal citation omitted.)
- "Simply stated, purchasers of property that is known to be condemned are prevented from inflating the value of the property by conjecturing what the condemner will actually pay for the property." (*People ex rel. Dept. of Water Resources v. Andresen* (1987) 193 Cal.App.3d 1144, 1156 [238 Cal.Rptr. 826], internal citation omitted.)

- "In condemnation cases it is a firmly established principle that the compensation payable is to be based upon the loss to the owner rather than upon the benefit received by the taker. The California Supreme Court early stated that 'it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land.' This has been construed to mean that '[the] beneficial purpose to be derived by the condemnor's use of the property is not to be taken into consideration in determining market values, for it is wholly irrelevant.' This rule, however, does not mean that evidence of the highest and best use of the property must be excluded simply because that is the use that the condemner intends to make of the property . . . . [I]n *City of Los Angeles v. Decker*, the court reiterated that it is improper to award compensation based upon the value to the condemner, but held that it was proper in that case to consider the value of the property for parking purposes (the highest and best use) despite the fact that the city intended to use it for such purposes." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1127 [234 Cal.Rptr. 630], internal citations omitted.)
- " 'The right to future exploitation of undeveloped natural resources has a present and ascertainable value for purposes of eminent domain.' Accordingly, ' "[i]n determining just compensation in eminent domain proceedings, the existence of valuable mineral deposits in the land taken constitutes an element which may be considered insofar as it influences the market value of the land." [Citations.]' " (*San Diego Gas & Electric Co.*, *supra*, 228 Cal.App.4th at p. 1289, internal citation omitted.)
- "[Defendant] also argues that the developer's rule precluded defendants' experts from testifying that the highest and best use of the property was a mining operation because such an operation did not currently exist on the property. We reject this assertion as a condemnee may present evidence that the property is suitable for a particular purpose even if the property has not yet been developed to that particular highest and best use. Moreover, ample authority supported the income approach used by defendants where, as here, the property at issue contains undeveloped natural resources." (*San Diego Gas & Electric Co.*, *supra*, 228 Cal.App.4th at p. 1293, internal citation omitted.)
- "Once the highest and best use of the property is determined, one of several approaches to valuation must be selected. Evidence Code sections 815–820 set forth various methodologies sanctioned for use by valuation experts, including considering sales contracts of comparable properties and capitalizing income from the subject land and its existing improvements." (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 926 [62 Cal.Rptr.2d 121], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1368

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.9–4.21

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and*

Inverse Condemnation, § 247.134 (Matthew Bender)

3503. Change in Zoning or Land Use Restriction

A determination of the property's highest and best use is not necessarily limited by current zoning or land use restrictions. If you decide that as of [*insert date of valuation*] there was a reasonable probability of a change in zoning or other use restrictions in the near future, then you must determine the highest and best use of the property based on that change.

New September 2003

Sources and Authority

- "Where due to zoning restrictions the condemned property is not presently available for use to which it is otherwise geographically and economically adaptable, the condemnee is entitled to show a reasonable probability of a zoning change in the near future and thus to establish such use as the highest and best use of the property . . . . 'The general rule is that present market value must be determined only by uses for which land is adaptable and available. However, where land sought to be condemned is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but the evidence tends to show a "reasonable probability" of a change in the near future, the effect of such probability on the minds of purchasers generally may be taken into consideration in fixing present market value . . . .' " (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 867–868 [135 Cal.Rptr. 647, 558 P.2d 545], internal citations omitted.)
- "A determination of the property's highest and best use is not necessarily limited to the current zoning or land use restrictions imposed on the property; the property owner 'is entitled to show a reasonable probability of a zoning [or other change] in the near future and thus to establish such use as the highest and best use of the property.' " (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1058 [20 Cal.Rptr.2d 675], internal citations omitted.)
- "[T]he determination as to whether or not there is a reasonable probability of a [use] change is ordinarily a question of fact for the jury." (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 967 [62 Cal.Rptr.3d 623, 161 P.3d 1175].)
- "Before such evidence may be presented to the jury, however, the trial court must first determine whether there is sufficient evidence that would permit a jury to conclude there is a reasonable probability of rezoning in the near future. Evidence of a reasonable probability of a zoning change in the near future 'must at least be in accordance with the usual minimum evidentiary requirements, and that which is purely speculative, wholly guess work and conjectural, is

inadmissible.' The evidence, if credited, must also be sufficient to establish that rezoning is reasonably probable. If the trial court determines that no fact finder could find a reasonable probability of rezoning on the record presented, it may exclude all evidence and opinions of value based on a use other than that authorized by the existing zoning. If, on the other hand, the trial court determines that there is sufficient evidence of a reasonable probability of rezoning to warrant submitting the issue to the jury, it is for the jury, in considering the weight to be given valuation testimony based upon a reasonable probability of rezoning, to determine whether there was a reasonable probability of rezoning and, if so, its effect on the market value of the property. Thus, before a jury may even reach the question whether a use which was unauthorized by the existing zoning otherwise meets the criteria of a highest and best use, the jury must first find that there was a reasonable probability of rezoning to permit that use. Once that has been established, neither party bears the burden to persuade the fact finder of the effect of this probability on the valuation of the property." (*Metropolitan Water Dist. of So. California, supra,* 41 Cal.4th at p. 968, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1369

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.12–4.17

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, § 508.13; Ch. 512, *Compensation*, § 512.10 et seq. (Matthew Bender)

4 Nichols on Eminent Domain, Ch. 12C, *Absence of Market Value and Effect of Restrictions*, §§ 12C.01–12C.03, Ch. 13, *Fair Market Value—Physical Character*, §§ 13.04, 13.29 (Matthew Bender)

3504. Project Enhanced Value

You must consider any increase or decrease in the property's fair market value caused by public knowledge of [*insert entity's purpose for condemning the property***] until [***insert date of property's probable inclusion***]. You may not consider any change in value caused by [***insert entity's purpose for condemning the property***] after that date. You may, however, consider other factors that changed the property's value after [***insert date of property's probable inclusion***], but before [***insert date of valuation***].**

New September 2003

Sources and Authority

- Exclusions From Fair Market Value. Code of Civil Procedure section 1263.330.
- "A legitimate element of just compensation lies in the increase in value resulting from a reasonable expectation that a particular piece of property will be outside a proposed public improvement, and thus will reap the benefits of that improvement." (*Merced Irrigation Dist. v. Woolstenhulme* (1971) 4 Cal.3d 478, 488 [93 Cal.Rptr. 833, 483 P.2d 1].)
- "The 'market value' of a given piece of property, of course, reflects a great variety of factors independent of the size, nature, or condition of the property itself. The general character of the neighborhood, the quality of the public and private services, and the availability of public facilities all play important roles in establishing market value. Thus, widespread knowledge of a proposed public improvement, planned for an indefinite location within a given region or neighborhood, will frequently cause the market value of land in the region or neighborhood to rise." (*Merced Irrigation Dist., supra,* 4 Cal.3d at p. 488.)
- "[W]e now hold that increases in value, attributable to a project but reflecting a reasonable expectation that property will not be taken for the improvement, should properly be considered in determining 'just compensation.' " (*Merced Irrigation Dist., supra,* 4 Cal.3d at p. 495.)
- "[I]n computing 'just compensation' in such a case, a jury should only consider the increase in value attributable to the project up until the time when it became probable that the land would be needed for the improvement." (*Merced Irrigation Dist., supra,* 4 Cal.3d at p. 498.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1372

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.3–4.8

3 Nichols on Eminent Domain, Ch. 8A, *Enhancement*, §§ 8A.01–8A.02 (Matthew Bender)

4 Nichols on Eminent Domain, Ch. 12B, *Valuation of the Fee Interest*, § 12B.17 (Matthew Bender)

3505. Information Discovered after Date of Valuation

In determining fair market value you must consider any condition that affects the value of the property if the condition existed on [*insert date of valuation***] but was discovered after that date.**

New September 2003

Sources and Authority

- "[W]hile evidence of a change in the condition of the property after the date of valuation may not be admissible . . . , information about the condition of the property on the date of valuation which happens to be discovered after that date must be considered. In effect, the parties are presumed to know all relevant information available at the time of trial, even if it could not reasonably have been discovered until after the date of valuation." (*San Diego Water Authority v. Mireiter* (1993) 18 Cal.App.4th 1808, 1814 [23 Cal.Rptr.2d 455].)
- "The California statutory scheme and the overwhelming weight of authority supports the conclusion that relevant factual discoveries up to and including the date of trial must be taken into account, regardless of whether they inflate or deflate the value of the property. Accordingly, the trial court erred in failing to instruct the jury it was required to consider the newly discovered information in determining the compensation due defendants, and reversal is therefore required." (*San Diego County Water Authority, supra,* 18 Cal.App.4th at pp. 1817–1818.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1369

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 4.23

4 Nichols on Eminent Domain, Ch. 12A, *Market Value—Time of Valuation*, § 12A.01[7] (Matthew Bender)

3506. Effect of Improvements

In determining the fair market value of the property you must consider both the value of the land and whether any buildings, machinery, or other equipment attached to the property increase or decrease the value of the property.

New September 2003

Directions for Use

The court decides as a legal issue whether an improvement is a fixture "pertaining to the realty." (Code Civ. Proc., § 1260.030.)

Sources and Authority

- Improvements to Property Compensable. Code of Civil Procedure section 1263.210(a).
- "Improvements" Defined. Code of Civil Procedure section 1263.205(a).
- Removal of Property Without Substantial Economic Loss. Code of Civil Procedure section 1263.205(b).
- "[T]he market value of land and the improvements thereon is the market value thereof viewed as a whole and not separately." (*South Bay Irrigation Dist. v. California-American Water Co.* (1976) 61 Cal.App.3d 944, 986 [133 Cal.Rptr. 166], internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1362, 1363

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 4.55

4 Nichols on Eminent Domain, Ch. 13, *Fair Market Value—Physical Character*, §§ 13.02, 13.12 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.136 (Matthew Bender)

3507. Personal Property and Inventory

Just compensation also includes the loss of any inventory or personal property caused by the taking. [*Name of property owner***] may be entitled to the retail value of the inventory or personal property if the property is unique and not readily replaceable. Otherwise, [***name of property owner***] is entitled to wholesale value.**

New September 2003

Sources and Authority

- "The Fifth Amendment of the United States Constitution, as applied to the states by the Fourteenth Amendment, conditions the power of eminent domain upon the payment of 'just compensation.' That constitutional requirement makes no distinction between real property and personal property. If personal property is taken by the government in the exercise of its eminent domain power, it must compensate the owner." (*City of Needles v. Griswold* (1992) 6 Cal.App.4th 1881, 1891 [8 Cal.Rptr.2d 753].)
- "We further acknowledge that where a condemner takes certain real property and the removal or relocation of either tangible or intangible personal property is impossible due to the condemnatory act, the owner is entitled to be justly compensated for the loss of property, regardless of its nature." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 533 [86 Cal.Rptr.2d 473], internal citations omitted.)
- "The general rule is that the Constitution does not require compensation for personal property not affixed to the condemned realty. Movable items of personal property are not 'taken' by the public entity when it condemns real property or a business; instead, under the Relocation Assistance Act, the public entity compensates the owner for the cost of moving the personal property to a new site." (*County of San Diego v. Cabrillo Lanes, Inc.* (1992) 10 Cal.App.4th 576, 583 [12 Cal.Rptr.2d 613].)
- "Business inventory may be compensable under limited circumstances, i.e., where the loss results from the condemnatory act itself (e.g., the inventory cannot be relocated) rather than the personal circumstances of the condemnee (e.g., the owner has decided that he will not relocate)." (*Chhour v. Community Redevelopment Agency of Buena Park* (1996) 46 Cal.App.4th 273, 283 [53 Cal.Rptr.2d 585].)
- "The goal of the eminent domain trial [is] 'to determine just compensation,' to wit, to put [condemnee] in 'as good a position' as if its business inventory had 'not been taken.' However, [condemnee] was only 'entitled to be reimbursed for the actual value of what [it] lost—no more and no less.' " (*People ex rel. Dept. of Transportation v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066,

1072–1073 [116 Cal.Rptr.2d 240], internal citations omitted.)

- "To award [condemnee] retail value instead of wholesale value would result in a windfall to [condemnee]—an award in excess of just compensation sufficient to make [condemnee] whole. Here, the proper standard of fair market value is the wholesale value. This is what a retailer, whose inventory of nonunique, fungible, and readily replaceable goods is damaged as a result of an act of inverse condemnation, should receive." (*McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 700 [194 Cal.Rptr. 582].)
- In *People ex rel. Dept. of Transportation, supra,* the court held that a jury should have been allowed to consider expert witnesses' testimony on valuation of inventory based both on retail and wholesale value: "[A]lthough any 'just and equitable' method could be proper, the jury would remain 'free to accept or reject' [an expert's] valuation." (*People ex rel. Dept. of Transportation, supra,* 95 Cal.App.4th at p. 1083, internal citation omitted.)
- "[T]he general rule in eminent domain actions is that 'the right to a jury trial . . . goes *only* to the *amount* of compensation. All other questions of fact, or mixed fact and law, are to be tried . . . without reference to a jury.' " (*Emeryville Redevelopment v. Harcros Pigments* (2002) 101 Cal.App.4th 1083, 1116 [125 Cal.Rptr.2d 12], original italics, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1386

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 4.56

4 Nichols on Eminent Domain, Ch. 13, *Fair Market Value—Physical Character*, §§ 13.11, 13.18[8] (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.136 (Matthew Bender)

3508. Bonus Value of Leasehold Interest

[Some/All] of the property taken was leased to [*name of lessee***]. You must determine the amount of compensation that [***name of lessee***] can recover.**

To do this, you must determine the difference between:

1. **The present value of the total rent that [***name of lessee***] agreed to pay during the time remaining on the lease after [***insert date of possession when lessee no longer occupied the premises***]; and**
2. **The present value of the total fair market rent for the leased property from [***date of valuation***] for the time remaining on the lease.**

If the present value of the total agreed rent is less than the present value of the total fair market rent, then [*name of lessee***] is entitled to the difference.**

New September 2003

Directions for Use

Do not give this instruction if bonus value is allocated under the lease to the owner.

This instruction may not be appropriate in every case involving a lessee.

This instruction would be applicable to the apportionment phase of the case under Code of Civil Procedure section 1260.220(b).

Sources and Authority

- Lessee's Right to Compensation. Code of Civil Procedure section 1265.150.
- Terms of Lease Define Rights of Parties. Code of Civil Procedure section 1265.160.
- "Under the Eminent Domain Law, a provision of a lease that declares that the lease terminates if all the property subject thereto is acquired for public use does *not* deprive the lessee of any right he may have to compensation for the taking of his leasehold or other property. The Eminent Domain Law itself declares the generally applicable rules that the lease terminates if all the property subject thereto is acquired for public use, and that such termination does not affect any right of the lessee to compensation related thereto." (*City of Vista v. W.O. Fielder* (1996) 13 Cal.4th 612, 618 [54 Cal.Rptr.2d 861, 919 P.2d 151], original italics.)
- "Usually the rental value of the property is measured in terms of existing tenancies. Tenants, like owners in fee, are also entitled to compensation in condemnation." (*People ex rel. Dept. of Water Resources v. Andresen* (1987) 193 Cal.App.3d 1144, 1163 [238 Cal.Rptr. 826].)
- "The bonus value can be more precisely defined as the present value of the

difference between economic rent, i.e., the value of market rental, and the contract rent through the remaining lease term. The bonus value usually assumes importance only in long-term commercial leases." (*New Haven Unified School Dist. v. Taco Bell Corp.* (1994) 24 Cal.App.4th 1473, 1478–1479 [30 Cal.Rptr.2d 469], internal citations omitted.)

- "Whether or not the lessor and lessee are joined in a single proceeding, these rules will ordinarily result in an aggregate award to both lessor and lessee equal to market value of the property. Where the lease rental falls below market value, the lessor will have a claim to less than the full market value of the property, since he is restricted to the present value of actual contract rental; but the lessee will have a right to recover the balance of the market value, above that recovered by the lessor, as lease bonus value." (*New Haven, supra*, 24 Cal.App.4th at p. 1479, internal citation omitted.)
- "Although generally a tenant is entitled to all compensation attributable to the tenant's interest in a lease, it is well recognized that the parties to a lease may contractually agree to allocate a condemnation award to the landlord rather than the tenant." (*City of South San Francisco v. Mayer* (1998) 67 Cal.App.4th 1350, 1354 [79 Cal.Rptr.2d 704], internal citations omitted.)
- "A lessee's option to renew a lease should be considered to the extent that the option enhances the value of the leasehold." (*San Francisco Bay Area Rapid Transit Dist. v. McKeegan* (1968) 265 Cal.App.2d 263, 272 [71 Cal.Rptr. 204].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1389

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.57–4.63

4 Nichols on Eminent Domain, Ch. 12D, *Valuation of Interests Other Than Fee Interests*, § 12D.01[3] (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.136 (Matthew Bender)

3509A. Precondemnation Damages—Unreasonable Delay (*Klopping* Damages)

I have determined that [*insert one or both of the following:***]**

> **[there was an unreasonable delay between [***date of announcement of intent to condemn***], when the [***name of condemnor***] announced its intent to condemn [***name of property owner***]'s property, and [***date of filing***], when this case was filed] [and]**
>
> **[***insert description of unreasonable conduct***].**

In determining just compensation you must award damages that [*name of property owner***] has suffered as a result of the [***name of condemnor***]'s [delay/[***describe unreasonable conduct***]]. These damages may include [***insert damages appropriate to the facts, e.g., the cost of repairs, the loss of use of the property, loss of rent, loss of profits, or increased operating expenses pending repairs, and diminution of market value***].**

New September 2003; Revised and Renumbered May 2017

Directions for Use

This instruction will need to be modified if the entity does not ultimately proceed with the condemnation, or if there has been another type of unreasonable conduct other than unreasonable delay.

For an instruction on precondemnation damages arising from the public entity's authorized entry to investigate suitability of the property for the project, see CACI No. 3509B, *Precondemnation Damages—Public Entity's Authorized Entry to Investigate Property's Suitability*.

Sources and Authority

- "[A] condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value." (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 52 [104 Cal.Rptr. 1, 500 P.2d 1345].)
- "The measure of damages may be the cost of repairs, the loss of use of the property, loss of rent, loss of profits, or increased operating expenses pending repairs." (*City of Los Angeles v. Tilem* (1983) 142 Cal.App.3d 694, 703 [191 Cal.Rptr. 229], internal citations omitted.)
- "[A]bsent a formal resolution of condemnation, recovery under *Klopping* requires that the public entity's conduct 'directly and specially affect the landowner to his injury.' This requirement mandates that the plaintiff

demonstrate conduct on the part of the public entity 'which significantly invaded or appropriated the use or enjoyment' of the property." (*Barthelemy v. Orange County Flood Control Dist.* (1998) 65 Cal.App.4th 558, 570 [76 Cal.Rptr.2d 575], internal citations omitted.)

- "[S]ince *Klopping* damages compensate a landowner for a public entity's unreasonable *precondemnation* conduct, their recovery 'is permitted irrespective of whether condemnation proceedings are abandoned or whether they are instituted at all.' " (*Barthelemy, supra*, 65 Cal.App.4th at p. 569, original italics, internal citation omitted.)
- "*Klopping* does not permit an owner to recover precondemnation damages for general market decline as that is not attributable to the condemner." (*People ex rel. Dept. of Transportation v. McNamara* (2013) 218 Cal.App.4th 1200, 1209 [160 Cal.Rptr.3d 812].)
- "Whether there has been unreasonable delay by the condemner and whether the condemner has engaged in unreasonable conduct are both questions of fact. What constitutes a direct and substantial impairment of property rights for purposes of compensation is also a factual question. In deciding factual matters on conflicting testimony and inferences, it is for the trier of fact to determine which evidence and inferences it finds more reasonable." (*Contra Costa County Water Dist. v. Vaquero Farms, Inc.* (1997) 58 Cal.App.4th 883, 897 [68 Cal.Rptr.2d 272], internal citations omitted.)
- "Whether the public entity has acted unreasonably is a question of fact. 'However, the threshold question of liability for unreasonable precondemnation conduct is to be determined by the court, with the issue of the *amount* of damages to be thereafter submitted to the jury only upon a sufficient showing of liability by the condemnee.' Because inverse condemnation damages for precondemnation conduct must be claimed in a pending eminent domain action, the appropriate procedure is to bifurcate the trial of the action so that the question of the liability of the public entity is first adjudicated by the court without a jury." (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 897 [122 Cal.Rptr.2d 802], original italics, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1373

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 4.8

14 California Real Estate Law and Practice, Ch. 512, *Compensation*, § 512.12 (Matthew Bender)

6 Nichols on Eminent Domain, Ch. 26D, *Abandonment, Dismissal of Action and Assessment of Damages*, § 26D.01 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.202 (Matthew Bender)

9 California Points and Authorities, Ch. 95, *Eminent Domain*, § 95.123 (Matthew Bender)

3509B. Precondemnation Damages—Public Entity's Authorized Entry to Investigate Property's Suitability (Code Civ. Proc., § 1245.060)

A public entity that is considering condemning property for public use may enter the property before condemnation to conduct activities that are reasonably related to acquiring the property for a public project. However, the property owner may recover for any actual damage to, or substantial interference with, the owner's possession and use of the property caused by the public entity's entry for these purposes.

[*Name of property owner***] claims that [he/she/***nonbinary pronoun***/it] suffered damage to, or substantial interference with, the use or possession of [his/her/***nonbinary pronoun***/its] property because of [***name of condemnor***]'s precondemnation activities on the property.**

[If you determine that [*name of property owner***] suffered actual damage to, or substantial interference with, the use or possession of [his/her/***nonbinary pronoun***/its] property during precondemnation activities,] [Y/y]ou must determine the amount of this loss and include it in determining just compensation.**

New May 2017

Directions for Use

Give this instruction if the property owner alleges that the public entity's precondemnation entry onto the property to investigate its suitability for a public project caused actual damage or substantially interfered with the owner's possession or use of the property. (See Code Civ. Proc., §§ 1245.010, 1245.060.) The amount of any such damages must be determined by a jury. (*Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 207–210 [204 Cal.Rptr.3d 770, 375 P.3d 887].)

The last paragraph is partially bracketed because it is not clear whether the jury is also to determine whether in fact the owner has suffered any precondemnation harm from the entry. (See *City of Perris v. Stamper* (2016) 1 Cal.5th 576, 593–595 [205 Cal.Rptr.3d 797, 376 P.3d 1221.) But for the similar claim for severance damages, the California Supreme Court has held that it is for the jury to determine if such a loss has actually occurred as long as the claim is not speculative, conjectural, or remote. (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 973 [62 Cal.Rptr.3d 623, 161 P.3d 1175].)

For an instruction on a claim for precondemnation damages because of the public entity's unreasonable delay in condemnation, see CACI No. 3509A, *Precondemnation Damages—Unreasonable Delay (Klopping Damages).*

Sources and Authority

- Public Entity's Precondemnation Entry to Investigate Property's Suitability for Public Project. Code of Civil Procedure section 1245.010 et seq.
- Public Entity's Precondemnation Entry Authorized for Particular Purposes. Code of Civil Procedure 1245.010.
- Damages to or Interference With Possession and Use of Property During Precondemnation Entry. Code of Civil Procedure section 1245.060.
- "[T]he current precondemnation entry and testing statutes not only establish a statutory compensation procedure but also expressly preserve a property owner's right to pursue and obtain damages in a statutorily authorized civil action or an ordinary inverse condemnation action. Taken as a whole, state law clearly provides 'a " 'reasonable, certain and adequate' " ' procedure to enable a property owner to recover money damages for any injury caused by the activities authorized by the statutes." (*Property Reserve, Inc., supra*, 1 Cal.5th at pp. 186–187, internal citations omitted.)
- "[T]he statutory damages that a property owner is entitled to obtain under section 1245.060, the applicable precondemnation entry and testing statute, are a constitutionally adequate measure of just compensation under the state takings clause for the precondemnation activities authorized by the statutory scheme. [¶] Like the concept of just compensation under the federal takings clause, the just compensation required by the state takings clause is the amount required to compensate the property owner for what the owner has lost." (*Property Reserve, Inc., supra*, 1 Cal.5th at pp. 203–204, internal citation omitted.)
- "[T]he compensation authorized by section 1245.060, subdivision (a)—damages for any 'actual damage' to the property and for 'substantial interference with the [property owner's] possession or use of the property'—appears on its face to be a reasonable means of measuring what the property owner has lost by reason of the specific precondemnation activities that are authorized by the trial court's environmental order." (*Property Reserve, Inc., supra*, 1 Cal.5th at p. 205.)
- "The statutes at issue in the present case involve a factual setting—precondemnation entry and testing—that falls between the classic condemnation proceeding where the public entity is seeking to obtain title to or a compensable property interest in the property and the typical inverse condemnation action where the public entity does not intend to enter or intrude upon private property but damage to such property nonetheless ensues. Here, the proposed precondemnation entry and testing activities upon the subject property are intentional, but the public entity is not seeking to obtain title to or exclusive possession of the property for a significant period of time. Rather, the public entity is seeking temporary access to the property to conduct investigations that are needed to decide whether the property is suitable for a proposed project and should thereafter be acquired by the public entity." (*Property Reserve, Inc., supra*, 1 Cal.5th at p. 190.)
- "Although the measure of compensation that is 'just' for purposes of both the

federal and state takings clause is often determined by the 'fair market value' of what has been lost, both federal and state takings cases uniformly recognize that the fair market value standard is not applicable in all circumstances and that there is no rigid or fixed standard that is appropriate in all settings." (*Property Reserve, Inc., supra*, 1 Cal.5th at pp. 203–204.)

- "In light of the nature of the environmental order at issue here, however, granting a property owner the rental value of the property in addition to any damages the owner sustains for actual injury or substantial interference with the possession or use of the property would afford the owner an unwarranted windfall. Under the trial court's environmental order, the owner retains full possession and use of the property over the period covered by the order, notwithstanding the authorized testing activities. Under these circumstances, the rental value of the property would not be a valid measure of what the property owner has lost as a result of the trial court's environmental order." (*Property Reserve, Inc., supra*, 1 Cal.5th at p. 204.)
- "We have long held that this jury right applies only to determining the appropriate amount of compensation, not to any other issues that arise in the course of condemnation proceedings. ' "[A]ll issues except the sole issue relating to compensation[] are to be tried by the court," including, "except those relating to compensation, the issues of fact." ' " ' " 'It is only the 'compensation,' the 'award,' which our constitution declares shall be found and fixed by a jury. All other questions of fact, or of mixed fact and law, are to be tried, as in many other jurisdictions they are tried, without reference to a jury.' " ' " (*City of Perris, supra*, 1 Cal.5th at p. 593, internal citations omitted.)
- "By contrast, *Campus Crusade* held that two pure questions of fact directly pertaining to the proper amount of compensation were reserved to the jury. First, we said that whether it is reasonably probable a city would change the zoning status of the landowners' property in the near future was a jury question. Second, because the landowner had introduced credible evidence that the remaining portion of its property would be worth less after the proposed taking due to hazards associated with a pipeline the government proposed to install on the property, the extent of the resulting severance damages was a jury question." (*City of Perris, supra*, 1 Cal.5th at p. 595, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1333

14 California Real Estate Law and Practice, Ch. 503, *Preliminary Case Evaluation and Preparation for the Condemnor*, § 503.05 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.72 (Matthew Bender)

3510. Value of Easement

The [*name of condemnor*] has taken the right to use a portion of [*name of property owner*]'s land for a specific purpose. That right is called an "easement." After an easement has been taken, the property owner has the right to use the land for any purpose that does not conflict with the easement.

You must determine the fair market value of the easement on [*insert date of valuation*]. The fair market value of the easement is determined by subtracting the fair market value of the land after the easement was taken from the fair market value of the land before the easement was taken.

New September 2003

Sources and Authority

- "The holder of an easement is entitled to damages when the easement is taken or damaged for public use." (*County Sanitation Dist. No. 8 of Los Angeles County v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1279 [22 Cal.Rptr.2d 117], internal citation omitted.)
- "The value of an easement in gross . . . is the difference in the before and after value of the strip of land taken, and not what has been gained by the public agency." (*County Sanitation Dist., supra,* 17 Cal.App.4th at p. 1279, internal citations omitted.)
- " 'An easement is an incorporeal interest in the land of another that gives its owner the right to use the land of another or to prevent the property owner from using his land.' " (*County Sanitation Dist., supra,* 17 Cal.App.4th at p. 1278, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1371

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.79–4.81

4 Nichols on Eminent Domain, Ch. 12D, *Valuation of Interests Other Than Fee Interests*, § 12D.01[1][a] (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.136 (Matthew Bender)

3511A. Severance Damages to Remainder (Code Civ. Proc., §§ 1263.410, 1263.420(a))

The [*name of condemnor*] has taken only a part of [*name of property owner*]'s property. [*Name of property owner*] claims that [his/her/*nonbinary pronoun*/its] remaining property has lost value as a result of the taking because [*specify reasons alleged for diminution of value of remaining property*]. This loss in value is called "severance damages."

Severance damages are the damages to [*name of property owner*]'s remaining property caused by the taking. If you determine that the remaining property has lost value because of the taking, severance damages must be included in determining just compensation.

Severance damages are determined as follows:

1. **Determine the fair market value of the remaining property on [*date of valuation*] by subtracting the fair market value of the part taken from the fair market value of the entire property;**
2. **Determine the fair market value of the remaining property after the [*name of condemnor*]'s proposed project is completed; and**
3. **Subtract the fair market value of the remaining property after the [*name of condemnor*]'s proposed project is completed from the fair market value of the remaining property on [*date of valuation*].**

New September 2003; Revised December 2016; Revised and Renumbered May 2017

Directions for Use

Give this instruction if the owner claims that property not taken has lost value because of the taking, for example because a view has been lost. It is for the jury to determine if such a loss has actually occurred as long as the claim is not speculative, conjectural, or remote. (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 973 [62 Cal.Rptr.3d 623, 161 P.3d 1175].) Read CACI No. 3512, *Severance Damages—Offset for Benefits*, if benefits to the owner's remaining property are at issue.

A property owner may also be able to recover for economic loss to the remaining property incurred during the construction of the project. (Code Civ. Proc., § 1263.420(b); see *City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 676 [73 Cal.Rptr.3d 54].) For an instruction on this loss, see CACI No. 3511B, *Damage to Remainder During Construction*.

Sources and Authority

- Right to Severance Damages. Code of Civil Procedure section 1263.410.

- Damages to Remainder After Severance. Code of Civil Procedure section 1263.420(a).
- Benefit to Remainder. Code of Civil Procedure section 1263.430.
- "When property acquired by eminent domain is part of a larger parcel, compensation must be awarded for the injury, if any, to the remainder. Such compensation is commonly called severance damages. When the property taken is but part of a single legal parcel, the property owner need only demonstrate injury to the portion that remains to recover severance damages." (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 741 [25 Cal.Rptr.2d 480, 863 P.2d 725], internal citations omitted.)
- "The claimed loss in market value must directly and proximately flow from the taking. Thus, recovery may not be based on ' " 'speculative, remote, imaginary, contingent, or merely possible' " ' events." (*City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, 1466 [141 Cal.Rptr.3d 271].)
- The court determines as a matter of law what constitutes the "larger parcel" for which severance damages may be obtained: "The Legislature has framed the question of whether property should be viewed as an integrated whole in terms of whether the land remaining after the taking forms part of a 'larger parcel'." (*City of San Diego, supra,* 6 Cal.4th at p. 745, internal citations omitted.)
- "As we said in *Pierpont Inn*, 'Where the property taken constitutes only a part of a larger parcel, the owner is entitled to recover, inter alia, the difference in the fair market value of his property in its "before" condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken. Items such as view, access to beach property, freedom from noise, etc. are unquestionably matters which a willing buyer in the open market would consider in determining the price he would pay for any given piece of real property.' Severance damages are not limited to special and direct damages, but can be based on any factor, resulting from the project, that causes a decline in the fair market value of the property." (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 712 [66 Cal.Rptr.2d 630, 941 P.2d 809], internal citations omitted.)
- "Both sides here thus agree that the court, not the jury, must make certain determinations that are a predicate to the award of severance damages. But [condemnor] is on weaker ground when it attempts to derive . . . a general rule that 'as a matter of constitutional and decisional law, *all* issues having to do with the existence of, or entitlement to, severance damages are entrusted to the trial judge,' such that '[o]nly after the trial judge has determined that severance damages exist does the jury consider the amount of those severance damages.' [Condemnor]'s proposed rule assumes that questions relating to the measurement of severance damages can be readily distinguished from questions relating to the entitlement to them in the first place but, as we have previously cautioned, the two concepts are not necessarily 'so easily separable.' " (*Metropolitan Water Dist. of So. California, supra*, 41 Cal.4th at p. 972, original italics, internal citations omitted.)

- "[W]here the property owner produces evidence tending to show that some other aspect of the taking . . . 'naturally tends to and actually does decrease the market value' of the remaining property, it is for the jury to weigh its effect on the value of the property, as long as the effect is not speculative, conjectural, or remote." (*Metropolitan Water Dist. of So. California, supra*, 41 Cal.4th at p. 973.)
- "In determining severance damage, the jury must assume 'the most serious damage' which will be caused to the remainder by the taking of the easement and construction of the property. The value of the remainder after the condemnation has occurred is referred to as the 'after' value of the property. The diminution in fair market value is determined by comparing the before and after values. This is the amount of the severance damage." (*San Diego Gas & Electric Co. v. Daley* (1988) 205 Cal.App.3d 1334, 1345 [253 Cal.Rptr. 144], internal citations omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority, supra*, 16 Cal.4th at p. 720.)
- "[S]everance damages are not limited to specific direct damages but can be based on any indirect factors that cause a decline in the market value of the property. California decisions have indicated the following are compensable as direct damages under section 1263.410: (1) impairment of view, (2) restriction of access, (3) increased noise, (4) invasion of privacy, (5) unsightliness of the project, (6) lack of maintenance of the easement and (7) nuisances in general such as trespassers and safety risks. Several courts have recognized that the condemnee should be compensated for any characteristic of the project which causes 'an adverse impact on the fair market value of the remainder.'" (*San Diego Gas & Electric Co., supra*, 205 Cal.App.3d at p. 1345.)
- "When 'the property acquired [by eminent domain] is part of a larger parcel,' in addition to compensation for the property actually taken, the property owner must be compensated for the injury, if any, to the land that he retains. Once it is determined that the owner is entitled to severance damages, they, too, normally are measured by comparing the fair market value of the remainder before and after the taking." (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations and footnote omitted.)
- "[W]hether access to a property has been 'substantially impaired' for purposes of determining severance damages is a question for the court, even though '[s]ubstantial impairment cannot be fixed by abstract definition; it must be found in each case upon the basis of the factual situation.' " (*City of Perris v. Stamper* (2016) 1 Cal.5th 576, 594 [205 Cal.Rptr.3d 797, 376 P.3d 1221].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1374–1382

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) Ch. 5

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, §§ 508.24, 508.25 (Matthew Bender)

4A Nichols on Eminent Domain, Ch. 14, *Damages for Partial Takings*, §§ 14.01–14.03 (Matthew Bender)

5 Nichols on Eminent Domain, Ch. 16, *Consequential Damages as a Result of Proposed Use*, §§ 16.01–16.05 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.140 (Matthew Bender)

3511B. Damage to Remainder During Construction (Code Civ. Proc., § 1263.420(b))

The [*name of condemnor***] has taken only a part of [***name of property owner***]'s property. [***Name of property owner***] claims that [he/she/***nonbinary pronoun***/it] suffered damage to the remaining property during construction of the project for which the property was taken. This loss was because of [***specify reasons alleged for damage due to construction, e.g., reduced business because construction made access to owner's business more difficult***].**

If you determine that [*name of property owner***] suffered damage to [his/her/***nonbinary pronoun***/its] remaining property during construction, you must determine the amount of this damage and include it in determining just compensation.**

New May 2017; Revised May 2020

Directions for Use

Give this instruction if the owner claims that the owner suffered an economic loss on the property not taken during construction of the project, for example because of decreased business due to access being made more difficult. (See *City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 676 [73 Cal.Rptr.3d 54].) Courts have referred to these damages as "temporary severance damages" (see, e.g., *City of Fremont, supra*, 160 Cal.App.4th at p. 676.), though the statute does not call them either "temporary" or "severance." (See Code Civ. Proc., § 1263.420(b) [damage to the remainder caused by the construction and use of the project for which the property is taken].)

It is for the jury to determine if such a loss has actually occurred as long as the claim is not speculative, conjectural, or remote. (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 973 [62 Cal.Rptr.3d 623, 161 P.3d 1175].)

A property owner may also be able to recover severance damages if the remaining property has decreased in value because of the partial taking. If severance damages are sought, give CACI No. 3511A, *Severance Damages to Remainder*. Read CACI No. 3512, *Severance Damages—Offset for Benefits*, if benefits to the owner's remaining property are at issue.

Sources and Authority

- Damages to Remainder During Construction. Code of Civil Procedure section 1263.420(b).
- Benefit to Remainder. Code of Civil Procedure section 1263.430.
- "When property acquired by eminent domain is part of a larger parcel,

compensation must be awarded for the injury, if any, to the remainder. Such compensation is commonly called severance damages. When the property taken is but part of a single legal parcel, the property owner need only demonstrate injury to the portion that remains to recover severance damages." (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 741 [25 Cal.Rptr.2d 480, 863 P.2d 725], internal citations omitted.)

- "Temporary severance damages resulting from the construction of a public project are also compensable. A property owner 'generally should be able "to present evidence to show whether and to what extent the delay disrupted its use of the remaining property." ' However, 'the mere fact of a delay associated with construction' does not, without more, entitle the property owner to temporary severance damages. The temporary easement or taking must interfere with the owner's *actual* intended use of the property." (*City of Fremont, supra*, 160 Cal.App.4th at p. 676, original italics.)
- "If [owner] had sold the property during the construction period and if the ongoing construction had temporarily lowered the sales price of the property, it would appear that [owner] would be entitled to recover that loss from [city]. But the mere fact of a delay associated with construction of the pipeline did not, without more, entitle [owner] to temporary severance damages relating to the financing or marketing of the property in this eminent domain action. [¶] This is not to say, however, that [owner] is barred from recovering damages for actual injury it may have suffered during the construction of the pipeline. On remand, [owner] may have the opportunity before the trial court to create an appropriate record to support its claim of severance damages. In addition, '[w]hen the condemnation action is tried before the improvement is constructed, and substantial although temporary interference with the property owner's rights of possession or access occurs during construction, the property owner may maintain a subsequent action for such damage occurring during construction.' " (*Metropolitan Water Dist. of So. California, supra*, 41 Cal.4th at p. 975, internal citations omitted.)
- "[Owner] sought temporary severance damages for impairment to his property because of construction activities associated with the project. Specifically, [owner] asserted the effect of removal of all landscaping for a period of one year, and the closure of two of four driveways on his property for four months during construction entitles him to temporary severance damages. In addition, [owner] asserts the access to his property was substantially impaired by the traffic detour traveling east through the intersection of East Airway Boulevard and Isabel Avenue created by the construction project." (*City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, 1471 [141 Cal.Rptr.3d 271] [court erred in excluding evidence of the above].)
- "The Legislature has framed the question of whether property should be viewed as an integrated whole in terms of whether the land remaining after the taking forms part of a 'larger parcel'; the issue is one of law for decision by the court." (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations omitted.)

- "Both sides here thus agree that the court, not the jury, must make certain determinations that are a predicate to the award of severance damages. But [condemnor] is on weaker ground when it attempts to derive . . . a general rule that 'as a matter of constitutional and decisional law, *all* issues having to do with the existence of, or entitlement to, severance damages are entrusted to the trial judge,' such that '[o]nly after the trial judge has determined that severance damages exist does the jury consider the amount of those severance damages.' [Condemnor]'s proposed rule assumes that questions relating to the measurement of severance damages can be readily distinguished from questions relating to the entitlement to them in the first place but, as we have previously cautioned, the two concepts are not necessarily 'so easily separable.' " (*Metropolitan Water Dist. of So. California, supra*, 41 Cal.4th at p. 972, original italics, internal citations omitted.)
- "In determining severance damage, the jury must assume 'the most serious damage' which will be caused to the remainder by the taking of the easement and construction of the property." (*San Diego Gas & Electric Co. v. Daley* (1988) 205 Cal.App.3d 1334, 1345 [253 Cal.Rptr. 144], internal citations omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 720 [66 Cal.Rptr.2d 630, 941 P.2d 809].)
- "[W]hether access to a property has been 'substantially impaired' for purposes of determining severance damages is a question for the court, even though '[s]ubstantial impairment cannot be fixed by abstract definition; it must be found in each case upon the basis of the factual situation.' " (*City of Perris v. Stamper* (2016) 1 Cal.5th 576, 594 [205 Cal.Rptr.3d 797, 376 P.3d 1221].)
- "Although the measure of compensation that is 'just' for purposes of both the federal and state takings clause is often determined by the 'fair market value' of what has been lost, both federal and state takings cases uniformly recognize that the fair market value standard is not applicable in all circumstances and that there is no rigid or fixed standard that is appropriate in all settings." (*Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 186 [204 Cal.Rptr.3d 770, 375 P.3d 887].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1374–1382

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) Ch. 5

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, §§ 508.24, 508.25 (Matthew Bender)

4A Nichols on Eminent Domain, Ch. 14, *Damages for Partial Takings*, §§ 14.01–14.03 (Matthew Bender)

5 Nichols on Eminent Domain, Ch. 16, *Consequential Damages as a Result of Proposed Use*, §§ 16.01–16.05 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and*

Inverse Condemnation, § 247.140 (Matthew Bender)

3512. Severance Damages—Offset for Benefits

The [*name of condemnor*] claims that the remainder of [*name of property owner*]'s property has received a benefit from the project as proposed.

You must determine the amount of benefit by determining any reasonably certain increase in the fair market value of the remaining property caused by the project.

[You must then subtract that amount from the severance damages. If the project's benefit to the remaining property is equal to or greater than the loss caused by the taking, then you must award zero severance damages. Any benefits to the remaining property should not be subtracted from the value of the property that [*name of condemnor*] has taken.]

New September 2003

Directions for Use

A special verdict form may be used to have the jury set forth separately the determination of severance damages and benefits. Use the bracketed paragraph if the judge will not be calculating the offset to severance damages for the benefit to the remaining property.

Sources and Authority

- Compensation for Remainder After Severance. Code of Civil Procedure section 1263.410.
- "Benefit to Remainder" Defined. Code of Civil Procedure section 1263.430.
- Functions of Trier of Fact. Code of Civil Procedure section 1260.230.

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1374–1382

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 5.33–5.40

5 Nichols on Eminent Domain, Ch. 16, *Consequential Damages as a Result of Proposed Use*, §§ 16.01–16.05 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.140 (Matthew Bender)

3513. Goodwill

In this case, [*name of business owner*] is entitled to compensation for any loss of goodwill as a part of just compensation. "Goodwill" is the benefit that a business gains as a result of its location, reputation for dependability, skill, or quality, and any other circumstances that cause a business to keep old customers or gain new customers. You must include the amount of any loss of goodwill as an item in your award for just compensation.

New September 2003; Revised February 2007

Sources and Authority

- Compensation for Loss of Goodwill. Code of Civil Procedure section 1263.510.
- "Goodwill is the amount by which a business's overall value exceeds the value of its constituent assets, often due to a recognizable brand name, a sterling reputation, or an ideal location. Regardless of the cause, however, goodwill almost always translates into a business's profitability." (*People ex rel. Dept. of Transportation v. Dry Canyon Enterprises, LLC* (2012) 211 Cal.App.4th 486, 493–494 [149 Cal.Rptr.3d 601], internal citation omitted.)
- "Historically, lost business goodwill was not recoverable under eminent domain law. However, in 1975 the Legislature enacted section 1263.510 'in response to widespread criticism of the injustice wrought by the Legislature's historic refusal to compensate condemnees whose ongoing businesses were diminished in value by a forced relocation. [Citations.] The purpose of the statute was unquestionably to provide monetary compensation for the kind of losses which typically occur when an ongoing small business is forced to move and give up the benefits of its former location.' Thus, a business owner's right to compensation for loss of goodwill is a statutory right, not a constitutional right." (*City and County of San Francisco v. Coyne* (2008) 168 Cal.App.4th 1515, 1522 [86 Cal.Rptr.3d 255], internal citations omitted.)
- "Determining liability for loss of goodwill under section 1263.510 involves a two-step process. 'First, the court determines *entitlement*: that is, whether the party seeking compensation has presented sufficient evidence of the conditions for compensation set forth in subdivision (a)—causation, unavoidability, and no double recovery—such that the party is entitled to *some* compensation. If the party meets this burden, the matter proceeds to a second step, in which a jury (unless waived) determines the *amount* of the loss.' Thus, if that party meets certain ' "qualifying conditions for such compensation," ' it has a right to a jury trial on the amount of compensation due." (*Los Angeles County Metropolitan Transportation Authority v. Yum Yum Donut Shops, Inc.* (2019) 32 Cal.App.5th 662, 669 [244 Cal.Rptr.3d 201], original italics, internal citation omitted.)

- "[T]he owner of a business conducted on property taken by eminent domain is entitled to compensation for loss of goodwill resulting from the taking. (*Thee Aguila, Inc. v. Century Law Group, LLP* (2019) 37 Cal.App.5th 22, 27 [249 Cal.Rptr.3d 254].)
- " 'Under section 1263.510, subdivision (a), the business owner has the initial burden of showing entitlement to compensation for lost goodwill.' " (*City and County of San Francisco, supra*, 168 Cal.App.4th at pp. 1522–1523, internal citations omitted.)
- "Since the conditions set forth in subdivision (a) all pertain to the 'loss' of 'goodwill,' the initial obligation to establish entitlement to compensation requires a showing, 'as a threshold matter, that the business had goodwill to lose.' " (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation* (2016) 5 Cal.App.5th 190, 201 [209 Cal.Rptr.3d 461].)
- "[I]n the entitlement phase, the party seeking compensation need only show that there was *some* loss of the benefit that the business was enjoying before the taking due to its location, reputation, and the like, without necessarily having to quantify its precise value." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra*, 5 Cal.App.5th at p. 204, original italics.)
- "After entitlement to goodwill is shown (which includes a showing that compensation for the loss will not be duplicated) neither party has the burden of proof with regard to valuation." (*Redevelopment Agency of the City of Pomona v. Thrifty Oil Co.* (1992) 4 Cal.App.4th 469, 475 [5 Cal.Rptr.2d 687], internal citations omitted.)
- "Only an owner of a business conducted on the real property taken may claim compensation for loss of goodwill." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 537 [86 Cal.Rptr.2d 473], internal citation omitted.)
- "[W]hile there are no explicit statutory requirements regarding an expert's use of a particular methodology for valuing lost goodwill, the expert's methodology must provide a fair estimate of *actual value* and cannot be based on hypothetical or speculative uses of a condemned business . . . ." (*City and County of San Francisco, supra*, 168 Cal.App.4th at p. 1523, original italics.)
- "The underlying purpose of this statute is to provide compensation for the kind of losses which typically occur when an ongoing business is forced to move and give up the benefits of its former location. It includes not only compensation for lost patronage itself, but also for expenses reasonably incurred in an effort to prevent a loss of patronage." (*San Diego Metropolitan Transit Development Bd., supra*, 73 Cal.App.4th at p. 537, internal citations omitted.)
- "Goodwill must, of course, be measured by a method which excludes the value of tangible assets or the normal return on those assets. However, the courts have wisely maintained that there is no single acceptable method of valuing goodwill. Valuation methods will differ with the nature of the business or practice and with

the purpose for which the evaluation is conducted." (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 271, fn. 7 [203 Cal.Rptr. 772, 681 P.2d 1340], internal citations omitted.)

- "The value of this goodwill may be determined using a variety of methods: for example, determining the total value of the business by capitalizing its cash flow, and then subtracting its tangible assets; or determining the amount by which the business's average profits exceed a fair rate of return on the fair market value of its tangible assets, and then capitalizing that amount. But the essential idea is that there is some intangible 'X-factor' that gives the business greater value than it would otherwise have." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra*, 5 Cal.App.5th at p. 201, internal citation omitted.)
- "Certainly a comparison of the pre-taking and post-taking goodwill values would be one way to quantify the amount of goodwill that was lost due to the taking. But it is not evident from the appellate record that the amount of lost goodwill could not be calculated in some other manner." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra*, 5 Cal.App.5th at p. 205.)
- "Section 1263.510 does not dictate that the only way to obtain compensation for the loss of goodwill is to prove pre-taking goodwill value based on a business value in excess of its tangible assets. Nor does the statute define goodwill as the value of a business not attributable to its tangible assets." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra*, 5 Cal.App.5th at p. 211.)
- "[A] 'cost to create' approach is a permissible means by which to value goodwill under [Code of Civil Procedure] section 1263.510 where, as here, a nascent business has not yet experienced excess profits but clearly has goodwill within the meaning of the statute and experiences a total loss of goodwill due to condemnation of the property on which the business is operated." (*Inglewood Redevelopment Agency v. Aklilu* (2007) 153 Cal.App.4th 1095, 1102 [64 Cal.Rptr.3d 519].)
- "As *Aklilu* implicitly recognized, unless there is independent proof that a business possesses goodwill in the first place, the cost-to-create methodology does not reflect the cost of creating any actual goodwill. Instead, it simply adds up costs and calls the total 'goodwill.' The relationship between goodwill and the costs to create breaks down even further when the condemnation takes only a portion of the business's goodwill. In that situation, it becomes necessary to figure out which costs match up with which portions of goodwill that are lost; in most cases, this will devolve into an exercise in futility or fiction." (*Dry Canyon Enterprises, LLC, supra*, 211 Cal.App.4th at p. 494.)
- "Since quantifying the loss of goodwill is a matter concerning the amount of goodwill lost, it is for the jury to decide between the competing views of the experts." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts*

Foundation, supra, 5 Cal.App.5th at pp. 213–214.)

- "A business which is required to move because of the taking of the property on which it operates has suffered a loss from the taking. This is true whether the tenancy is for a fixed term, or is a periodic tenancy as in this case. The value of the lost goodwill is affected by the probable remaining term of the tenancy. Evidence of the remaining length of a lease and the existence of an option to renew a lease are, of course, relevant for determining the amount of compensation, if any, to be paid for loss of goodwill. Similarly, evidence of the pre-condemnation duration of a periodic tenancy and the quality and mutual satisfaction in the landlord and tenant relationship are probative for determination of compensation for loss of goodwill." (*Los Angeles Unified Sch. Dist. v. Pulgarin* (2009) 175 Cal.App.4th 101, 107 [95 Cal.Rptr.3d 527], internal citation omitted.)
- "The statute's unambiguous plain language provides that a condemnee must show it cannot prevent a loss of goodwill by relocating or otherwise taking reasonable steps to prevent that loss to be entitled to a jury trial on the amount of that unavoidable loss. A fortiori, if the condemnee would lose goodwill—even if it relocated its business or otherwise reasonably mitigated the loss—the condemnee satisfies its threshold burden." (*Los Angeles County Metropolitan Transportation Authority, supra*, 32 Cal.App.5th at p. 670.)
- "[I]n some circumstances, there may be a limited right to reimbursement for costs incurred to mitigate loss of goodwill." (*Los Angeles Unified School Dist. v. Casasola* (2010) 187 Cal.App.4th 189, 208 [114 Cal.Rptr.3d 318].)
- "Although the statutory scheme applies only to eminent domain proceedings, the right to recover lost goodwill has been extended to the indirect condemnee. Thus, 'goodwill is compensable in an inverse condemnation action to the same extent and with the same limitations on recovery found in . . . section 1263.510.' " (*San Diego Metropolitan Transit Development Bd., supra*, 73 Cal.App.4th at p. 537, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1358

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:314–7.316.3 (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8C-H, *Foundation*, ¶ 8:748.2 (The Rutter Group)

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.64–4.78

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, § 508.19; Ch. 512, *Compensation*, § 512.13 (Matthew Bender)

4 Nichols on Eminent Domain, Ch. 13, *Loss of Business Goodwill*, § 13.18[5] (Matthew Bender)

6A Nichols on Eminent Domain, Ch. 29, *Loss of Business Goodwill*, §§ 29.01–29.08 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.136 (Matthew Bender)

3514. Burden of Proof

Neither the [*name of condemnor***] nor [***name of property owner***] has the burden of proving the amount of just compensation.**

New September 2003

Sources and Authority

- Order of Presenting Evidence; No Burden of Proof. Code of Civil Procedure section 1260.210.

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1358

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 9.14

5 Nichols on Eminent Domain, Ch. 18, *Evidence in Condemnation Proceedings*, § 18.02 (Matthew Bender)

3515. Valuation Testimony

You must decide the value of property based solely on the testimony of the witnesses who have given their opinion of fair market value. You may consider other evidence only to help you understand and weigh the testimony of those witnesses.

You may find the same fair market value testified to by a witness, or you may find a value anywhere between the highest and lowest values stated by the witnesses.

If the witnesses disagreed with one another, you should weigh each opinion against the others based on the reasons given for each opinion, the facts or other matters that each witness relied on, and the witnesses' qualifications.

New September 2003

Sources and Authority

- Evidence of Value of Property. Evidence Code section 813(a).
- "The only type of evidence which can be used to establish value in eminent domain cases is the opinion of qualified experts and the property owners." (*Aetna Life and Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 877 [216 Cal.Rptr. 831], internal citations omitted.)
- "A jury hearing a condemnation action may not disregard the evidence as to value and render a verdict which either exceeds or falls below the limits established by the testimony of the witnesses. The trier of fact in an eminent domain action is not an appraiser, and does not make a determination of market value based on its opinion thereof. Instead it determines the market value of the property, based on the opinions of the valuation witnesses." (*Aetna Life and Casualty Co., supra,* 170 Cal.App.3d at p. 877, internal citations omitted.)
- " 'The trier of fact may accept the evidence of any one expert or choose a figure between them based on all of the evidence.' There is insufficient evidence to support a verdict 'only when "no reasonable interpretation of the record" supports the figure . . . .' " (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 931 [62 Cal.Rptr.2d 121], internal citations omitted.)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, § 103

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 9.62–9.64

5 Nichols on Eminent Domain, Ch. 23, *Expert and Opinion Evidence*, §§ 23.01–23.11 (Matthew Bender)

3516. View

You have viewed the property and its surrounding area. The purpose of this view was to help you understand and weigh the testimony of the witnesses.

New September 2003

Sources and Authority

- View of Property. Evidence Code section 813(b).

Secondary Sources

2 Witkin, California Evidence (5th ed. 2012) Demonstrative, Experimental, and Scientific Evidence, § 33

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 9.95

3517. Comparable Sales (Evid. Code, § 816)

To assist you in determining the fair market value of the property, you have heard evidence of comparable sales. It is up to you to decide the importance of this evidence in determining the fair market value.

New December 2013

Directions for Use

Use this instruction if the court has allowed evidence of comparable sales to be presented to the jury.

Sources and Authority

- Comparable Sales. Evidence Code section 816.
- "[T]he essence of comparability is recent and local sales '*sufficiently* alike in respect to character, size, situation, usability, and improvements' so that the price 'may fairly be considered as *shedding light*' on the value of the condemned property. . . . After the trial court resolves this preliminary legal question, it is then ultimately for the jury to determine the extent to which the other property is in fact comparable." (*County of Glenn v. Foley* (2012) 212 Cal.App.4th 393, 401 [151 Cal.Rptr.3d 8], original italics, internal citations omitted.)
- "This whole 'shedding light on value' standard is nothing more than a restatement of the general rule for the introduction of circumstantial evidence, which is admissible if *relevant*, 'i.e., if it can provide any rational inference in support of the issue.' " (*County of Glenn, supra,* 212 Cal.App.4th at p. 402, original italics, footnote omitted.)
- "[No] general rule can be laid down regarding the degree of similarity that must exist to make [comparable sales] evidence admissible. It must necessarily vary with the circumstances of each particular case. Whether the properties are sufficiently similar to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused." (*Merced Irrigation Dist. v. Woolstenhulme* (1971) 4 Cal.3d 478, 500 [93 Cal.Rptr. 833, 483 P.2d 1].)
- "The trial judge's prima facie determination that a sale is sufficiently 'comparable' to be admitted into evidence has never been thought to foreclose the question of 'comparability' altogether. '[If] at the discretion of the court, such [sales] are admissible on the grounds of comparability, the degree of comparability is a question of fact for the jury.' " (*County of San Luis Obispo v. Bailey* (1971) 4 Cal.3d 518, 525 [93 Cal.Rptr. 859, 483 P.2d 27].)
- "We have never declared properties noncomparable per se merely because they differ in size or shape. On the contrary, the trial court's obligation, pursuant to

section 816, is to determine whether the sale price of one property could *shed light* upon the value of the condemned property, notwithstanding any differences that might exist between them. If it resolves that question affirmatively, it can admit the evidence. The jury then, on the basis of all the evidence, determines the extent to which any differences between the condemned property and the comparable property affect their relative values." (*Los Angeles v. Retlaw Enterprises, Inc.* (1976) 16 Cal.3d 473, 482 [128 Cal.Rptr. 436, 546 P.2d 1380], original italics.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017), Constitutional Law §§ 1372, 1385

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, § 108

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, § 508.11 (Matthew Bender)

Cotchett, California Courtroom Evidence, Ch. 17, *Nonexpert and Expert Opinion*, 17.14 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.147 (Matthew Bender)

3518–3599. Reserved for Future Use

VF-3500. Fair Market Value Plus Goodwill

We answer the questions submitted to us as follows:

1. **What was the fair market value of the property on [***insert date of valuation***]?** **$_____**

Answer question 2.

2. **What was the value of the loss of goodwill on [***insert date of valuation***]?** **$_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3501, *"Fair Market Value" Explained,* and CACI No. 3513, *Goodwill*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3501. Fair Market Value Plus Severance Damages

We answer the questions submitted to us as follows:

1. **What was the fair market value of the property taken on [*date of valuation*]?** **$_____**

Answer question 2.

2. **What was the fair market value of the remaining property on [*date of valuation*]?** **$_____**

Answer question 3.

3. **What would the fair market value of the remaining property have been on [*date of valuation*] if the [*name of public entity*]'s proposed project were completed as planned?**

$_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, December 2016, May 2020, May 2024

Directions for Use

This verdict form is based on CACI No. 3501, *"Fair Market Value" Explained,* and CACI No. 3511, *Permanent Severance Damages*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. For example, if the public entity's project was completed before the date of valuation, modify question 3 accordingly.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3502. Fair Market Value Plus Loss of Inventory/Personal Property

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We answer the questions submitted to us as follows:

1. **What was the fair market value of the property taken on [*insert date of valuation*]? $_____**

[Answer question 2.

2. **What was the retail value on [*insert date of valuation*] of the portion of the lost inventory or personal property that was unique and not readily replaceable? $_____]**

[Answer question 3.

3. **What was the wholesale value on [*insert date of valuation*] of the portion of the lost inventory or personal property that was readily replaceable and not unique? $_____]**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3501, *"Fair Market Value" Explained,* and CACI No. 3507, *Personal Property and Inventory.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

In an eminent domain action, the jury finds only the amount of compensation. (*Emeryville Redevelopment v. Harcros Pigments* (2002) 101 Cal.App.4th 1083, 1116 [125 Cal.Rptr.2d 12].) The court should determine whether there is inventory or personal property that is unique and not readily replaceable. The jury should then determine the value of that property.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest.*

This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3503–VF-3599. Reserved for Future Use

CONSPIRACY

3600. Conspiracy—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by [***name of coconspirator***]'s [***insert tort theory***] and that [***name of defendant***] is responsible for the harm because [he/she/***nonbinary pronoun***] was part of a conspiracy to commit [***insert tort theory***]. A conspiracy is an agreement by two or more persons to commit a wrongful act. Such an agreement may be made orally or in writing or may be implied by the conduct of the parties.**

If you find that [*name of coconspirator***] committed [a/an] [***insert tort theory***] that harmed [***name of plaintiff***], then you must determine whether [***name of defendant***] is also responsible for the harm. [***Name of defendant***] is responsible if [***name of plaintiff***] proves both of the following:**

1. **That [***name of defendant***] was aware that [***name of coconspirator***] [and others] planned to [***insert wrongful act***]; and**
2. **That [***name of defendant***] agreed with [***name of coconspirator***] [and others] and intended that the [***insert wrongful act***] be committed.**

Mere knowledge of a wrongful act without cooperation or an agreement to cooperate is insufficient to make [*name of defendant***] responsible for the harm.**

A conspiracy may be inferred from circumstances, including the nature of the acts done, the relationships between the parties, and the interests of the alleged coconspirators. [*Name of plaintiff***] is not required to prove that [***name of defendant***] personally committed a wrongful act or that [he/she/***nonbinary pronoun***] knew all the details of the agreement or the identities of all the other participants.**

New September 2003

Sources and Authority

- "Conspiracy is not a separate tort, but a form of vicarious liability by which one defendant can be held liable for the acts of another. . . . A conspiracy requires evidence 'that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it.' Thus, conspiracy provides a remedial measure for affixing liability to all who have 'agreed to a common design to commit a wrong' when damage to the plaintiff results. The defendant in a conspiracy claim must be capable of committing the target tort." (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 652 [231 Cal.Rptr.3d 771], internal citations omitted.)
- "Conspiracy is not a cause of action, but a legal doctrine that imposes liability

on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510–511 [28 Cal.Rptr.2d 475, 869 P.2d 454], internal citations omitted.)

- "While criminal conspiracies involve distinct substantive wrongs, civil conspiracies do not involve separate torts. The doctrine provides a remedial measure for affixing liability to all persons who have 'agreed to a common design to commit a wrong.' " (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333 [103 Cal.Rptr.2d 339], internal citation omitted.)
- "As long as two or more persons agree to perform a wrongful act, the law places civil liability for the resulting damage on all of them, regardless of whether they actually commit the tort themselves. 'The effect of charging . . . conspiratorial conduct is to implicate all . . . who agree to the plan to commit the wrong as well as those who actually carry it out.' " (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784 [157 Cal.Rptr. 392, 598 P.2d 45], internal citations omitted.)
- "To support a conspiracy claim, a plaintiff must allege the following elements: '(1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct.' " (*AREI II Cases* (2013) 216 Cal.App.4th 1004, 1022 [157 Cal.Rptr.3d 368].)
- " '[T]he major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.' " (*Applied Equipment Corp., supra,* 7 Cal.4th at p. 511, internal citations omitted.)
- "A complaint for civil conspiracy states a cause of action only when it alleges the commission of a civil wrong that causes damage. Though conspiracy may render additional parties liable for the wrong, the conspiracy itself is not actionable without a wrong." (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 454 [175 Cal.Rptr. 157, 629 P.2d 1369].)
- "Defendants seem to argue that an action for conspiracy must be based exclusively on tort principles, not on a statutory violation that provides civil penalties. No authority is cited for that proposition, and we cannot conceive of a basis for limiting conspiracy claims in that manner. It is sufficient that a conspiracy is based on an agreement to engage in unlawful conduct regardless of whether the conspiracy violates a duty imposed by tort law or a statute." (*Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136, 1158 [151 Cal.Rptr.3d 683].)
- "[Defendant] finally argues, relying on federal or out-of-state authorities, that

because [plaintiff] only alleged [driver] was negligent and the evidence does not permit a finding that either she or [driver] intended to harm anyone, there is no basis for liability; that there cannot be a civil conspiracy to commit a negligent act. We acknowledge there is a split within out-of-state authorities, most of which hold that parties cannot conspire to commit a negligent or unintentional act and such a conspiracy is a legal impossibility. [¶] But the law in California remains that a civil conspiracy requires an express or tacit agreement only to commit a civil wrong or tort, which then renders all participants 'responsible . . . for all damages ensuing from the wrong . . . .' " (*Navarrete v. Meyer* (2015) 237 Cal.App.4th 1276, 1293 [188 Cal.Rptr.3d 623], footnote omitted.)

- "Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it. They must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. It is not enough that the conspiring officers knew of an intended wrongful act, they had to agree—expressly or tacitly—to achieve it. Unless there is such a meeting of the minds, 'the independent acts of two or more wrongdoers do not amount to a conspiracy.' " (*Choate, supra,* 86 Cal.App.4th at p. 333, internal citations omitted.)
- "Conspiracies are typically proved by circumstantial evidence. '[S]ince such participation, cooperation or unity of action is difficult to prove by direct evidence, it can be inferred from the nature of the act done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.' " (*Rickley, supra*, 212 Cal.App.4th at p. 1166, internal citation omitted.)
- "A cause of action for civil conspiracy may not arise . . . if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing . . . ." (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44 [260 Cal.Rptr. 183, 775 P.2d 508], internal citation omitted.)
- "Conspiracy is not an independent tort; it cannot create a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles." (*Applied Equipment Corp., supra,* 7 Cal.4th at p. 514, internal citations omitted.)
- "A conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to achieve. As long as the underlying wrongs are subject to privilege, defendants cannot be held liable for a conspiracy to commit those wrongs. Acting in concert with others does not destroy the immunity of defendants." (*McMartin v. Children's Institute International* (1989) 212 Cal.App.3d 1393, 1406 [261 Cal.Rptr. 437], internal citations omitted.)
- "We agree . . . that the general rule is that a party who is not personally bound by the duty violated may not be held liable for civil conspiracy even though it may have participated in the agreement underlying the injury. However, an

exception to this rule exists when the participant acts in furtherance of its own financial gain." (*Mosier v. Southern California Physicians Insurance Exchange* (1998) 63 Cal.App.4th 1022, 1048 [74 Cal.Rptr.2d 550], internal citations omitted.)

- " 'The basis of a civil conspiracy is the formation of a group of two or more persons who have agreed to a common plan or design to commit a tortious act.' The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582 [47 Cal.Rptr.2d 752], internal citations omitted.)
- "Liability as a co-conspirator depends upon projected joint action. 'The mere knowledge, acquiescence, or approval of the act, without co-operation or agreement to cooperate is not enough . . . .' But once the plan for joint action is shown, 'a defendant may be held liable who in fact committed no overt act and gained no benefit therefrom.' " (*Wetherton v. Growers Farm Labor Assn.* (1969) 275 Cal.App.2d 168, 176 [79 Cal.Rptr. 543], internal citations omitted, disapproved on another ground in *Applied Equipment Corp., supra,* 7 Cal.4th at p. 521, fn. 10.)
- "Furthermore, the requisite concurrence and knowledge 'may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.' Tacit consent as well as express approval will suffice to hold a person liable as a coconspirator." (*Wyatt, supra,* 24 Cal.3d at p. 785, internal citations omitted.)
- "[A]ctual knowledge of the planned tort, without more, is insufficient to serve as the basis for a conspiracy claim. Knowledge of the planned tort must be combined with intent to aid in its commission. 'The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective.' 'This rule derives from the principle that a person is generally under no duty to take affirmative action to aid or protect others.' " (*Kidron, supra,* 40 Cal.App.4th at p. 1582, internal citations omitted.)
- "While knowledge and intent 'may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances,' '[c]onspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense.' An inference must flow logically from other facts established in the action." (*Kidron, supra,* 40 Cal.App.4th at p. 1583, internal citations omitted.)
- "[A] nonfiduciary cannot conspire to breach a duty owed only by a fiduciary." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1474 [171 Cal.Rptr.3d 548].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 151 et seq.

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-I, *Conspiracy*, ¶ 11:167 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability*, § 9.03 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 126, *Conspiracy*, § 126.11 (Matthew Bender)

4 California Points and Authorities, Ch. 46, *Conspiracy*, § 46.20 et seq. (Matthew Bender)

3601. Ongoing Conspiracy

If you decide that [*name of defendant*] joined the conspiracy to commit [*insert tort theory*], then [he/she/*nonbinary pronoun*] is responsible for all acts done as part of the conspiracy, whether the acts occurred before or after [he/she/*nonbinary pronoun*] joined the conspiracy.

New September 2003

Sources and Authority

- "It is the settled rule that 'to render a person civilly liable for injuries resulting from a conspiracy of which he was a member, it is not necessary that he should have joined the conspiracy at the time of its inception; everyone who enters into such a common design is in law a party to every act previously or subsequently done by any of the others in pursuance of it.' Having been found to have joined and actively participated in the continuing conspiracy to convert, appellant became liable for the previous acts of his coconspirators under the rules relating to civil liability, and the fact that some of the missing goods may never have come into his possession would not absolve him from liability." (*De Vries v. Brumback* (1960) 53 Cal.2d 643, 648 [2 Cal.Rptr. 764, 349 P.2d 532], internal citations omitted.)
- "It is well settled that a conspirator is liable for all the acts done in furtherance of a common scheme or plan even though he is not a direct actor. It is equally well settled that a party may be liable even if the intentional tort is commenced before he participates, if he, knowing the facts, then participates therein." (*Peterson v. Cruickshank* (1956) 144 Cal.App.2d 148, 168–169 [300 P.2d 915], internal citations omitted.)
- "[Defendant] could not join in a conspiracy that had been completed." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1595 [47 Cal.Rptr.2d 752], internal citations omitted.)

Secondary Sources

1 Levy et al., California Torts, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability*, § 9.03 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 126, *Conspiracy* (Matthew Bender)

4 California Points and Authorities, Ch. 46, *Conspiracy* (Matthew Bender)

3602. Affirmative Defense—Agent and Employee Immunity Rule

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] was not part of a conspiracy because [he/she/***nonbinary pronoun***] was acting as an [agent/employee] of [***name of defendant entity***]. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [he/she/***nonbinary pronoun***] was acting in [his/her/***nonbinary pronoun***] official capacity on behalf of [***name of defendant entity***]; and**
2. **That [he/she/***nonbinary pronoun***] was not acting to advance [his/her/***nonbinary pronoun***] own personal interests.**

New September 2003

Directions for Use

This instruction is for use if an individual defendant is alleged to have conspired with an entity. This instruction is not intended to apply if an individual defendant is alleged to have conspired with a third party and there is no agency relationship between them.

Sources and Authority

- "[A]gents or employees of a corporation cannot conspire with the corporation while acting in their official capacities on behalf of the corporation rather than as individuals acting for their individual advantage." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 12 [101 Cal.Rptr. 499], internal citations omitted.)
- "The rule 'derives from the principle that ordinarily corporate agents and employees acting for or on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract since being in a confidential relationship to the corporation their action in this respect is privileged.' " (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 512, fn. 4 [28 Cal.Rptr.2d 475, 869 P.2d 454], internal citations omitted.)
- "A corporation is, of course, a legal fiction that cannot act at all except through its employees and agents. When a corporate employee acts in the course of his or her employment, on behalf of the corporation, there is no entity apart from the employee with whom the employee can conspire. '[I]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation . . . .' To hold that a subordinate employee of a corporation can be liable for conspiring with the corporate principal would destroy what has heretofore been the settled rule that a corporation cannot conspire with itself." (*Black v. Bank of*

America N.T. & S.A. (1994) 30 Cal.App.4th 1, 6 [35 Cal.Rptr.2d 725], internal citations and footnote omitted.)

- "[U]nder the agent's immunity rule, '[a] cause of action for civil conspiracy may not arise . . . if the alleged conspirator, though a participant in the agreement underlying the injury, was *not personally bound by the duty violated by the wrongdoing* and was acting only as the agent or employee of the party who did have that duty.' " (*Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136, 1157 [151 Cal.Rptr.3d 683], original italics.)
- "Conspiracy liability may properly be imposed on nonfiduciary agents or attorneys for conduct which they carry out not simply as agents or employees of fiduciary defendants, but in furtherance of their own financial gain." (*Skarbrevik v. Cohen* (1991) 231 Cal.App.3d 692, 709 [282 Cal.Rptr. 627].)

Secondary Sources

1 Levy et al., California Torts, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability*, § 9.03[3][b] (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 126, § 126.11 *Conspiracy* (Matthew Bender)

4 California Points and Authorities, Ch. 46, § 46.21 et seq. *Conspiracy* (Matthew Bender)

3603–3609. Reserved for Future Use

3610. Aiding and Abetting Tort—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by [***name of actor***]'s [***insert tort theory, e.g., assault and battery***] and that [***name of defendant***] is responsible for the harm because [he/she/***nonbinary pronoun***] aided and abetted [***name of actor***] in committing the [***e.g., assault and battery***].**

If you find that [*name of actor***] committed [a/an] [***e.g., assault and battery***] that harmed [***name of plaintiff***], then you must determine whether [***name of defendant***] is also responsible for the harm. [***Name of defendant***] is responsible as an aider and abetter if [***name of plaintiff***] proves all of the following:**

1. **That [***name of defendant***] knew that [a/an] [***e.g., assault and battery***] was [being/going to be] committed by [***name of actor***] against [***name of plaintiff***];**
2. **That [***name of defendant***] gave substantial assistance or encouragement to [***name of actor***]; and**
3. **That [***name of defendant***]'s conduct was a substantial factor in causing harm to [***name of plaintiff***].**

Mere knowledge that [a/an] [*e.g., assault and battery***] was [being/going to be] committed and the failure to prevent it do not constitute aiding and abetting.**

New April 2008; Revised December 2015

Directions for Use

Give this instruction if the plaintiff seeks to hold a defendant responsible for the tort of another on a theory of aiding and abetting, whether or not the active tortfeasor is also a defendant.

Some cases seem to hold that in addition to the elements of knowledge and substantial assistance, a complaint must allege the aider and abettor had the specific intent to facilitate the wrongful conduct. (See *Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 95 [60 Cal.Rptr.3d 810].)

It appears that one may be liable as an aider and abetter of a negligent act. (See *Navarrete v. Meyer* (2015) 237 Cal.App.4th 1276, 1290 [188 Cal.Rptr.3d 623]; *Orser v. George* (1967) 252 Cal.App.2d 660, 668 [60 Cal.Rptr. 708].)

Sources and Authority

- "The jury was also instructed on aiding and abetting, as follows: 'A person aids and abets the commission of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of

committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] A person who aids and abets the commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1140–1141 [69 Cal.Rptr.3d 445].)

- "The elements of a claim for aiding and abetting a breach of fiduciary duty are: (1) a third party's breach of fiduciary duties owed to plaintiff; (2) defendant's actual knowledge of that breach of fiduciary duties; (3) substantial assistance or encouragement by defendant to the third party's breach; and (4) defendant's conduct was a substantial factor in causing harm to plaintiff. (Judicial Council of Cal., Civ. Jury Instns. (CACI) (2014) No. 3610 . . .)." (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 343 [179 Cal.Rptr.3d 813].)
- "[C]ausation is an essential element of an aiding and abetting claim, i.e., plaintiff must show that the aider and abettor provided assistance that was a substantial factor in causing the harm suffered." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1476 [171 Cal.Rptr.3d 548].)
- "The fact the instruction [CACI No. 3610] does not use the word 'intent' is not determinative. 'California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. . . . "The words 'aid and abet' as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation *with knowledge of the object to be attained*." [Citation.]' A defendant who acts with actual knowledge of the intentional wrong to be committed and provides substantial assistance to the primary wrongdoer is not an accidental participant in the enterprise." (*Upasani v. State Farm General Ins. Co.* (2014) 227 Cal.App.4th 509, 519 [173 Cal.Rptr.3d 784], original italics, internal citations omitted.)
- "As noted, some cases suggest that a plaintiff also must plead specific intent to facilitate the underlying tort. We need not decide whether specific intent is a required element because, read liberally, the fifth amended complaint alleges that [defendant] intended to assist the Association in breaching its fiduciary duties. In particular, plaintiffs allege that, with knowledge of the Association's breaches, [defendant] 'gave substantial encouragement and assistance to [the Association] *to breach its fiduciary duties*.' Fairly read, that allegation indicates intent to participate in tortious activity." (*Nasrawi, supra*, 231 Cal.App.4th at p. 345, original italics, internal citations omitted.)
- "[W]e consider whether the complaint states a claim based upon 'concert of action' among defendants. The elements of this doctrine are prescribed in section 876 of the Restatement Second of Torts. The section provides, 'For harm resulting to a third person from the tortious conduct of another, one is subject to

liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.' With respect to this doctrine, Prosser states that 'those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. [para.] Express agreement is not necessary, and all that is required is that there be a tacit understanding . . . .' " (*Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 604 [163 Cal.Rptr. 132, 607 P.2d 924], internal citations omitted.)

- "Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 653–654 [231 Cal.Rptr.3d 771].)
- "Restatement Second of Torts . . . recognizes a cause of action for aiding and abetting in a civil action when it provides: 'For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he [¶] . . . [¶] (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . . .' 'Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance . . . . It likewise applies to a person who knowingly gives substantial aid to another who, as he knows, intends to do a tortious act.' " (*Schulz, supra*, 152 Cal.App.4th at pp. 93–94, internal citations omitted.)
- "California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted . . . . 'The words "aid and abet" as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation *with knowledge of the object to be attained*.' " (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145–1146 [26 Cal.Rptr.3d 401], original italics, internal citations omitted.)
- " 'Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting. "As a general rule, one owes no duty to control the conduct of another . . . ." More specifically, a supervisor is not liable to third parties for the acts of his or her subordinates.' " (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 879 [57 Cal.Rptr.3d 454], internal citations omitted.)

- " 'In the civil arena, an aider and abettor is called a cotortfeasor. To be held liable as a cotortfeasor, a defendant must have knowledge and intent . . . . A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted *with the intent of facilitating the commission of that tort*.' Of course, a defendant can only aid and abet another's tort if the defendant knows what 'that tort' is . . . . [T]he defendant must have acted to aid the primary tortfeasor 'with knowledge of the object to be attained.' " (*Casey, supra*, 127 Cal.App.4th at p. 1146, original italics, internal citations omitted.)
- "The concert of action theory of group liability 'may be used to impose liability on a person who did not personally cause the harm to plaintiff, but whose " '[a]dvice or encouragement to act operates as a moral support to a tortfeasor[,] and if the act encouraged is known to be tortious[,] it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act.' " ' The doctrine is likened to aiding and abetting." (*Navarrete, supra,* 237 Cal.App.4th at p. 1286.)
- " 'Despite some conceptual similarities, civil liability for aiding and abetting the commission of a tort, which has no overlaid requirement of an independent duty, differs fundamentally from liability based on conspiracy to commit a tort. [Citations.] " '[A]iding-abetting focuses on whether a defendant knowingly gave "substantial assistance" to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct.' " ' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 324 [166 Cal.Rptr.3d 116].)
- " '[W]hile aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. . . .' [Citation.] The aider and abetter's conduct need not, as 'separately considered,' constitute a breach of duty." (*American Master Lease LLC*, *supra*, 225 Cal.App.4th at pp. 1475–1476.)
- "Nor do we agree with [defendant]'s contention that there is no evidence she aided and abetted [tortfeasor]. Her claim is premised on the assertion that the law in California does not permit liability for aiding and abetting 'unintentional conduct'; that [plaintiff] alleged no intentional tort, only that [tortfeasor] acted negligently, and there is no evidence he intended to harm anyone. She argues, 'Even if [tortfeasor] inadvertently violated the law against an "exhibition of speed," which he did not, [defendant] could not be liable for aiding and abetting such unintentional conduct.' However, for purposes of joint liability under a concert of action theory, it suffices that [defendant] assist or encourage [tortfeasor]'s breach of a duty, which Vehicle Code section 23109 imposed upon him (and also upon her not to aid and abet [tortfeasor])." (*Navarrete, supra*, 237 Cal.App.4th at p. 1290.)

- "James too must be held as a defendant because, although he did not fire the fatal bullet, there is evidence (*which may or may not be sufficient to prove him liable at the trial*) creating a question for the trier of fact. This evidence indicates he was firing alternately with Vierra at the same mudhen, in the same line of fire and possibly tortiously. In other words (to paraphrase the Restatement . . .), the record permits a possibility James knew Vierra's conduct constituted a breach of duty owed Orser and that James was giving Vierra substantial 'assistance or encouragement'; also that this was substantial assistance to Vierra in a tortious result with James' own conduct, 'separately considered, constituting a breach of duty to' Orser." (*Orser, supra*, 252 Cal.App.2d at p. 668, original italics; see also Rest. 2d Torts, § 876, Com. on Clause (b), Illustration 6.)
- "Because transferring funds in order to evade creditors constitutes an intentional tort, it logically follows that California common law should recognize liability for aiding and abetting a fraudulent transfer." (*Berger v. Varum* (2019) 35 Cal.App.5th 1013, 1025 [248 Cal.Rptr.3d 51].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 149, 150

1 Levy et al., California Torts, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability*, §§ 9.01, 9.02 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 126, *Conspiracy*, §§ 126.10, 126.11 (Matthew Bender)

4 California Points and Authorities, Ch. 46, *Conspiracy*, § 46.04 (Matthew Bender)

3611–3699. Reserved for Future Use

VICARIOUS RESPONSIBILITY

3700. Introduction to Vicarious ResponsibilityIntroduction to Vicarious Responsibility

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[One may authorize another to act on one's behalf in transactions with third persons. This relationship is called "agency." The person giving the authority is called the "principal"; the person to whom authority is given is called the "agent."]

[An employer/A principal] is responsible for harm caused by the wrongful conduct of [his/her/*nonbinary pronoun*/its] [employees/agents] while acting within the scope of their [employment/authority].

[An [employee/agent] is always responsible for harm caused by [his/her/*nonbinary pronoun*/its] own wrongful conduct, whether or not the [employer/principal] is also liable.]

New September 2003; Revised June 2015, May 2020

Directions for Use

This instruction provides the jury with some basic background information about the doctrine of respondeat superior. Include the first paragraph if the relationship at issue is one of principal-agent. If the employee or agent is also a defendant, give the third paragraph.

This instruction should be followed by either CACI No. 3703, *Legal Relationship Not Disputed*, CACI No. 3704, *Existence of "Employee" Status Disputed*, or CACI No. 3705, *Existence of "Agency" Relationship Disputed*.

Sources and Authority

- "Agency" Defined. Civil Code section 2295.
- Principal's Responsibility for Acts of Agent. Civil Code section 2338.
- "Agency is the relation that results from the act of one person, called the principal, who authorizes another, called the agent, to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal." (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 304 [1 Cal.Rptr.2d 680].)
- " ' "An agent 'is anyone who undertakes to transact some business, or manage some affair, for another, by authority of and on account of the latter, and to render an account of such transactions.' [Citation.] 'The chief characteristic of the agency is that of representation, the authority to act for and in the place of the principal for the purpose of bringing him or her into legal relations with third parties. [Citations.]' [Citation.] 'The significant test of an agency relationship is the principal's right to control the activities of the agent.' " ' "

(*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1171–1172 [201 Cal.Rptr.3d 390].)

- "Under the doctrine of respondeat superior, an employer is vicariously liable for his employee's torts committed within the scope of the employment. This doctrine is based on " 'a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business." ' " (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106, 719 P.2d 676].)
- " '[A] principal is liable to third parties . . . for the frauds or other wrongful acts committed by [its] agent in and as a part of the transaction of' the business of the agency." (*Daniels, supra*, 246 Cal.App.4th at p. 1172.)
- "[U]nder the Tort Claims Act, public employees are liable for injuries caused by their acts and omissions to the same extent as private persons. Vicarious liability is a primary basis for liability on the part of a public entity, and flows from the responsibility of such an entity for the acts of its employees under the principle of respondeat superior. As the Act provides, '[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would . . . have given rise to a cause of action against that employee,' unless 'the employee is immune from liability.' (Gov. Code, § 815.2, subds. (a), (b).)" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128 [119 Cal.Rptr.2d 709, 45 P.3d 1171], internal citations omitted.)
- "[W]here the liability of an employer in tort rests solely on the doctrine of respondeat superior, a judgment on the merits in favor of the employee is a bar to an action against the employer . . . ." (*Hilts v. County of Solano* (1968) 265 Cal.App.2d 161, 176 [71 Cal.Rptr. 275].)
- "An agent or employee is always liable for his own torts, whether his employer is liable or not." (*Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1411 [178 Cal.Rptr.3d 18].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 173–178

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, §§ 8.03–8.04 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.11 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.14 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee:*

Respondeat Superior, § 100A.24A (Matthew Bender)
California Civil Practice: Torts §§ 3:1–3:4 (Thomson Reuters)

3701. Tort Liability Asserted Against Principal—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by [***name of agent***]'s [***insert tort theory, e.g., negligence***].**

[*Name of plaintiff***] also claims that [***name of defendant***] is responsible for the harm because [***name of agent***] was acting as [his/her/***nonbinary pronoun***/its] [agent/employee/[***insert other relationship, e.g., partner***]] when the incident occurred.**

If you find that [*name of agent***]'s [***insert tort theory***] harmed [***name of plaintiff***], then you must decide whether [***name of defendant***] is responsible for the harm. [***Name of defendant***] is responsible if [***name of plaintiff***] proves both of the following:**

1. **That [***name of agent***] was [***name of defendant***]'s [agent/employee/[***insert other relationship***]]; and**
2. **That [***name of agent***] was acting within the scope of [his/her/***nonbinary pronoun***] [agency/employment/[***insert other relationship***]] when [he/she/***nonbinary pronoun***] harmed [***name of plaintiff***].**

New September 2003

Directions for Use

The term "name of agent," in brackets, is intended in the general sense, to denote the person or entity whose wrongful conduct is alleged to have created the principal's liability.

Under other principles of law, a principal may be directly liable for authorizing or directing an agent's wrongful acts. (See 3 Witkin, Summary of Cal. Law (11th ed. 2017) Agency and Employment, § 173.)

One of the two bracketed first sentences would be used, depending on whether the plaintiff is suing both the principal and the agent or the principal alone.

If there is no issue regarding whether a principal-agent exists, see CACI No. 3703, *Legal Relationship Not Disputed.*

This instruction may not apply if employer liability is statutory, such as under the Fair Employment and Housing Act.

Sources and Authority

- "Agent" Defined. Civil Code section 2295.
- " 'An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.' 'An agent for a particular

act or transaction is called a special agent. All others are general agents.' 'An agency relationship "may be implied based on conduct and circumstances." ' " (*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 262 [225 Cal.Rptr.3d 305], internal citations omitted.)

- "The rule of respondeat superior is familiar and simply stated: an employer is vicariously liable for the torts of its employees committed within the scope of the employment. Equally well established, if somewhat surprising on first encounter, is the principle that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296–297 [48 Cal.Rptr.2d 510, 907 P.2d 358], internal citations and footnote omitted.)
- "It is a settled rule of the law of agency that a principal is responsible to third persons for the ordinary contracts and obligations of his agent with third persons made in the course of the business of the agency and within the scope of the agent's powers as such, although made in the name of the agent and not purporting to be other than his own personal obligation or contract." (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1178 [201 Cal.Rptr.3d 390].)
- "The employer is liable not because the employer has control over the employee or is in some way at fault, but because the employer's enterprise creates inevitable risks as a part of doing business." (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1559 [56 Cal.Rptr.2d 333], internal citations omitted.)
- "Respondeat superior is based on a 'deeply rooted sentiment' that it would be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208 [285 Cal.Rptr. 99, 814 P.2d 1341], internal citation omitted.)
- "[The Supreme Court has] articulated three reasons for applying the doctrine of respondeat superior: (1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury." (*Mary M., supra*, 54 Cal.3d at p. 209.)
- "[A] principal is charged only with the knowledge of an agent acquired while the agent was acting in that role and within the scope of his or her authority as an agent." (*RSB Vineyards, LLC v. Orsi* (2017) 15 Cal.App.5th 1089, 1099 [223 Cal.Rptr.3d 458].)
- "[A] relationship of agency always 'contemplates three parties—the principal, the agent, and the third party with whom the agent is to deal.' " (*RSB Vineyards, LLC*, *supra*, 15 Cal.App.5th at p. 1100.)
- "[A] principal may be liable for the wrongful conduct of its agent, even if that conduct is criminal, in one of three ways: (1) if the ' "principal directly

authorizes . . . [the tort or] crime to be committed" '; (2) if the agent commits the tort 'in the scope of his employment and in performing service on behalf of the principal', 'regardless of whether the wrong is authorized or ratified by [the principal];, and even if the wrong is criminal; or (3) if the principal ratifies its agent's conduct 'after the fact by . . . voluntar[ily] elect[ing] to adopt the [agent's] conduct . . . as its own' " (*Doe v. Roman Catholic Archbishop of Los Angeles* (2016) 247 Cal.App.4th 953, 969 [202 Cal.Rptr.3d 414], internal citations omitted.)

- "The employee need not have intended to further the employer's interest for the employer to be liable if there is a 'causal nexus' between the intentional tort and the employee's work. The connection or causal nexus required for respondeat superior liability is the tort must have been engendered by or arise from the work. The required connection has been described as (1) 'the incident leading to injury must be an "outgrowth" of the employment'; (2) 'the risk of tortious injury is ' " 'inherent in the working environment' " '; (3) the risk of tortious injury is ' " 'typical of or broadly incidental to the enterprise [the employer] has undertaken' " ' or (4) 'the tort was, in a general way, foreseeable from the employee's duties.' " (*Crouch v. Trinity Christian Center of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1015 [253 Cal.Rptr.3d 1], internal citations omitted.)
- "[W]here recovery of damages is sought against a principal and an agent, and the negligence of the agent is the cause of the injury, a verdict releasing the agent from liability releases the principal." (*Lehmuth v. Long Beach Unified School Dist.* (1960) 53 Cal.2d 544, 550 [2 Cal.Rptr. 279, 348 P.2d 887].)
- The doctrine of respondeat superior applies equally to public and private employers. (*Mary M., supra*, 54 Cal.3d at p. 209.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 173–178

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶ 2:600 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, §§ 8.03–8.04 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.14 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.20 et seq. (Matthew Bender)

California Civil Practice: Torts §§ 3:1–3:4 (Thomson Reuters)

3702. Affirmative Defense—Comparative Fault of Plaintiff's Agent

[*Name of defendant***] claims that the negligence of [***name of plaintiff's agent***] contributed to [***name of plaintiff principal***]'s harm. To succeed on this claim, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff's agent***] was acting as [***name of plaintiff principal***]'s [agent/employee/[***insert other relationship, e.g., "partner"***]];**
2. **That [***name of plaintiff's agent***] was acting within the scope of [his/her/***nonbinary pronoun***] [agency/employment/[***insert other relationship***]] when the incident occurred; and**
3. **That the negligence of [***name of plaintiff's agent***] was a substantial factor in causing [***name of plaintiff principal***]'s harm.**

If [*name of defendant***] proves the above, [***name of plaintiff principal***]'s claim is reduced by your determination of the percentage of [***name of plaintiff's agent***]'s responsibility. I will calculate the actual reduction.**

New September 2003; Revised December 2009

Directions for Use

This instruction may be used by a defendant against a principal/employer to assert the comparative fault of an agent/employee. For example, in an automobile accident lawsuit brought by a corporate plaintiff, the defendant may use this instruction to assert that the negligence of the plaintiff's employee/driver contributed to causing the accident.

Sources and Authority

- The doctrine of respondeat superior is not limited to the principal's responsibility for injuries to third parties. A defendant also can use the doctrine to support a claim of contributory negligence against a plaintiff principal if the plaintiff's agent was contributorily negligent. (See 6 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 1481.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1481

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.08 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.19 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.23 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.43 (Matthew Bender)

3703. Legal Relationship Not Disputed

In this case [*name of agent***] was the [employee/agent/[***insert other relationship, e.g., "partner"***]] of [***name of defendant***].**

If you find that [*name of agent***] was acting within the scope of [his/her/** *nonbinary pronoun***] [employment/agency/[***insert other relationship***]] when the incident occurred, then [***name of defendant***] is responsible for any harm caused by [***name of agent***]'s [***insert applicable tort theory, e.g., "negligence"***].**

New September 2003

Directions for Use

The term "name of agent," in brackets, is intended in the general sense, to denote the person or entity whose wrongful conduct is alleged to have created the principal's liability.

Under other principles of law, a principal may be directly liable for authorizing or directing an agent's wrongful acts. (See 3 Witkin, Summary of Cal. Law (11th ed. 2017) Agency and Employment, § 173.)

This instruction may not apply where employer liability is statutory, such as under the Fair Employment and Housing Act.

Sources and Authority

- Ordinarily, the question of agency is one of fact; however, where the evidence is undisputed the issue becomes one of law. (*Mantonya v. Bratlie* (1948) 33 Cal.2d 120, 128–129 [199 P.2d 677].)
- This instruction may be appropriate in cases where vicarious liability is asserted in the context of employment, since agency and employment are often viewed as synonymous. Witkin observes: "There is seldom any reason to distinguish between the service of an agent and that of an employee . . . . [However, t]he two relationships are not considered identical. It is said that an employee works for the employer, while an agent also acts for and in the place of the principal for the purpose of bringing the principal into legal relations with third persons." (3 Witkin, Summary of Cal. Law (11th ed. 2017), Agency and Employment, § 4.)
- "It is settled that for purposes of liability to third parties for torts, a real estate salesperson is the agent of the broker who employs him or her. The broker is liable as a matter of law for all damages caused to third persons by the tortious acts of the salesperson committed within the course and scope of employment." (*California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1581 [23 Cal.Rptr.2d 462], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 2–4

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, §§ 8.01–8.03 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

California Civil Practice: Torts § 3:1 (Thomson Reuters)

3704. Existence of "Employee" Status Disputed

[*Name of plaintiff***] must prove that [***name of agent***] was [***name of defendant***]'s employee.**

In deciding whether [*name of agent***] was [***name of defendant***]'s employee, the most important factor is whether [***name of defendant***] had the right to control how [***name of agent***] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker [without cause]. It does not matter whether [***name of defendant***] exercised the right to control.**

In deciding whether [*name of defendant***] was [***name of agent***]'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that [***name of defendant***] was the employer of [***name of agent***]. No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.**

(a) [*Name of defendant***] supplied the equipment, tools, and place of work;**

(b) [*Name of agent***] was paid by the hour rather than by the job;**

(c) [*Name of defendant***] was in business;**

(d) The work being done by [*name of agent***] was part of the regular business of [***name of defendant***];**

(e) [*Name of agent***] was not engaged in a distinct occupation or business;**

(f) The kind of work performed by [*name of agent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) The kind of work performed by [*name of agent***] does not require specialized or professional skill;**

(h) The services performed by [*name of agent***] were to be performed over a long period of time; [and]**

(i) [*Name of defendant***] and [***name of agent***] believed that they had an employer-employee relationship[./; and]**

(j) [*Specify other factor***].**

New September 2003; Revised December 2010, June 2015, December 2015, November 2018, May 2020, May 2021

Directions for Use

This instruction is based on *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399] and the Restatement Second of Agency, section 220. It is sometimes referred to as the *Borello* test or the common law test. (See *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 934 [232 Cal.Rprt.3d 1, 416 P.3d 1].) It is intended to address the employer-employee relationship for purposes of assessing vicarious responsibility on the employer for the employee's acts. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed.*

Secondary factors (a)–(i) come from the Restatement section 220. (See also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [173 Cal.Rptr.3d 332, 327 P.3d 165]; Rest.3d Agency, § 7.07, com. f,) They have been phrased so that a yes answer points toward an employment relationship. Omit any that are not relevant. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355.) Therefore, an "other" option (j) has been included.

Borello was a workers' compensation case. In *Dynamex, supra,* the court, in holding that *Borello* did not control the specific wage order dispute at issue, noted that "it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue." (*Dynamex*, *supra*, 4 Cal.5th at p. 934.) The court also said that "[t]he *Borello* decision repeatedly emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation." (*Id.* at p. 935.) With respondeat superior, there is no statutory provision or social welfare legislation to be considered. (Cf. Lab. Code, § 2775 [codifying *Dynamex* for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, with limited exceptions for specified occupations].)

A different test for the existence of "independent contractor" status applies to app-based rideshare and delivery drivers. (See Bus. & Prof. Code, § 7451.)

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.
- Rebuttable Presumption that Contractor Is Employee Rather Than Independent Contractor; Proof of Independent Contractor Status. Labor Code section 2750.5.
- "[S]ubject to certain policy considerations, a hirer . . . cannot be held vicariously liable for the negligence of his independent contractors." (*Blackwell v. Vasilas* (2016) 244 Cal.App.4th 160, 168 [197 Cal.Rptr.3d 753].)

- "Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved." (*Ayala, supra*, 59 Cal.4th at p. 528.)
- "However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*S. G. Borello & Sons, Inc.*, *supra*, 48 Cal.3d at p. 350, internal citations omitted.)
- "While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.' " (*Ayala*, *supra*, 59 Cal.4th at p. 532.)
- " 'Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*S. G. Borello & Sons, Inc.*, *supra*, 48 Cal.3d at p. 351, internal citations omitted.)
- "[T]he Restatement guidelines heretofore approved in our state remain a useful reference." (*S. G. Borello & Sons, Inc.*, *supra*, 48 Cal.3d at p. 354.)
- "We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." (*S.*

G. Borello & Sons, Inc., *supra*, 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

- "[A]t common law the problem of determining whether a worker should be classified as an employee or an independent contractor initially arose in the tort context—in deciding whether the hirer of the worker should be held vicariously liable for an injury that resulted from the worker's actions. In the vicarious liability context, the hirer's right to supervise and control the details of the worker's actions was reasonably viewed as crucial, because ' "[t]he extent to which the employer had a right to control [the details of the service] activities was . . . highly relevant to the question whether the employer ought to be legally liable for them . . . ." ' For this reason, the question whether the hirer controlled the details of the worker's activities became the primary common law standard for determining whether a worker was considered to be an employee or an independent contractor." (*Dynamex, supra,* 4 Cal.5th at p. 927, internal citations omitted.)
- "[A]lthough we have sometimes characterized *Borello* as embodying the common law test or standard for distinguishing employees and independent contractors, it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue. In other words, *Borello* calls for application of a *statutory purpose* standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification (employee or independent contractor) best effectuates the underlying legislative intent and objective of the statutory scheme at issue." (*Dynamex, supra,* 4 Cal.5th at p. 934, original italics, internal citation omitted.)
- "The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences. ' "Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact . . . ." ' The question is one of law only if the evidence is undisputed." (*Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1225 [223 Cal.Rptr.3d 761].)
- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)
- "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*S. G. Borello & Sons, Inc.*, *supra*, 48 Cal.3d at p. 342.)
- "[A]lthough the Caregiver Contract signed by Plaintiff stated she was an independent contractor, not an employee, there is evidence of other indicia of employment and Plaintiff averred in her declaration that the Caregiver Contract

was presented to her 'on a take it or leave it basis.' 'A party's use of a label to describe a relationship with a worker . . . will be ignored where the evidence of the parties' actual conduct establishes that a different relationship exists.' " (*Duffey v. Tender Heart Home Care Agency, LLC* (2019) 31 Cal.App.5th 232, 257–258 [242 Cal.Rptr.3d 460].)

- "It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)
- " '[W]hat matters is whether a hirer has the "legal right to control the activities of the alleged agent" . . . . That a hirer chooses not to wield power does not prove it lacks power.' " (*Duffey, supra*, 31 Cal.App.5th at p. 257.)
- "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.' " (*Ayala*, *supra*, 59 Cal.4th at p. 531.)
- "The worker's corresponding right to leave is similarly relevant: ' "An employee may quit, but an independent contractor is legally obligated to complete his contract." ' " (*Ayala*, *supra*, 59 Cal.4th at p. 531 fn. 2.)
- "A finding of employment is supported where the workers are 'a regular and integrated portion of [the] business operation.' " (*Garcia v. Seacon Logix Inc.* (2015) 238 Cal.App.4th 1476, 1487 [190 Cal.Rptr.3d 400].)
- "Where workers are paid weekly or by the hour, rather than by the job, it suggests an employment relationship." (*Garcia, supra,* 238 Cal.App.4th at p. 1488.)
- "In cases where there is a written contract, to answer that question [the right of control] without full examination of the contract will be virtually impossible. . . . [¶] . . . [T]he rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." (*Ayala*, *supra*, 59 Cal.4th at p. 535.)
- "[T]he right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1179 [183 Cal.Rptr.3d 394].)
- " '[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], . . . the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor . . . .' " (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143

[159 Cal.Rptr.3d 102], quoting *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902].)

- "Agency and independent contractorship are not *necessarily* mutually exclusive legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor. One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*Jackson, supra*, 233 Cal.App.4th at p. 1184, original italics, internal citations omitted.)
- "[W]hen a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213].)
- "[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." (*Arnold, supra*, 202 Cal.App.4th at p. 589.)
- Restatement Second of Agency, section 220, provides: "(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control. [¶] (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: [¶] (a) the extent of control which, by the agreement, the master may exercise over the details of the work; [¶] (b) whether or not the one employed is engaged in a distinct occupation or business; [¶] (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; [¶] (d) the skill required in the particular occupation; [¶] (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; [¶] (f) the length of time for which the person is employed; [¶] (g) the method of payment, whether by the time or by the job; [¶] (h) whether or not the work is a part of the regular business of the employer; [¶] (i) whether or not the parties believe they are creating the relation of master and servant; and [¶] (j) whether the principal is or is not in business."

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 29A

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, 248.22, 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.13 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior,* §§ 100A.25, 100A.34 (Matthew Bender)

California Civil Practice: Torts §§ 3:5–3:6 (Thomson Reuters)

3705. Existence of "Agency" Relationship Disputed

[*Name of plaintiff***] claims that [***name of agent***] was [***name of defendant***]'s agent and that [***name of defendant***] is therefore responsible for [***name of agent***]'s conduct.**

If [*name of plaintiff***] proves that [***name of defendant***] gave [***name of agent***] authority to act on [his/her/***nonbinary pronoun***/its] behalf, then [***name of agent***] was [***name of defendant***]'s agent. This authority may be shown by words or may be implied by the parties' conduct. This authority cannot be shown by the words of [***name of agent***] alone.**

New September 2003; Revised November 2017

Directions for Use

This instruction should be used when the factual setting involves a relationship other than employment, such as homeowner-real estate agent or franchisor-franchisee. For an instruction for use for employment, give CACI No. 3704, *Existence of "Employee" Status Disputed*. The secondary factors (a) through (j) in CACI No. 3704 may be given with this instruction also. (See *Secci v. United Independent Taxi Drivers, Inc.* (2017) 8 Cal.App.5th 846, 855 [214 Cal.Rptr.3d 379].)

Sources and Authority

- "Agent" Defined. Civil Code section 2295.
- "[A] principal who personally engages in no misconduct may be vicariously liable for the tortious act committed by an agent within the course and scope of the agency. [Citation.] Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act . . . . [Citation.] While the existence of an agency relationship is 'typically a question of fact, when ' "the evidence is susceptible of but a single inference," ' summary judgment may be appropriate." (*Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 85 [244 Cal.Rptr.3d 680], internal citations omitted.)
- " ' "The existence of an agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence. [Citation.]" [Citation.] Inferences drawn from conflicting evidence by the trier of fact are generally upheld. [Citation.]' 'Only when the essential facts are not in conflict will an agency determination be made as a matter of law. [Citation.]' " (*Secci, supra,* 8 Cal.App.5th at p. 854.)
- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)
- One who performs a mere favor for another without being subject to any legal

duty of service and without assenting to right of control is not an agent, because the agency relationship rests upon mutual consent. (*Hanks v. Carter & Higgins of Cal., Inc.* (1967) 250 Cal.App.2d 156, 161 [58 Cal.Rptr. 190].)

- An agency must rest upon an agreement. (*D'Acquisto v. Evola* (1949) 90 Cal.App.2d 210, 213 [202 P.2d 596].) "Agency may be implied from the circumstances and conduct of the parties." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579 [36 Cal.Rptr.2d 343], internal citations omitted.)
- "Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent. . . . It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)
- "For an agency relationship to exist, the asserted principal must have a sufficient right to control the relevant aspect of the purported agent's day-to-day operations." (*Barenborg, supra*, 33 Cal.App.5th at p. 85.)
- When the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25 [202 Cal.Rptr. 141], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)
- " '[W]hether an agency relationship has been created or exists is determined by the relation of the parties as they in fact exist by agreement or acts [citation], and the primary right of control is particularly persuasive. [Citations.] Other factors may be considered to determine if an independent contractor is acting as an agent, including: whether the "principal" and "agent" are engaged in distinct occupations; the skill required to perform the "agent's" work; whether the "principal" or "agent" supplies the workplace and tools; the length of time for completion; whether the work is part of the 'principal's" regular business; and whether the parties intended to create an agent/principal relationship. [Citation.]' " (*Secci, supra,* 8 Cal.App.5th at p. 855.)
- "[T]here is substantial overlap in the factors for determining whether one is an employee or an agent." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1184 [183 Cal.Rptr.3d 394].)
- "Agency and independent contractorship are not *necessarily* mutually exclusive legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor. One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*Jackson, supra*, 233 Cal.App.4th at p. 1184, original italics, internal citations omitted.)
- "[Defendant] argues that when public regulations require a company to exert

control over its independent contractors, evidence of that government-mandated control cannot support a finding of vicarious liability based on agency. This argument conflicts with the policy behind the regulated hirer exception, which emphasizes that the effectiveness of public regulations 'would be impaired if the carrier could circumvent them by having the regulated operations conducted by an independent contractor.' " (*Secci, supra,* 8 Cal.App.5th at pp. 860–861.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 101–105

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 2-C *Broker's Relationship and Obligations to Principal and Third Parties*, ¶ 2:120 et seq. (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶¶ 2:600, 2:611 (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.12 (Matthew Bender)

18 California Points and Authorities, Ch. 182, *Principal and Agent*, § 182.30 et seq. (Matthew Bender)

California Civil Practice: Torts §§ 3:26–3:27 (Thomson Reuters)

3706. Special Employment—Lending Employer Denies Responsibility for Worker's Acts

When one employer sends or loans an employee to work for another employer, a special employment relationship may be created that affects the duties and responsibilities between the two employers and the employee. The arrangement may be temporary with a determined ending date or event; or it may be open-ended. In this situation, the borrowing employer is known as a "special employer" and the employee is referred to as a "special employee."

[*Name of plaintiff***] claims that [***name of worker***] was the employee of [***name of defendant lending employer***] when the incident occurred, and that [***name of defendant lending employer***] is therefore responsible for [***name of worker***]'s conduct. [***Name of defendant lending employer***] claims that [***name of worker***] was the special employee of [***name of defendant borrowing employer***] when the incident occurred, and therefore [***name of defendant borrowing employer***] is solely responsible for [***name of worker***]'s conduct.**

In deciding whether [*name of worker***] was [***name of defendant borrowing employer***]'s special employee when the incident occurred, the most important factor is whether [***name of defendant borrowing employer***] had the right to fully control the details of the work activities of [***name of worker***], rather than just the right to specify the result. It does not matter whether [***name of defendant borrowing employer***] actually exercised the right to control.**

In addition to the right to control, you must consider all the circumstances in deciding whether [*name of worker***] was [***name of defendant borrowing employer***]'s special employee when the incident occurred. The following factors, if true, may tend to show that [***name of worker***] was the special employee of [***name of defendant borrowing employer***]. No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.**

(a) [*Name of defendant borrowing employer***] supplied the equipment, tools, and place of work;**

(b) [*Name of worker***] was paid by the hour rather than by the job;**

(c) The work being done by [*name of worker***] was part of the regular business of [***name of defendant borrowing employer***];**

(d) [*Name of defendant borrowing employer***] had the right to terminate [***name of worker***]'s employment, not just the right to have [him/**

her/*nonbinary pronoun*] removed from the job site;

(e) [*Name of worker*] was not engaged in a distinct occupation or business;

(f) The kind of work performed by [*name of worker*] is usually done under the direction of a supervisor rather than by a specialist working without supervision;

(g) The kind of work performed by [*name of worker*] does not require specialized or professional skill;

(h) The services performed by [*name of worker*] were to be performed over a long period of time;

(i) [*Name of defendant lending employer*] and [*name of defendant borrowing employer*] were not jointly engaged in a project of mutual interest;

(j) [*Name of worker*], expressly or by implication, consented to the special employment with [*name of defendant borrowing employer*]; [and]

(k) [*Name of worker*] and [*name of defendant borrowing employer*] believed that they had a special employment relationship[./;] [and]

(l) [*Specify any other relevant factors*.]

New September 2003; Revised June 2013, December 2015, December 2016

Directions for Use

This instruction is for use in "special employment" cases. Special employment arises when a worker has been loaned from one employer to another, and there is an issue as to which employer the worker should be attributed with regard to the claim in the case. The borrowing employer is called the "special" employer. The lending employer is sometimes called the "general" employer, though use of that term may be confusing to a jury.

The instruction as drafted is for use by the lending employer to claim that the worker should be considered as the special employee of the borrowing employer. This would be the case if the issue is which employer is responsible for the worker's tortious conduct under respondeat superior. The instruction may be modified if the claim is for injury to the worker, and the borrowing employer wants to claim the worker as its own in order to take advantage of the exclusive remedy bar of workers' compensation. This instruction is not for use by the worker to claim employment rights under the Labor Code, though many of its provisions will likely be applicable.

In addition to the borrowing employer's control over the employee, there are a number of relevant secondary factors to use in deciding whether a special

employment relationship existed. They are similar, but not identical, to the factors from the Restatement Second of Agency, section 220 to be used in an independent contractor analysis. (See *State ex rel. Dept. of California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1013–1014 [184 Cal.Rptr.3d 354, 343 P.3d 415]; CACI No. 3704, *Existence of "Employee" Status Disputed*; see also *Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492 [162 Cal.Rptr. 320, 606 P.2d 355]; *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 176–177 [151 Cal.Rptr. 671, 588 P.2d 811].) In the employee-contractor context, it has been held to be error not to give the secondary factors. (See *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 303–304 [111 Cal.Rptr.3d 787].)

Sources and Authority

- "[W]here the servants of two employers are jointly engaged in a project of mutual interest, each employee ordinarily remains the servant of his own master and does not thereby become the special employee of the other." (*Marsh*, *supra*, 26 Cal.3d at p. 493.)
- "When an employer—the 'general' employer—lends an employee to another employer and relinquishes to a borrowing employer all right of control over the employee's activities, a 'special employment' relationship arises between the borrowing employer and the employee. During this period of transferred control, the special employer becomes solely liable under the doctrine of respondeat superior for the employee's job-related torts." (*Marsh, supra*, 26 Cal.3d at p. 492.)
- "The law of agency has long recognized that a person generally the servant of one master can become the borrowed servant of another. If the borrowed servant commits a tort while carrying out the bidding of the borrower, vicarious liability attaches to the borrower and not to the general master." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 455–456 [183 Cal.Rptr. 51, 645 P.2d 102], internal citations omitted.)
- "Liability in borrowed servant cases involves the exact public policy considerations found in sole employer cases. Liability should be on the persons or firms which can best insure against the risk, which can best guard against the risk, which can most accurately predict the cost of the risk and allocate the cost directly to the consumers, thus reflecting in its prices the enterprise's true cost of doing business." (*Strait v. Hale Construction Co.* (1972) 26 Cal.App.3d 941, 949 [103 Cal.Rptr. 487].)
- "In determining whether a special employment relationship exists, the primary consideration is whether the special employer has ' "[t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not . . . ." ' However, '[whether] the right to control existed or was exercised is generally a question of fact to be resolved from the reasonable inferences to be drawn from the circumstances shown.' " (*Kowalski*, *supra*, 23 Cal.3d at p. 175, internal citations omitted.)
- "[S]pecial employment is most often resolved on the basis of 'reasonable

inferences to be drawn from the circumstances shown.' Where the evidence, though not in conflict, permits conflicting inferences, . . . ' "the existence or nonexistence of the special employment relationship barring the injured employee's action at law is generally a question reserved for the trier of fact." ' " (*Marsh, supra,* 26 Cal.3d at p. 493.)

- "[I]f neither the evidence nor inferences are in conflict, then the question of whether an employment relationship exists becomes a question of law which may be resolved by summary judgment." (*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1248–1249 [250 Cal.Rptr. 718], internal citations omitted.)
- "The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will not suffice." (*Marsh, supra,* 26 Cal.3d at p. 492.)
- "California courts have held that evidence of the following circumstances tends to negate the existence of a special employment: The employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer." (*Marsh, supra*, 26 Cal.3d at p. 492.)
- "The common law also recognizes factors secondary to the right of control. We have looked to other considerations discussed in the Restatement of Agency to assess whether an employer-employee relationship exists. The comments to section 227 of the Restatement Second of Agency, which covers servants lent by one master to another, note that '[m]any of the factors stated in Section 220 which determine that a person is a servant are also useful in determining whether the lent servant has become the servant of the borrowing employer.' The secondary Restatement factors that we have adopted are: ' "(a) [W]hether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." [Citations.]' " (*State ex rel. Dept. of California Highway Patrol, supra,* 60 Cal.4th at pp. 1013–1014, internal citations omitted.)
- "Evidence that the alleged special employer has the power to discharge a worker 'is strong evidence of the existence of a special employment relationship . . . . The payment of wages is not, however, determinative.' Other factors to be taken into consideration are 'the nature of the services, whether skilled or unskilled, whether the work is part of the employer's regular business, the duration of the

employment period, . . . and who supplies the work tools.' Evidence that (1) the employee provides unskilled labor, (2) the work he performs is part of the employer's regular business, (3) the employment period is lengthy, and (4) the employer provides the tools and equipment used, tends to indicate the existence of special employment. Conversely, evidence to the contrary negates existence of a special employment relationship. [¶¶] In addition, consideration must be given to whether the worker consented to the employment relationship, either expressly or impliedly, and to whether the parties believed they were creating the employer-employee relationship." (*Kowalski, supra*, 23 Cal.3d at pp. 176–178, footnotes and internal citations omitted.)

- "Moreover, that an alleged special employer can have an employee removed from the job site does not necessarily indicate the existence of a special employment relationship. Anyone who has the employees of an independent contractor working on his premises could, if dissatisfied with an employee, have the employee removed. Yet, the ability to do so would not make the employees of the independent contractor the special employees of the party receiving the services." (*Kowalski, supra*, 23 Cal.3d at p. 177 fn. 9.)
- [T]he jury need not find that [the worker] remained exclusively defendant's employee in order to impose liability on defendant. Facts demonstrating the existence of a special employment relationship do not necessarily preclude a finding that a particular employee also remained under the partial control of the original employer. Where general and special employers share control of an employee's work, a 'dual employment' arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts." (*Marsh, supra*, 26 Cal.3d at pp. 494–495.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 179–182

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2][e] (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.22 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine*, § 239.28 (Matthew Bender)

California Civil Practice: Torts §§ 3:26–3:27 (Thomson Reuters)

3707. Special Employment—Joint Responsibility

If you decide that [*name of worker***] was the special employee of [***name of defendant borrowing employer***], but that [***name of defendant lending employer***] partially controlled [***name of worker***]'s activities along with [***name of defendant borrowing employer***], then you must conclude that both [***name of defendant lending employer***] and [***name of defendant borrowing employer***] are responsible for the conduct of [***name of worker***].**

New September 2003; Revised December 2016

Directions for Use

Give this instruction with CACI No. 3706, *Special Employment—Lending Employer Denies Responsibility for Worker's Acts*, if the jury will be given the option of deciding that both the lending employer and the borrowing employer should be treated as the worker's employer with regard to the claim at issue.

Sources and Authority

- " ' "Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers—his original or 'general' employer and a second, the 'special' employer." ' A general employer is absolved of respondeat superior liability when it has relinquished total control to the special employer. During this period of transferred control, the special employer becomes solely liable under the doctrine of respondeat superior for the employee's job-related torts." (*Montague v. AMN Healthcare, Inc.* (2014) 223 Cal.App.4th 1515, 1520 [168 Cal.Rptr.3d 123], internal citations omitted.)
- "Facts demonstrating the existence of a special employment relationship do not necessarily preclude a finding that a particular employee also remained under the partial control of the original employer. Where general and special employers share control of an employee's work, a 'dual employment' arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 494–495 [162 Cal.Rptr. 320, 606 P.2d 355], internal citations omitted.)
- "This is especially true where the loaned employee performs work of interest to both the general and special employers." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 460 [183 Cal.Rptr. 51, 645 P.2d 102], internal citation omitted.) If the loaned employee performs work of interest to both the general and special employers, "there is a presumption that the [employee] remained in his general employment. (*Ibid.*) The [general employer] can avoid liability only if it can [prove] that it gave up . . . 'authoritative direction and control' [over the employee]." (*Ibid.*)
- " 'Authoritative direction and control' is more than the power to suggest details

or the necessary cooperation." (*Societa per Azioni de Navigazione Italia, supra*, 31 Cal.3d at p. 460, internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 179–182

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2][e] (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.22 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine*, § 239.28 (Matthew Bender)

California Civil Practice: Torts §§ 3:26–3:27 (Thomson Reuters)

3708. Peculiar-Risk Doctrine

[*Name of plaintiff*] claims that even if [*name of independent contractor*] was not an employee, [*name of defendant*] is responsible for [*name of independent contractor*]'s conduct because the work involved a special risk of harm.

A special risk of harm is a recognizable danger that arises out of the nature of the work or the place where it is done and requires specific safety measures appropriate to the danger. A special risk of harm may also arise out of a planned but unsafe method of doing the work. A special risk of harm does not include a risk that is unusual, abnormal, or not related to the normal or expected risks associated with the work.

To establish this claim, [*name of plaintiff*] must prove each of the following:

1. **That the work was likely to involve a special risk of harm to others;**
2. **That [*name of defendant*] knew or should have known that the work was likely to involve this risk;**
3. **That [*name of independent contractor*] failed to use reasonable care to take specific safety measures appropriate to the danger to avoid this risk; and**
4. **That [*name of independent contractor*]'s failure was a cause of harm to [*name of plaintiff*].**

[In deciding whether [*name of defendant*] should have known the risk, you should consider [his/her/*nonbinary pronoun*/its] knowledge and experience in the field of work to be done.]

*New September 2003; Revised November 2024**

Directions for Use

This instruction may be used if the plaintiff seeks to hold the hirer of an independent contractor vicariously liable for the independent contractor's torts because the work for which the contractor was hired involves a special risk arising out of the nature of the work or its location.

However, do not give this instruction if an independent contractor (or its employee) seeks to hold the hirer or general contractor vicariously liable for injuries arising from the work performed by the independent contractor for the hirer. (*Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 52 [282 Cal.Rptr.3d 658, 493 P.3d 212].) Give instead, if applicable, CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control*.

Sources and Authority

- "The doctrine of peculiar risk is an exception to the common law rule that a hirer was not liable for the torts of an independent contractor. Under this doctrine, 'a person who hires an independent contractor to perform work that is inherently dangerous can be held liable for tort damages when the contractor's negligent performance of the work causes injuries to others. By imposing such liability without fault on the person who hires the independent contractor, the doctrine seeks to ensure that injuries caused by inherently dangerous work will be compensated, that the person for whose benefit the contracted work is done bears responsibility for any risks of injury to others, and that adequate safeguards are taken to prevent such injuries.' This doctrine of peculiar risk thus represents a limitation on the common law rule and a corresponding expansion of hirer vicarious liability." (*Vargas v. FMI, Inc.* (2015) 233 Cal.App.4th 638, 646–647 [182 Cal.Rptr.3d 803], internal citation omitted.)
- "A critical inquiry in determining the applicability of the doctrine of peculiar risk is whether the work for which the contractor was hired involves a risk that is 'peculiar to the work to be done,' arising either from the nature or the location of the work and ' "against which a reasonable person would recognize the necessity of taking special precautions." ' " (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 695 [21 Cal.Rptr.2d 72, 854 P.2d 721], internal citations omitted.)
- "The courts created this exception in the late 19th century to ensure that innocent third parties injured by inherently dangerous work performed by an independent contractor for the benefit of the hiring person could sue not only the contractor, but also the hiring person, so that in the event of the contractor's insolvency, the injured person would still have a source of recovery." (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 258 [74 Cal.Rptr.2d 878, 955 P.2d 504].)
- "The analysis of the applicability of the peculiar risk doctrine to a particular fact situation can be broken down into two elements: (1) whether the work is likely to create a peculiar risk of harm unless special precautions are taken; and (2) whether the employer should have recognized that the work was likely to create such a risk." (*Jimenez v. Pacific Western Construction Co.* (1986) 185 Cal.App.3d 102, 110 [229 Cal.Rptr. 575] [proper in this case for trial court to find peculiar risk as a matter of law].)
- "Whether the particular work which the independent contractor has been hired to perform is likely to create a peculiar risk of harm to others unless special precautions are taken is ordinarily a question of fact." (*Castro v. State of California* (1981) 114 Cal.App.3d 503, 511 [170 Cal.Rptr. 734], internal citations omitted.)
- "[T]he hiring person's liability is cast in the form of the hiring person's breach of a duty to see to it that special precautions are taken to prevent injuries to others; in that sense, the liability is 'direct.' Yet, peculiar risk liability is not a traditional theory of direct liability for the risks created by one's own conduct:

Liability . . . is in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor, because it is the hired contractor who has caused the injury by failing to use reasonable care in performing the work . . . . 'The conclusion that peculiar risk is a form of vicarious liability is unaffected by the characterization of the doctrine as "direct" liability in situations when the person hiring an independent contractor "fails to provide in the contract that the contractor shall take [special] precautions." ' "(*Toland, supra,* 18 Cal.4th at p. 265.)

- "A peculiar risk may arise out of a contemplated and unsafe method of work adopted by the independent contractor." (*Mackey v. Campbell Construction Co.* (1980) 101 Cal.App.3d 774, 785–786 [162 Cal.Rptr. 64].)
- "The term 'peculiar risk' means neither a risk that is abnormal to the type of work done, nor a risk that is abnormally great; it simply means 'a special, recognizable danger arising out of the work itself.' For that reason, as this court has pointed out, the term 'special risk' is probably a more accurate description than 'peculiar risk,' which is the terminology used in the Restatement." (*Privette, supra*, 5 Cal.4th at p. 695, internal citations omitted.)
- "Even when work performed by an independent contractor poses a special or peculiar risk of harm, . . . the person who hired the contractor will not be liable for injury to others if the injury results from the contractor's 'collateral' or 'casual' negligence." (*Privette, supra,* 5 Cal.4th at p. 696.)
- " 'Casual' or 'collateral' negligence has sometimes been described as negligence in the operative detail of the work, as distinguished from the general plan or method to be followed. Although this distinction can frequently be made, since negligence in the operative details will often not be within the contemplation of the employer when the contract is made, the distinction is not essentially one between operative detail and general method. 'It is rather one of negligence which is unusual or abnormal, or foreign to the normal or contemplated risks of doing the work, as distinguished from negligence which creates only the normal or contemplated risk.' " (*Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 510 [156 Cal.Rptr. 41, 595 P.2d 619], overruled on other grounds in *Privette, supra*, 5 Cal.4th at p. 702, fn. 4.)
- "[T]he question is whether appellant's alleged injuries resulted from negligence which was unusual or abnormal, creating a new risk not inherent in the work itself or in the ordinary or prescribed way of doing it, and not reasonably foreseeable by respondent; or whether the injuries were caused by normal negligence which precipitated a contemplated special risk of harm which was itself 'peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable man would recognize the necessity of taking special precautions.' This question, like the broader issue of whether there was a peculiar risk inherent in the work being performed, is a question of fact to be resolved by the trier of fact." (*Caudel v. East Bay Municipal Utility Dist.* (1985) 165 Cal.App.3d 1, 9 [211 Cal.Rptr. 222].)

- "[T]he dispositive issue for purposes of applying the peculiar risk doctrine to the present case is whether there was a direct relationship between the accident and the 'particular work performed' by [contractor]. In other words, if the 'character' of the work contributed to the accident, the peculiar risk doctrine applies. If the accident resulted from 'ordinary' use of the vehicle, the peculiar risk doctrine does not apply, notwithstanding the vehicle's size and weight." (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 309 [111 Cal.Rptr.3d 787], internal citation omitted.)
- "Nevertheless, we determined that the doctrine of peculiar risk does not apply when an independent contractor 'seeks to hold the general contractor vicariously liable for injuries arising from risks inherent in the nature *or the location* of the hired work over which the independent contractor has, through the chain of delegation, been granted control.' " (*Gonzalez, supra*, 12 Cal.5th at p. 52, original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1394–1395

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.05[3][b] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.10[2][b] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.22[b] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.41 et seq. (Matthew Bender)

California Civil Practice: Torts § 3:22 (Thomson Reuters)

3709. Ostensible Agent

[*Name of plaintiff***] claims that [***name of defendant***] is responsible for [***name of agent***]'s conduct because [***name of agent***] was [***name of defendant***]'s apparent [employee/agent]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally or carelessly created the impression that [***name of agent***] was [***name of defendant***]'s [employee/agent];**
2. **That [***name of plaintiff***] reasonably believed that [***name of agent***] was [***name of defendant***]'s [employee/agent]; and**
3. **That [***name of plaintiff***] reasonably relied on [his/her/***nonbinary pronoun***] belief.**

New September 2003; Revised November 2019, November 2021

Directions for Use

Give this instruction with CACI No. 3701, *Tort Liability Asserted Against Principal—Essential Factual Elements*, if the plaintiff is relying on the doctrine of ostensible agency to establish the principal-agent relationship in CACI No. 3701.

For an instruction on ostensible agency in the physician-hospital context, see CACI No. 3714, *Ostensible Agency—Physician-Hospital Relationship*.

Sources and Authority

- Agency Is Actual or Ostensible. Civil Code section 2298.
- "Ostensible Agency" Defined. Civil Code section 2300.
- "Ostensible Authority" Defined. Civil Code section 2317.
- When Principal is Bound by Ostensible Agent. Civil Code section 2334.
- " '[O]stensible authority arises as a result of conduct of the principal which causes the *third party* reasonably to believe that the agent possesses the authority to act on the principal's behalf.' 'Ostensible authority may be established by proof that the principal approved prior similar acts of the agent.' ' "[W]here the principal knows that the agent holds himself out as clothed with certain authority, and remains silent, such conduct on the part of the principal may give rise to liability." ' " (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 426–427 [115 Cal.Rptr.3d 707], original italics, internal citations omitted.)
- "Whether an agent has ostensible authority is a question of fact and such authority may be implied from circumstances." (*Pierson v. Helmerich & Payne Internat. Drilling Co.* (2016) 4 Cal.App.5th 608, 635 [209 Cal.Rptr.3d 222].)

- " 'It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence.' " (*Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399 [118 Cal.Rptr. 772, 530 P.2d 1084], internal citations omitted.)
- "Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the belief the agency exists." (*American Way Cellular, Inc. v. Travelers Property Casualty Co. of America* (2013) 216 Cal.App.4th 1040, 1053 [157 Cal.Rptr.3d 385].)
- "Ostensible agency is based on *appearances*, and turns on whether the [*sic*] 'the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent' even though the third person is not *actually* an agent. [¶] . . . Because a principal's liability for the acts of an ostensible agent rests on the notion that the principal should be estopped from creating the false impression of agency, the appearance of agency 'must be based on the acts or declarations of *the principal* and not solely upon the agent's conduct.' " (*Pereda v. Atos Jiu Jitsu LLC* (2022) 85 Cal.App.5th 759, 768 [301 Cal.Rptr.3d 690], internal citations omitted, original italics.)
- "Because ostensible agency focuses on what a reasonable person knowing what plaintiff knew would have believed, we necessarily focus on what plaintiff knew *at the time of his injury*." (*Pereda, supra,* 85 Cal.App.5th at p. 771, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 105, 154–159

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶¶ 2:676, 2:677 (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04[6] (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, §§ 427.11[4], 427.22[2] (Matthew Bender)

18 California Points and Authorities, Ch. 182, *Principal and Agent*, §§ 182.04, 182.120 et seq. (Matthew Bender)

California Civil Practice: Torts § 3:29 (Thomson Reuters)

3710. Ratification

[*Name of plaintiff*] claims that [*name of defendant*] is responsible for the harm caused by [*name of agent*]'s conduct because [*name of defendant*] approved that conduct after it occurred. If you find that [*name of agent*] harmed [*name of plaintiff*], you must decide whether [*name of defendant*] approved that conduct. To establish [his/her/*nonbinary pronoun*] claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of agent*], although not authorized to do so, purported to act on behalf of [*name of defendant*];**
2. **That [*name of defendant*] learned of [*name of agent*]'s unauthorized conduct, and all of the material facts involved in the unauthorized transaction, after it occurred; and**
3. **That [*name of defendant*] then approved [*name of agent*]'s conduct.**

Approval can be shown through words, or it can be inferred from a person's conduct. [Approval can be inferred if [*name of defendant*] voluntarily keeps the benefits of [*name of agent*]'s unauthorized conduct after [he/she/*nonbinary pronoun*/it] learns of it.]

New September 2003; Revised June 2016

Directions for Use

This instruction is for use in a traditional principal-agent relationship. The last bracketed sentence should be read only if it is appropriate to the facts of the case.

This instruction should not be given without modifications in an employment law case, in which an employee seeks to hold the employer liable for the tortious conduct of a supervisor or other employee. Ratification involves different considerations in employment law. For example, element 1 should not be given because it is not necessary for the culpable employee to purport to act on behalf of the employer. (See *Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 271–272 [150 Cal.Rptr.3d 861] [CACI 3710 given without element 1].)

For an instruction for use for governmental entity liability in a civil rights case under Title 42 United States Code section 1983, see CACI No. 3004, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

Sources and Authority

- Agency Created by Ratification. Civil Code section 2307.
- Ratification by Acceptance of Benefits. Civil Code section 2310.
- Partial Ratification. Civil Code section 2311.

- Vicarious Liability for Ratified Acts. Civil Code section 2339.
- "Ratification is the subsequent adoption by one person of an act which another without authority assumed to do as his agent." (*Anderson v. Fay Improv. Co.* (1955) 134 Cal.App.2d 738, 748 [286 P.2d 513].)
- " '[S]ince ratification contemplates an act by one person in behalf of another, there must exist at the time the unauthorized act was done a relationship, either actual or assumed, of principal and agent, between the person alleged to have ratified and the person by whom the unauthorized act was done.' " (*Anderson, supra*, 134 Cal.App.2d at p. 748, citing 2 California Jurisprudence 2d 741, section 83.)
- " 'Furthermore, the prevailing view is that there can be no ratification if the person who performed the unauthorized act did not at the time profess to be an agent.' " (*Anderson, supra*, 134 Cal.App.2d at p. 748, citing 2 California Jurisprudence 2d 741, section 83.)
- "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him. A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct which is 'inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it.' " (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73 [104 Cal.Rptr. 57, 500 P.2d 1401].)
- "Ratification is essentially a matter of assent. Consequently, a principal is not bound by ratification unless he acts with knowledge of all the material facts involved in the unauthorized transaction, particularly with knowledge of the acts of the person who assumed to act as his agent. This knowledge is equally necessary whether the ratification be express or implied." (*Bate v. Marsteller* (1959) 175 Cal.App.2d 573, 582 [346 P.2d 903].)
- "Ratification is the subsequent adoption by one claiming the benefits of an act, which without authority, another has voluntarily done while ostensibly acting as the agent of him who affirms the act and who had the power to confer authority. A principal cannot split an agency transaction and accept the benefits thereof without the burdens." (*Reusche v. California Pacific Title Ins. Co.* (1965) 231 Cal.App.2d 731, 737 [42 Cal.Rptr. 262], internal citation omitted.)
- "[A]n employer may be liable for an employee's act where the employer . . . subsequently ratified an originally unauthorized tort. [Citations.] The failure to discharge an employee who has committed misconduct may be evidence of ratification. [Citation.] The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort, such as assault or battery. [Citations.] Whether an employer has ratified an employee's conduct is generally a factual question. [Citation.]" (*Ventura, supra*, 212 Cal.App.4th at p. 272.)

- "On this issue, the jury was instructed that in order to establish her claim that defendants were responsible for [supervisor]'s conduct, [plaintiff] 'must prove . . . that [defendants] learned of [supervisor]'s conduct after it occurred,' and that 'defendants approved [supervisor]'s conduct.' The instruction concluded, 'Approval can be shown through words, or it can be inferred from a person's conduct.' " [¶] Defendants contend that the instruction was erroneous because it did not tell the jury that there is ratification only if the employee intended to act on behalf of the employer, the employer actually knows that the wrongful conduct occurred, and the employer benefitted from the conduct, and that a disputed allegation is not actual knowledge. . . . We can see no error." (*Ventura, supra*, 212 Cal.App.4th at pp. 271–272.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 149–153

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04[7] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, §§ 30.02, 30.07 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.13 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.18 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.21 et seq. (Matthew Bender)

California Civil Practice: Torts § 3:4 (Thomson Reuters)

3711. Partnerships

A partnership and each of its partners are responsible for the wrongful conduct of a partner acting within the scope of the partner's authority.

You must decide whether a partnership existed in this case. A partnership is a group of two or more persons who own a business in which all the partners agree to share the profits and losses. A partnership can be formed by a written or oral agreement or by an agreement implied by the parties' conduct.

New September 2003; Revised May 2020

Directions for Use

This instruction is not intended for cases involving limited liability partnerships.

Sources and Authority

- Formation of Partnership. Corporations Code section 16202.
- Liability of Partnership. Corporations Code section 16305(a).
- "Under traditional legal concepts the partnership is regarded as an aggregate of individuals with each partner acting as agent for all other partners in the transaction of partnership business, and the agents of the partnership acting as agents for all of the partners." (*Marshall v. International Longshoremen's and Warehousemen's Union* (1962) 57 Cal.2d 781, 783 [22 Cal.Rptr. 211, 371 P.2d 987].)
- "[T]he partners of a partnership are jointly and severally liable for the conduct and torts injuring a third party committed by one of the partners." (*Black v. Sullivan* (1975) 48 Cal.App.3d 557, 569 [122 Cal.Rptr. 119], internal citations omitted.)
- " '[A] partnership need not be evidenced by writing [citation]. It is immaterial that the parties do not designate the relationship as a partnership or realize that they are partners, for the intent may be implied from their acts [citations].' 'In that sense, any partnership without a written agreement is a "de facto" partnership.' '[T]he question of partnership is one of fact . . . .' " (*Eng v. Brown* (2018) 21 Cal.App.5th 675, 694 [230 Cal.Rptr.3d 771], internal citation omitted.)
- "Ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in the profits and losses and in the management of the business." (*Eng, supra,* 21 Cal.App.5th at p. 694.)
- "The CACI instructions cited by the court [CACI Nos. 3711, 3712] are correct and were pertinent to the jury's question regarding partnership formation." (*Eng, supra,* 21 Cal.App.5th at p. 706.)

Secondary Sources

9 Witkin, Summary of California Law (11th ed. 2017) Partnership, § 43

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.06 (Matthew Bender)

35 California Forms of Pleading and Practice, Ch. 402, *Partnerships: Actions Between General Partners and Partnership,* § 402.12 (Matthew Bender)

17 California Points and Authorities, Ch. 170, *Partnerships*, § 170.20 et seq. (Matthew Bender)

California Civil Practice: Torts §§ 3:36–3:37 (Thomson Reuters)

3712. Joint Ventures

Each of the members of a joint venture, and the joint venture itself, are responsible for the wrongful conduct of a member acting in furtherance of the venture.

You must decide whether a joint venture was created in this case. A joint venture exists if all of the following have been proved:

1. **Two or more persons or business entities combine their property, skill, or knowledge with the intent to carry out a single business undertaking;**
2. **Each has an ownership interest in the business;**
3. **They have joint control over the business, even if they agree to delegate control; and**
4. **They agree to share the profits and losses of the business.**

A joint venture can be formed by a written or an oral agreement or by an agreement implied by the parties' conduct.

New September 2003; Revised June 2011, December 2011

Directions for Use

This instruction can be modified for cases involving unincorporated associations by substituting the term "unincorporated association" for "joint venture."

If the venture has no commercial purpose, this instruction may be modified by deleting elements 2 and 4, which do not apply to a noncommercial enterprise. Also modify elements 1 and 3 to substitute another word for "business" depending on the kind of activity involved. (See *Shook v. Beals* (1950) 96 Cal.App.2d 963, 969–970 [217 P.2d 56]; see also *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 872 [32 Cal.Rptr.3d 351].)

Sources and Authority

- "A joint venture is 'an undertaking by two or more persons jointly to carry out a single business enterprise for profit.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482 [286 Cal.Rptr. 40, 816 P.2d 892], internal citations omitted.)
- "A joint venture has been defined in various ways, but most frequently perhaps as an association of two or more persons who combine their property, skill or knowledge to carry out a single business enterprise for profit." (*Holtz v. United Plumbing and Heating Co.* (1957) 49 Cal.2d 501, 506 [319 P.2d 617].)
- " 'There are three basic elements of a joint venture: the members must have joint control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the members must each have an ownership

interest in the enterprise.' Where a joint venture is established, the parties to the venture are vicariously liable for the torts of the other in furtherance of the venture." (*Cochrum v. Costa Victoria Healthcare, LLC* (2018) 25 Cal.App.5th 1034, 1053 [236 Cal.Rptr.3d 457], internal citation omitted.)

- " 'Whether a joint venture actually exists depends on the intention of the parties . . . . [¶] . . . [¶] [W]here evidence is in dispute the existence or nonexistence of a joint venture is a question of fact to be determined by the jury. [Citation.]' " (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 370 [76 Cal.Rptr.3d 146], internal citations omitted.)
- " 'A joint venture exists when there is "an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control [citing this instruction]." ' " (*Simmons v. Ware* (2013) 213 Cal.App.4th 1035, 1053 [153 Cal.Rptr.3d 178], internal citation omitted.)
- "We turn next to the element of joint control. 'An essential element of a partnership or joint venture is the right of joint participation in the management and control of the business. [Citation.] Absent such right, the mere fact that one party is to receive benefits in consideration of services rendered or for capital contribution does not, as a matter of law, make him a partner or joint venturer. [Citations.]' " (*Simmons, supra*, 213 Cal.App.4th at p. 1056.)
- "The law requires little formality in the creation of a joint venture and the agreement is not invalid because it may be indefinite with respect to its details." (*Boyd v. Bevilacqua* (1966) 247 Cal.App.2d 272, 285 [55 Cal.Rptr. 610].)
- "The distinction between joint ventures and partnerships is not sharply drawn. A joint venture usually involves a single business transaction, whereas a partnership may involve 'a continuing business for an indefinite or fixed period of time.' Yet a joint venture may be of longer duration and greater complexity than a partnership. From a legal standpoint, both relationships are virtually the same. Accordingly, the courts freely apply partnership law to joint ventures when appropriate." (*Weiner, supra,* 54 Cal.3d at p. 482, internal citations omitted.)
- "The incidents of a joint venture are in all important respects the same as those of a partnership. One such incident of partnership is that all partners are jointly and severally liable for partnership obligations, irrespective of their individual partnership interests. Because joint and several liability arises from the partnership or joint venture, Civil Code section 1431.2 [Proposition 51] is not applicable." (*Myrick v. Mastagni* (2010) 185 Cal.App.4th 1082, 1091 [111 Cal.Rptr.3d 165], internal citations omitted.)
- "Normally, . . . a partnership or joint venture is liable to an injured third party for the torts of a partner or venturer acting in furtherance of the enterprise." (*Orosco v. Sun-Diamond Corp.* (1997) 51 Cal.App.4th 1659, 1670 [60 Cal.Rptr.2d 179, 186].)
- "The joint enterprise theory, while rarely invoked outside the automobile

accident context, is well established and recognized in this state as an exception to the general rule that imputed liability for the negligence of another will not be recognized." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 893 [2 Cal.Rptr.2d 79, 820 P.2d 181], internal citation omitted.)

- "The term 'joint enterprise' may cause some confusion because it is 'sometimes used to define a noncommercial undertaking entered into by associates with equal voice in directing the conduct of the enterprise . . . .' However, when it is 'used to describe a business or commercial undertaking[,] it has been used interchangeably with the term "joint venture" and courts have not drawn any significant legal distinction between the two.' " (*Jeld-Wen, Inc., supra*, 131 Cal.App.4th at p. 872, internal citation omitted.)
- "In the annotations [to Restatement of the Law of Torts, section 491], many California cases are cited holding that to have a joint venture there must be ' "a community of interest in objects and equal right to direct and govern movements and conduct of each other with respect thereto. Each must have voice and right to be heard in its control and management" . . .' " (*Shook, supra*, 96 Cal.App.2d at pp. 969–970.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1386

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.07 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Actions*, § 82.16 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.132 (Matthew Bender)

35 California Forms of Pleading and Practice, Ch. 401, *Partnerships: Actions Between General Partners and Partnership*, § 401.11 (Matthew Bender)

17 California Points and Authorities, Ch. 170, *Partnerships*, § 170.222 (Matthew Bender)

California Civil Practice: Torts §§ 3:38–3:39 (Thomson Reuters)

3713. Nondelegable Duty

[*Name of defendant***] has a duty that cannot be delegated to another person arising from [***insert name, popular name, or number of regulation, statute, or ordinance***/a contract between the parties/***other, e.g., the landlord-tenant relationship***]. Under this duty,**

[*insert requirements of regulation, statute, or ordinance or otherwise describe duty***].**

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by the conduct of [***name of third party***] and that [***name of defendant***] is responsible for this harm. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] hired [***name of third party***] to [***describe job involving nondelegable duty***];**
2. **That [***name of third party***] [***specify wrongful conduct in breach of duty, e.g., did not comply with this law***];**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of third party***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New October 2004; Revised June 2010, November 2024

Directions for Use

Use this instruction with regard to the liability of the hirer for the torts of a third party if a nondelegable duty is imposed on the hirer by statute, regulation, ordinance, contract, or common law. (See *Barry v. Raskov* (1991) 232 Cal.App.3d 447, 455 [283 Cal.Rptr. 463].)

Sources and Authority

- "As a general rule, a hirer of an independent contractor is not liable for physical harm caused to others by the act or omission of the independent contractor. There are multiple exceptions to the rule, however, one being the doctrine of nondelegable duties . . . . ' "A nondelegable duty is a definite affirmative duty the law imposes on one by reason of his or her relationship with others. One cannot escape this duty by entrusting it to an independent contractor." A nondelegable duty may arise when a statute or regulation requires specific safeguards or precautions to ensure others' safety. [Citation.] . . .' " (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 400 [99 Cal.Rptr.3d 5], internal citations omitted.)
- "Nondelegable duties 'derive from statutes [,] contracts, and common law

precedents.' They 'do not rest upon any personal negligence of the employer. They are rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault. They arise in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor. The liability imposed is closely analogous to that of a master for the negligence of his servant. [¶] The statement commonly made in such cases is that the employer is under a duty which he is not free to delegate to the contractor. Such a "non-delegable duty" requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted.' " (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 316 [111 Cal.Rptr.3d 787], internal citations omitted.)

- " 'When the manufacturer delegates some aspect of manufacture, such as final assembly or inspection, to a subsequent seller, the manufacturer may be subject to liability under rules of vicarious liability for a defect that was introduced into the product after it left the hands of the manufacturer.' This rule has the laudable effect of encouraging a manufacturer or distributor like [defendant] to act to safeguard proper assembly by its various dealers, including attempting to ensure that negligent conduct in one location does not repeat elsewhere. It further ensures that a plaintiff does not have the burden of discovering and proving *which* entity in the production chain is responsible for negligent assembly: [defendant] for insufficient instructions or safeguards that would ensure proper assembly, or a dealer for failing to execute [defendant's] commands properly." (*Defries v. Yamaha Motor Corp.* (2022) 84 Cal.App.5th 846, 861 [300 Cal.Rptr.3d 670], internal citation omitted.)
- "The rationale of the nondelegable duty rule is 'to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm[.]' The 'recognition of nondelegable duties tends to insure that there will be a financially responsible defendant available to compensate for the negligent harms caused by that defendant's activity[.]' Thus, the nondelegable duty rule advances the same purposes as other forms of vicarious liability." (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 727 [28 Cal.Rptr.2d 672], internal citations and footnote omitted.)
- "Simply stated, ' "[t]he duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition[.]" ' " (*Srithong, supra*, 23 Cal.App.4th at p. 726.)
- "Nondelegable duties may arise when a statute provides specific safeguards or precautions to insure the safety of others." (*Felmlee v. Falcon Cable Co.* (1995) 36 Cal.App.4th 1032, 1039 [43 Cal.Rptr.2d 158].)
- "Unlike strict liability, a nondelegable duty operates, not as a substitute for

liability based on negligence, but to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or an independent contractor." (*Maloney v. Rath* (1968) 69 Cal. 2d 442, 446 [71 Cal.Rptr. 897, 445 P.2d 513].)

- " '[A] nondelegable duty operates, not as a substitute for liability based on negligence, but to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or independent contractor.' A California public agency is subject to the imposition of the duty in the same manner as any private individual." (*Jordy v. County of Humboldt* (1992) 11 Cal.App.4th 735, 742 [14 Cal.Rptr.2d 553], citing Gov. Code, § 815.4, internal citations omitted.)
- "It is undisputable that '[t]he question of duty is . . . a legal question to be determined by the court.' " (*Summers v. A.L. Gilbert Co*. (1999) 69 Cal.App.4th 1155, 1184 [82 Cal.Rptr.2d 162], internal citation omitted.)
- "When a court finds that a defendant has a nondelegable duty as a matter of law, the instruction given by the court should specifically inform the jurors of that fact and not leave them to speculate on the subject." (*Summers, supra*, 69 Cal.App.4th at p. 1187, fn. 5.)
- " 'Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons can not escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor . . . . It is immaterial whether the duty thus regarded as "nondelegable" be imposed by statute, charter or by common law.' " (*Snyder v. Southern California Edison Co*. (1955) 44 Cal.2d 793, 800 [285 P.2d 912], internal citation omitted.)
- "[T]o establish a defense to liability for damages caused by a brake failure, the owner and operator must establish not only that ' "he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law" ' but also that the failure was not owing to the negligence of any agent, whether employee or independent contractor, employed by him to inspect or repair the brakes." (*Clark v. Dziabas* (1968) 69 Cal.2d 449, 451 [71 Cal.Rptr. 901, 445 P.2d 517], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1401 et seq.

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.05[3][d] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.10[2][d] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.22[2][c] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.42 (Matthew Bender)

3714. Ostensible Agency—Physician-Hospital Relationship—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by [***name of physician***]'s [***insert tort theory, e.g., negligence***].**

[*Name of plaintiff***] also claims that [***name of hospital***] is responsible for the harm because [***name of physician***] was acting as its [agent/employee/[***insert other relationship***]] when the incident occurred.**

If you find that [*name of physician***]'s [***insert tort theory***] harmed [***name of plaintiff***], then you must decide whether [***name of hospital***] is responsible for the harm. [***Name of hospital***] is responsible if [***name of plaintiff***] proves both of the following:**

1. **That [***name of hospital***] held itself out to the public as a provider of care; and**
2. **That [***name of plaintiff***] looked to [***name of hospital***] for services, rather than selecting [***name of physician***] for services.**

A hospital holds itself out to the public as a provider of care unless the hospital gives notice to a patient that a physician is not an [agent/employee] of the hospital. However, the notice may not be adequate if a patient in need of medical care cannot be expected to understand or act on the information provided. You must take into consideration [*name of plaintiff***]'s condition at the time and decide whether any notice provided was adequate to give a reasonable person in [***name of plaintiff***]'s condition notice of the disclaimer.**

New November 2021; Revised May 2022

Directions for Use

Use this instruction only if a patient claims that a hospital defendant is responsible for a physician's negligence or other wrongful conduct as an ostensible agent.

Sources and Authority

- Agency Is Actual or Ostensible. Civil Code section 2298.
- "Ostensible Agency" Defined. Civil Code section 2300.
- "Ostensible Authority" Defined. Civil Code section 2317.
- When Principal is Bound by Ostensible Agent. Civil Code section 2334.
- "Where a patient seeks to hold a hospital liable for the negligence of a physician, the doctrine of ostensible agency is now commonly expressed as having two elements: '(1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance

on that apparent agency relationship by the plaintiff.' Generally, the first element is satisfied 'when the hospital "holds itself out" to the public as a provider of care,' 'unless it gave the patient contrary notice.' Nonetheless, a hospital's 'contrary notice' may be insufficient 'to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information.' Reliance upon an apparent agency is demonstrated 'when the plaintiff "looks to" the hospital for services, rather than to an individual physician.' Ultimately, 'there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital. As noted above, hospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal physician. Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.' " (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1038 [208 Cal.Rptr.3d 363], internal citations omitted.)

- "It is well established in California that a hospital may be liable for the negligence of physicians on the staff, unless the hospital has clearly notified the patient that the treating physicians are not hospital employees and there is no reason to believe the patient was unable to understand or act on the information. This rule is founded on the theory of ostensible agency." (*Wicks v. Antelope Valley Healthcare Dist.* (2020) 49 Cal.App.5th 866, 882 [263 Cal.Rptr.3d 397].)
- "[T]he adequacy of the notice is only one of the many fact questions that arise under ostensible agency. The jury must also determine whether the patient entrusted herself to the hospital, whether the hospital selected the doctor, and whether the patient reasonably believed the doctor was an agent of the hospital." (*Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 641 [188 Cal.Rptr.3d 246].)
- "Effectively, all a patient needs to show is that he or she sought treatment at the hospital, which is precisely what plaintiff alleged in this case. Unless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital's agent, such as when the patient is treated by his or her personal physician, the issue of ostensible agency must be left to the trier of fact." (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1458 [122 Cal.Rptr.2d 233].)
- "Neither *Mejia*, *Whitlow*, nor *Markow* is factually on point with this case. Yet all three opinions inform our decision in this case. They rest on the same principle of California law, that although a hospital may not control, direct or supervise physicians on its staff, a hospital may be liable for their negligence on an ostensible agency theory, unless (1) the hospital gave the patient actual notice that the treating physicians are not hospital employees, and (2) there is no reason

to believe the patient was unable to understand or act on the information, or (3) the patient was treated by his or her personal physician and knew or should have known the true relationship between the hospital and physician." (*Wicks, supra,* 49 Cal.App.5th at p. 884; see *Franklin v. Santa Barbara Cottage Hospital* (2022) 82 Cal.App.5th 395, 405 [297 Cal.Rptr.3d 850].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 105

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.45 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.13 et seq. (Matthew Bender)

3715–3719. Reserved for Future Use

3720. Scope of Employment

[*Name of plaintiff*] must prove that [*name of agent*] was acting within the scope of [his/her/*nonbinary pronoun*] [employment/authorization] when [*name of plaintiff*] was harmed.

Conduct is within the scope of [employment/authorization] if:

(a) It is reasonably related to the kinds of tasks that the [employee/agent] was employed to perform; or

(b) It is reasonably foreseeable in light of the employer's business or the [agent's/employee's job] responsibilities.

New September 2003

Directions for Use

For an instruction on the scope of employment in cases involving on-duty peace officers, see CACI No. 3721, *Scope of Employment—Peace Officer's Misuse of Authority*.

This instruction is closely related to CACI No. 3723, *Substantial Deviation*, which focuses on when an act is not within the scope of employment.

Sources and Authority

- "The question of scope of employment is ordinarily one of fact for the jury to determine." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 221 [285 Cal.Rptr. 99, 814 P.2d 1341].)
- "The facts relating to the applicability of the doctrine of *respondeat superior* are undisputed in the instant case, and we conclude that as a matter of law the doctrine is applicable and that the trial court erred in its instructions in leaving the issue as one of fact to the jury." (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 963 [88 Cal.Rptr. 188, 471 P.2d 988], original italics.)
- "The burden of proof is on the plaintiff to demonstrate that the negligent act was committed within the scope of his employment." (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 721 [159 Cal.Rptr. 835, 602 P.2d 755].)
- "That the employment brought the tortfeasor and victim together in time and place is not enough . . . . [T]he incident leading to injury must be an 'outgrowth' of the employment [or] the risk of tortious injury must be 'inherent in the working environment' or 'typical of or broadly incidental to the enterprise [the employer] has undertaken.' " (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 298 [48 Cal.Rptr.2d 510, 907 P.2d 358], internal citations omitted.)
- "In California, the scope of employment has been interpreted broadly under the

respondeat superior doctrine." (*Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478, 906 P.2d 440].)

- "California courts have used different language when phrasing the test for scope of employment under the respondeat superior doctrine. (See Sources and Authority for CACI No. 3720 [scope of employment].)" (*Moreno v. Visser Ranch, Inc.* (2018) 30 Cal.App.5th 568, 576–577 [241 Cal.Rptr.3d 678].)
- "Despite the different formulations of the scope-of-employment standard, the courts articulating these tests all agree that an employee's tortious acts may qualify as within the scope of employment—assuming they satisfy the pertinent test—even if the employer did not authorize the employee's conduct, even if the employee acted without the motive of serving the employer's interest, and even if the employee engaged in intentional (or even criminal) conduct." (*Musgrove v. Silver* (2022) 82 Cal.App.5th 694, 710 [298 Cal.Rptr.3d 582], internal citations omitted.)
- "[R]espondeat superior liability attaches if the activities 'that cause[d] the employee to become an instrumentality of danger to others' were undertaken with the employer's permission and were of some benefit to the employer or, in the absence of proof of benefit, the activities constituted a customary incident of employment." (*Purton v. Marriott Internat., Inc.* (2013) 218 Cal.App.4th 499, 509 [159 Cal.Rptr.3d 912].)
- "Tortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment. So may acts that do not benefit the employer, or are willful or malicious in nature." (*Mary M., supra*, 54 Cal.3d at p. 209, internal citations omitted.)
- "A risk arises out of the employment when 'in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one "that may fairly be regarded as typical of or broadly incidental" to the enterprise undertaken by the employer.' Accordingly, the employer's liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise." (*Perez v. Van Groningen & Sons, Inc*. (1986) 41 Cal.3d 962, 968 [227 Cal.Rptr. 106, 719 P.2d 676].)
- "California no longer follows the traditional rule that an employee's actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer's interests." (*Lisa M., supra,* 12 Cal.4th at p. 297.)
- "*One way to determine* whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity. However, 'foreseeability' in this context must be distinguished from 'foreseeability' as a test for negligence. In the latter sense 'foreseeable' means a level of probability which would lead a prudent person to take effective precautions whereas 'foreseeability' as a test for respondeat superior merely

means that *in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business*." (*Farmers Ins. Group, supra*, 11 Cal.4th at pp. 1003–1004, original italics.)

- "[T]he employer is liable not because the employer has control over the employee or is in some way at fault, but because the employer's enterprise creates inevitable risks as a part of doing business." (*Moreno, supra*, 30 Cal.App.5th at p. 577.)
- "The employment . . . must be such as predictably to create the risk employees will commit [torts] of the type for which liability is sought." (*Lisa M., supra*, 12 Cal.4th at p. 299.)
- "Some courts employ a two-prong test to determine whether an employee's conduct was within the scope of his employment for purposes of respondeat superior liability, asking whether ' "1) the act performed was either required or 'incident to his duties' [citation], or 2) the employee's misconduct could be reasonably foreseen by the employer in any event [citation]." [Citation.]' " (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 94 [162 Cal.Rptr.3d 752].)
- "[T]he fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment." (*Moreno, supra*, 30 Cal.App.5th at p. 584.)
- "[I]n some cases, a cell phone call clearly would give rise to respondeat superior liability: 'We envision the link between respondeat superior and most work-related cell phone calls while driving as falling along a continuum. Sometimes the link between the job and the accident will be clear, *as when an employee is on the phone for work at the moment of the accident*.' " (*Ayon v. Esquire Deposition Solutions, LLC* (2018) 27 Cal.App.5th 487, 495 [238 Cal.Rptr.3d 185], original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 186–205

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

California Civil Practice: Torts § 3:8 (Thomson Reuters)

3721. Scope of Employment—Peace Officer's Misuse of Authority

[*Name of plaintiff*] must prove that [*name of agent*] was acting within the scope of [his/her/*nonbinary pronoun*] [employment/authorization] when [*name of plaintiff*] was harmed.

The conduct of a peace officer is within the scope of [his/her/*nonbinary pronoun*] employment as a peace officer if all of the following are true:

(a) The conduct occurs while the peace officer is on duty as a peace officer;

(b) The conduct occurs while the peace officer is exercising [his/her/*nonbinary pronoun*] authority as a peace officer; and

(c) The conduct results from the use of [his/her/*nonbinary pronoun*] authority as a peace officer.

New September 2003

Sources and Authority

- "[W]e hold that when, as in this case, a police officer on duty misuses his official authority by raping a woman whom he has detained, the public entity that employs him can be held vicariously liable. This does not mean that, as a matter of law, the public employer is vicariously liable whenever an on-duty officer commits a sexual assault. Rather, this is a question of fact for the jury." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 221 [285 Cal.Rptr. 99, 814 P.2d 1341].)
- "The use of authority is incidental to the duties of a police officer. The County enjoys tremendous benefits from the public's respect for that authority. Therefore, it must suffer the consequences when the authority is abused." (*White v. County of Orange* (1985) 166 Cal.App.3d 566, 572 [212 Cal.Rptr. 493].)
- "It is questionable whether the holding in *Mary M.* is still viable. Indeed, the Chief Justice of California has described it as an 'aberrant holding' that was 'wrongly decided' and should be 'overrule[d].' Nonetheless, it remains the rule of law unless a majority of the California Supreme Court decides otherwise." (*M.P. v. City of Sacramento* (2009) 177 Cal.App.4th 121, 124 [98 Cal.Rptr.3d 812], internal citations omitted.)
- "We reject plaintiff's effort to apply *Mary M.* to the facts of this case. For reasons that follow, we conclude the *Mary M.* holding that a public employer of a police officer may be vicariously liable for a sex crime committed by the officer against a person detained by the officer while on duty is, at best, limited to such acts by an on-duty police officer and does not extend to any other form of employment, including firefighting. Thus, as a matter of law, the alleged sexual assault by firefighters in this case was not conduct within in the scope of

their employment and cannot support a finding that their employer . . . is vicariously liable for the harm." (*M.P., supra*, 177 Cal.App.4th at p. 124; see also *Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 893–902 [189 Cal.Rptr.3d 570] [*Mary M.* not applicable to sexual assault by social worker on foster child].)

- "Appellants argue they fall within *Mary M.* because [employee]'s misconduct arose from the abuse of his authority as a law enforcement officer. The County counters that [employee] was a correctional officer, not a law enforcement officer. However, whether [employee] is classified as a law enforcement officer or not is immaterial. The power or privilege that [employee] abused, i.e., his access to the correctional management computer system, is totally different from the unique and formidable power and authority police officers have over members of the public or people under their control. [Employee] had no authority or control over appellants. As courts have noted, ' "police officers [exercise] the most awesome and dangerous power that a democratic state possesses with respect to its residents—the power to use lawful force to arrest and detain them." ' This is not the case with a correctional officer who processes paperwork and has access to a jail computer system. Rather in this context, the criminal conduct underlying appellants' action, namely the illegal act of writing the letters using the information gathered from the jail computer system for totally non-work-related purposes, must be considered unusual or startling." (*Perry v. County of Fresno* (2013) 215 Cal.App.4th 94, 103–104 [155 Cal.Rptr.3d 219], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 180, 190, 191, 196, 201

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3][f][ii] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.26 et seq. (Matthew Bender)

California Civil Practice: Torts § 3:8 (Thomson Reuters)

3722. Scope of Employment—Unauthorized Acts

An employee's unauthorized conduct may be within the scope of [employment/authorization] if [the conduct was committed in the course of a series of acts authorized by the employer] [or] [the conduct arose from a risk inherent in or created by the enterprise].

[An employee's wrongful or criminal conduct may be within the scope of employment even if it breaks a company rule or does not benefit the employer.]

New September 2003

Sources and Authority

- "[T]he employer's liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise." (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 968 [227 Cal.Rptr. 106, 719 P.2d 676].)
- "The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer . . . . [T]he proper inquiry is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 219 [285 Cal.Rptr. 99, 814 P.2d 1341], internal citations omitted.)
- "Tortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment. So may acts that do not benefit the employer, or are willful or malicious in nature." (*Mary M., supra*, 54 Cal.3d at p. 209, internal citations omitted.)
- "Equally well established, if somewhat surprising on first encounter, . . . that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296–297 [48 Cal.Rptr.2d 510, 907 P.2d 358], internal citations omitted.)
- "California no longer follows the traditional rule that an employee's actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer's interests . . . . [¶] *'It is sufficient . . . if the injury resulted from a dispute arising out of the employment . . . . "It is not necessary that the assault should have been made 'as a means, or for the purpose of performing the work he (the employee) was employed to do.' " '* " (*Lisa M., supra,* 12 Cal.4th at p. 297, original italics, internal citations omitted.)
- "Although an employee's willful, malicious, and even criminal torts may fall

within the scope of employment, 'an employer is not strictly liable for all actions of its employees during working hours.' For the employer to be liable for an intentional tort, the employee's act must have a 'causal nexus to the employee's work.' Courts have used various terms to describe this causal nexus: the incident leading to the injury must be an ' "outgrowth" ' of the employment; the risk of tortious injury must be ' " 'inherent in the working environment' " '; the risk must be ' " 'typical' " ' or ' " 'broadly incidental' " ' to the employer's business; the tort was ' "a generally foreseeable consequence" ' of the employer's business." (*Montague v. AMN Healthcare, Inc.* (2014) 223 Cal.App.4th 1515, 1521 [168 Cal.Rptr.3d 123], internal citations omitted.)

- "The question, then, is whether an employee's physical eruption, stemming from his interaction with a customer, is a predictable risk of retail employment. Our Supreme Court has suggested it may well be: 'Flare-ups, frustrations, and disagreements among employees are commonplace in the workplace and may lead to "physical act[s] of aggression." In bringing [people] together, work brings [personal] qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flareup . . . . These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.' " (*Flores v. AutoZone West, Inc.* (2008) 161 Cal.App.4th 373, 381 [74 Cal.Rptr.3d 178], internal citations omitted.)
- "Sexual assaults are not per se beyond the scope of employment. But courts have rarely held an employee's sexual assault or sexual harassment of a third party falls within the scope of employment." (*Daza v. Los Angeles Community College Dist.* (2016) 247 Cal.App.4th 260, 268 [202 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 196–201

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3][d], [f] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

California Civil Practice: Torts §§ 3:11–3:12 (Thomson Reuters)

3723. Substantial Deviation

If [an employee/a representative] combines the [employee/representative]'s personal business with the employer's business, then the [employee/representative]'s conduct is within the scope of [employment/authorization] unless the [employee/representative] substantially deviates from the employer's business.

Deviations that do not amount to abandoning the employer's business, such as incidental personal acts, minor delays, or deviations from the most direct route, are reasonably expected and within the scope of employment.

[Acts that are necessary for [an employee/a representative]'s comfort, health, and convenience while at work are within the scope of employment.]

New September 2003; Revised June 2006, April 2008, June 2014, May 2020

Directions for Use

This instruction may be given with CACI No. 3720, *Scope of Employment*, if the facts indicate that the employee has combined business and personal activities. In such a situation, the employee's personal activities must constitute a "substantial deviation" from or "abandonment" of the employer's business in order to be outside of the scope of employment. (See *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478, 906 P.2d 440].) The words "reasonably expected" express foreseeability.

This instruction may be given with CACI No. 3725, *Going-and-Coming Rule—Vehicle-Use Exception,* but not with CACI No. 3726, *Going-and-Coming Rule—Business-Errand Exception*. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 907–908 [162 Cal.Rptr.3d 280].)

Give the optional third paragraph if the employee was at the work site when the act giving rise to liability occurred, but was not directly involved in performing job duties at the time (for example, at lunch or on break). (See *Vogt v. Herron Construction, Inc.* (2011) 200 Cal.App.4th 643, 651 [132 Cal.Rptr.3d 683].)

Sources and Authority

- "[C]ases that have considered recovery against an employer for injuries occurring within the scope and during the period of employment have established a general rule of liability 'with a few exceptions' in instances where the employee has 'substantially deviated from his duties for personal purposes.' " (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 218 [285 Cal.Rptr. 99, 814 P.2d 1341], internal citation omitted.)
- "An exception [to employer liability] is made when the employee has

substantially deviated from his duties for personal purposes at the time of the tortious act. While a minor deviation is foreseeable and will not excuse the employer from liability, a deviation from the employee's duties that is ' "so material or substantial as to amount to an entire departure" ' from those duties will take the employee's conduct out of the scope of employment." (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 95 [162 Cal.Rptr.3d 752], internal citations omitted.)

- "While the question of whether an employee has departed from his special errand is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law." (*Moradi, supra*, 219 Cal.App.4th at p. 907.)
- "In some cases, the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment." (*Mary M., supra,* 54 Cal.3d at p. 213, internal citations omitted.)
- "The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer." (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 139 [176 Cal.Rptr. 287], internal citation omitted.)
- "One traditional means of defining this foreseeability is seen in the distinction between minor '*deviations*' and substantial '*departures*' from the employer's business. The former are deemed foreseeable and remain within the scope of employment; the latter are unforeseeable and take the employee outside the scope of his employment." (*Moradi, supra*, 219 Cal.App.4th at p. 901, original italics.)
- " ' "[W]here the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly nor indirectly could he have been serving his employer." ' " (*Farmers Ins. Group, supra*, 11 Cal.4th at p. 1004.)
- "Generally, '[i]f the main purpose of [the employee's] activity is still the employer's business, it does not cease to be within the scope of the employment by reason of incidental personal acts, slight delays, or deflections from the most direct route.' " (*Halliburton Energy Services, Inc., supra*, 220 Cal.App.4th at p. 98.)
- "Important factors in determining whether there has been a complete departure or merely a deviation are those of time and place. Thus, the fact that the employee is on the same route of return which he would use for both his employer's mission and his own is a factor tending to show a combination of missions. The amount of time consumed in the personal activity is likewise to be weighed. The nature of the digression is also to be considered. If the digression

was in itself an inducement for [employee] to undertake the special errand or was connected with the performance of the errand, for example, as a reward, the jury would be entitled to weigh these facts in deciding whether there had been the complete departure from duty which is requisite to terminate course of employment." (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 496–497 [48 Cal.Rptr. 765].)

- "[A]cts necessary to the comfort, convenience, health, and welfare of the employee while at work, though strictly personal and not acts of service, do not take the employee outside the scope of employment." (*Vogt, supra,* 200 Cal.App.4th at p. 651.)
- "Here, the required vehicle exception to the going and coming rule, not the special errand exception, governs our analysis. Accordingly, we have not applied the six factors used in special errand cases to determine whether [employee] was acting within the scope of her employment at the time of the accident. [¶] Rather, we have applied the relevant principles under the required vehicle exception. Those principles differ from the six factors used to determine whether the special errand exception applies. In the present case, [employer] required [employee] to use her personal vehicle to travel to and from the office and other destinations. She also had to use her personal vehicle before, during, and after regular work hours to develop new business. We have properly examined whether [employee]'s use of her personal vehicle conferred an incidental benefit on [employer]—it did; whether her planned stops at the frozen yogurt shop and the yoga studio were an unforeseeable, substantial departure from her commute—they were not; whether they were a foreseeable, minor deviation from her regular commute—they were; whether they were not so unusual or startling that it would be unfair to include the resulting loss among the other costs of the employer's business—they were not; and whether they were necessary for [employee]'s comfort, convenience, health, and welfare—they were." (*Moradi, supra,* 219 Cal.App.4th at pp. 907–908.)
- "We envision the link between respondeat superior and most work-related cell phone calls while driving as falling along a continuum. Sometimes the link between the job and the accident will be clear, as when an employee is on the phone for work at the moment of the accident. Oftentimes, the link will fall into a gray zone, as when an employee devotes some portion of his time and attention to work calls during the car trip so that the journey cannot be fairly called entirely personal. But sometimes, as here, the link is de minimis—one call of less than one minute eight or nine minutes before an accident while traveling on a personal errand of several miles' duration heading neither to nor from a worksite. When that happens, we find no respondeat superior as a matter of law." (*Miller v. American Greetings Corp.* (2008) 161 Cal.App.4th 1055, 1063 [74 Cal.Rptr.3d 776].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 186–195

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶¶ 2:716, 2:735 (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, §§ 100A.28, 100A.38 (Matthew Bender)

California Civil Practice: Torts § 3:8 (Thomson Reuters)

3724. Social or Recreational Activities

Social or recreational activities that occur after work hours are within the scope of employment if:

(a) They are carried out with the employer's stated or implied permission; and

(b) They either provide a benefit to the employer or have become customary.

New September 2003; Renumbered from CACI No. 3726 November 2017

Sources and Authority

- This aspect of the scope-of-employment analysis was expressly adopted for use in respondeat superior cases in *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 620 [124 Cal.Rptr. 143], and reiterated in *Childers v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792, 804 [235 Cal.Rptr. 641]. It is derived from the workers' compensation case of *McCarty v. Workmen's Compensation Appeals Bd.* (1974) 12 Cal.3d 677, 681–683 [117 Cal.Rptr. 65, 527 P.2d 617].)
- "[W]here social or recreational pursuits on the employer's premises after hours are endorsed by the express or implied permission of the employer and are 'conceivably' of some benefit to the employer or, even in the absence of proof of benefit, if such activities have become 'a customary incident of the employment relationship,' an employee engaged in such pursuits after hours is still acting within the scope of his employment." (*Rodgers, supra,* 50 Cal.App.3d at 620.)
- *McCarty* has been overruled by statute in the context of workers' compensation (see Lab. Code, § 3600(a)(9)). However, courts have acknowledged that "it has been adopted as a test in establishing liability under respondeat superior." (*West American Insurance Co. v. California Mutual Insurance Co.* (1987) 195 Cal.App.3d 314, 322 [240 Cal.Rptr. 540].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 193, 196, 201

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3][c] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

3725. Going-and-Coming Rule—Vehicle-Use Exception

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment. The employer's requirement may be either express or implied.

The drive to and from work may also be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly. The employee's agreement may be either express or implied.

New September 2003; Revised June 2014, May 2017, May 2019, May 2020

Directions for Use

This instruction sets forth the vehicle use exception to the going-and-coming rule, sometimes called the required-vehicle exception. (See (*Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 398, fn. 6 [207 Cal.Rptr.3d 586]; see also *Pierson v. Helmerich & Payne International Drilling Co.* (2016) 4 Cal.App.5th 608, 624–630 [209 Cal.Rptr.3d 222 [vehicle-use exception encompasses two categories; required-vehicle and incidental-use, both of which are expressed within CACI No. 3725].) It may be given with CACI No. 3720, *Scope of Employment*.

Under the going-and-coming rule, commute time is not within the scope of employment. However, commute time is within the scope of employment if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has reasonably come to rely on its use and to expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment. (See *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301 [105 Cal.Rptr.3d 718].) Whether there is such a requirement or agreement can be a question of fact for the jury. (See *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 723 [159 Cal. Rptr. 835, 602 P.2d 755].)

Under this exception, the commute itself is considered the employer's business. However, scope of employment may end if the employee substantially deviates from the commute route for personal reasons. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 899, 907–908 [162 Cal.Rptr.3d 280].) If substantial deviation is alleged, give CACI No. 3723, *Substantial Deviation*.

One court has stated that the employee must have been using the vehicle to do the employer's business or provide a benefit for the employer *at the time of the accident*. (*Newland v. County of L.A.* (2018) 24 Cal.App.5th 676, 693 [234 Cal.App.3d 374], emphasis added.) However, many cases have applied the vehicle use exception without imposing this time-of-the-accident requirement. (See, e.g., *Moradi, supra,* 219 Cal.App.4th at p. 892 (employee was just going home at the time of the accident); *Lobo, supra,* 182 Cal.App.4th at p. 302 (same); *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803, 806–807 [99 Cal.Rptr. 666] (same); see also *Smith v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 814, 815 [73 Cal.Rptr. 253, 447 P.2d 365] (workers' compensation case: accident happened on the way to work).) *Newland* could be read as requiring the employee to need the vehicle for the employer's business on the *day* of the accident, even if the employee was not engaged in the employer's business at the *time* of the accident. (See *Newland, supra,* 24 Cal.App.5th at p. 696 ["no evidence that [employee] required a vehicle for work on the day of the accident, and no evidence that the [employer] received any direct or incidental benefit from [employee] driving to and from work that day"].)

Sources and Authority

- " 'An offshoot of the doctrine of respondeat superior is the so-called "going and coming rule." Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. . . . This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. . . .' " (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435 [98 Cal.Rptr.3d 837].)
- "The 'required-vehicle' exception to the going and coming rule and its variants have been given many labels. In *Halliburton, supra*, 220 Cal.App.4th 87, we used the phrase 'incidental benefit exception' as the equivalent of the required-vehicle exception. In *Felix v. Asai* (1987) 192 Cal.App.3d 926 [237 Cal. Rptr. 718] (*Felix*), we used the phrase 'vehicle-use exception.' The phrase 'required-use doctrine' also has been used. The 'vehicle-use' variant appears in the title to California Civil Jury Instruction (CACI) No. 3725, 'Going-and-Coming Rule—Vehicle-Use Exception.' The various labels and the wide range of circumstances they cover have the potential to create uncertainty about the factual elements of the exception—a topic of particular importance when reviewing a motion for summary judgment for triable issues of *material* fact. [¶] To structure our analysis of this exception, and assist the clear statement of the factual elements of its variants, we adopt the phrase 'vehicle-use exception' from *Felix* and CACI No. 3725 to describe the exception in its broadest form. Next, under the umbrella of the vehicle-use exception, we recognize two identifiable categories with different factual elements. We label those two categories as the 'required-vehicle exception' and 'incidental benefit exception' because those labels emphasize the factual difference between the two categories." (*Pierson,*

supra, 4 Cal.App.5th at pp. 624–625, original italics, internal citations omitted.)

- "Our division of the vehicle-use exception for purposes of this summary judgment motion should not be read as implying that this division is required, or even helpful, when presenting the scope of employment issue to a jury. The broad formulation of the vehicle-use exception in CACI No. 3725 correctly informs the jury that the issue of ultimate fact—namely, the scope of employment—may be proven in different ways." (*Pierson, supra*, 4 Cal.App.5th at p. 625, fn. 4.)
- "The portion of CACI No. 3725 addressing an employer requirement states: '[I]f an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment. The employer's requirement may be either express or implied.' " (*Pierson, supra*, 4 Cal.App.5th at p. 625.)
- "Our formulation of the incidental benefit exception is based on the part of CACI No. 3725 that states: 'The drive to and from work may . . . be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly.' The 'agreement may be either express or implied.' The existence of an express or implied agreement can be a question of fact for the jury." (*Pierson, supra*, 4 Cal.App.5th at p. 629.)
- "[T]he exception 'covers situations where there is an express or implied employer requirement. "If an employer *requires* an employee to furnish a vehicle as an express or implied condition of employment, the employee will be in the scope of his employment while commuting to and from the place of his employment." ' Whether there is an express or implied requirement ' "can be a question of fact for the jury," ' but 'the question of fact sometimes can be decided by a court as a matter of law.' " (*Savaikie v. Kaiser Foundation Hospitals* (2020) 52 Cal.App.5th 223, 230 [265 Cal.Rptr.3d 92], original italics.)
- " '[W]hen a business enterprise requires an employee to drive to and from its office in order to have his vehicle available for company business during the day, accidents on the way to or from the office are statistically certain to occur eventually, and, the business enterprise having required the driving to and from work, the risk of such accidents are risks incident to the business enterprise.' [¶] These holdings are the bases for the CACI instruction, the first paragraph of which tells the jury that the drive to and from work is within the scope of employment if the "employer requires [the] employee to drive to and from the workplace so that the vehicle is available for the employer's business," and the second paragraph, that the drive may be if 'the use of the employee's vehicle provides some direct or incidental benefit to the employer' and 'there may be a benefit to the employer if, one, the employee has [agreed] to make the vehicle available as an accommodation to the employer, and two, the employer has

reasonably come to rely on the vehicle's use and expect the employee to make it available regularly.' (CACI No. 3725.)" (*Jorge, supra,* 3 Cal.App.5th at pp. 401–402, internal citation omitted.)

- " 'A well-known exception to the going-and-coming rule arises *where the use of the car gives some incidental benefit to the employer*. Thus, the key inquiry is whether there is an incidental benefit derived by the employer. [Citation.]' . . . The exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has 'reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment.' " (*Lobo, supra*, 182 Cal.App.4th at p. 297, original italics, internal citations omitted.)
- " 'To be sure, ordinary commuting is beyond the scope of employment . . . . Driving a required vehicle, however, is a horse of another color because it satisfies the control and benefit elements of respondeat superior. An employee who is required to use his or her own vehicle provides an "essential instrumentality" for the performance of the employer's work. . . . When a vehicle must be provided by an employee, the employer benefits by not having to have available an office car and yet possessing a means by which off-site visits can be performed by its employees.' " (*Moradi, supra*, 219 Cal.App.4th at p. 899.)
- "When an employer requires an employee to use a personal vehicle, it exercises meaningful control over the method of the commute by compelling the employee to foreswear the use of carpooling, walking, public transportation, or just being dropped off at work." (*Moradi, supra*, 219 Cal.App.4th at p. 899.)
- "The cases invoking the required-vehicle exception all involve employees whose jobs entail the regular use of a vehicle to accomplish the job in contrast to employees who use a vehicle to commute to a definite place of business." (*Tryer v. Ojai Valley School Dist.* (1992) 9 Cal.App.4th 1476, 1481 [12 Cal.Rptr.2d 114].)
- "[N]ot all benefits to the employer are of the type that satisfy the incidental benefits exception. The requisite benefit must be one that is 'not common to commute trips by ordinary members of the work force.' Thus, employers benefit when employees arrive at work on time, but this benefit is insufficient to satisfy the incidental benefits exception. An example of a sufficient benefit is where an employer enlarges the available labor market by providing travel expenses and paying for travel time." (*Pierson, supra*, 4 Cal.App.5th at p. 630.)
- "Where the incidental benefit exception applies, the employee's commute directly between work and home is considered to be within the scope of employment for respondeat superior purposes. Minor deviations from a direct commute are also included, but there is no respondeat superior liability if the employee substantially departs from the employer's business or is engaged in a

purely personal activity at the time of the tortious injury." (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 97 [162 Cal.Rptr.3d 752].)

- "Here, the required vehicle exception to the going and coming rule, not the special errand exception, governs our analysis. Accordingly, we have not applied the six factors used in special errand cases to determine whether [employee] was acting within the scope of her employment at the time of the accident. [¶] Rather, we have applied the relevant principles under the required vehicle exception. Those principles differ from the six factors used to determine whether the special errand exception applies. In the present case, [employer] required [employee] to use her personal vehicle to travel to and from the office and other destinations. She also had to use her personal vehicle before, during, and after regular work hours to develop new business. We have properly examined whether [employee]'s use of her personal vehicle conferred an incidental benefit on [employer]—it did; whether her planned stops at the frozen yogurt shop and the yoga studio were an unforeseeable, substantial departure from her commute—they were not; whether they were a foreseeable, minor deviation from her regular commute—they were; whether they were not so unusual or startling that it would be unfair to include the resulting loss among the other costs of the employer's business—they were not; and whether they were necessary for [employee]'s comfort, convenience, health, and welfare—they were." (*Moradi, supra*, 219 Cal.App.4th at pp. 907–908.)
- "One exception to the going and coming rule has been recognized when the commute involves ' "an incidental benefit to the employer, not common to commute trips by ordinary members of the work force." [Citation.]' When the employer incidentally benefits from the employee's commute, that commute may become part of the employee's workday for the purposes of respondeat superior liability. [¶] The incidental benefit exception has been applied when the employer furnishes, or requires the employee to furnish, a vehicle for transportation on the job, and the negligence occurs while the employee is traveling to or from work in that vehicle." (*Halliburton Energy Services, Inc., supra*, 220 Cal.App.4th at p. 96, internal citation omitted.)
- "[T]he employer benefits when a vehicle is available to the employee during off-duty hours in case it is needed for emergency business trips." (*Moreno v. Visser Ranch, Inc.* (2018) 30 Cal.App.5th 568, 580 [241 Cal.Rptr.3d 678].)
- "Public policy would be ill-served by a rule establishing 24-hour employer liability for on-call employees, regardless of the nature of the employee's activities at the time of an accident." (*Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1610 [26 Cal.Rptr.2d 749].)
- "[T]he trier of fact remains free to determine in a particular case that the employee's use of his or her vehicle was too infrequent to confer a sufficient benefit to the employer so as to make it reasonable to require the employer to bear the cost of the employee's negligence in operating the vehicle. This is particularly true in the absence of an express requirement that the employee

make his or her vehicle available for the employer's benefit or evidence that the employer actually relied on the availability of the employee's car to further the employer's purposes." (*Lobo v. Tamco* (2014) 230 Cal.App.4th 438, 447 [178 Cal.Rptr.3d 515].)

- "Whether the transit is part of the employment relationship tends to be a more subtle issue than whether the transit was between home and work. . . . 'These are the extraordinary transits that vary from the norm because the employer requires a special, different transit, means of transit, or use of a car, for some particular reason of his own. When the employer gains that kind of a particular advantage, the job does more than call for routine transport to it; it plays a different role, bestowing a special benefit upon the employer by reason of the extraordinary circumstances. The employer's special request, his imposition of an unusual condition, removes the transit from the employee's choice or convenience and places it within the ambit of the employer's choice or convenience, restoring the employer-employee relationship.' " (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038–1039 [219 Cal.Rptr.3d 630].)
- "Liability may be imposed on an employer for an employee's tortious conduct while driving to or from work, if at the time of the accident, the employee's use of a personal vehicle was required by the employer or otherwise provided a benefit to the employer." (*Newland, supra,* 24 Cal.App.5th at p. 679.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 195

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶ 2:803 (The Rutter Group)

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.42[3][d] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05[4][a] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.26 et seq. (Matthew Bender)

California Civil Practice: Torts § 3:10 (Thomson Reuters)

3726. Going-and-Coming Rule—Business-Errand Exception

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if the employee, while commuting, is on an errand for the employer, then the employee's conduct is within the scope of the employee's employment from the time the employee starts on the errand until the employee returns from the errand or until the employee completely abandons the errand for personal reasons.

In determining whether an employee has completely abandoned a business errand for personal reasons, you may consider the following:

a. The intent of the employee;

b. The nature, time, and place of the employee's conduct;

c. The work the employee was hired to do;

d. The incidental acts the employer should reasonably have expected the employee to do;

e. The amount of freedom allowed the employee in performing the employee's duties; [and]

f. The amount of time consumed in the personal activity [./; and]

g. [*specify other factors, if any***].**

New September 2003; Revised June 2014, June 2017; Revised and Renumbered from CACI No. 3724 November 2017; Revised May 2020

Directions for Use

This instruction sets forth the business errand exception to the going-and-coming rule, sometimes called the "special errand" or "special mission" exception. (*Sumrall v. Modern Alloys, Inc.* (2017) 10 Cal.App.5th 961, 968, fn. 1 [216 Cal.Rptr.3d 848]; see *Pierson v. Helmerich & Payne Internat. Drilling Co.* (2016) 4 Cal.App.5th 608, 632–633, fn.6 [209 Cal.Rptr.3d 222] [citing this instruction].) It may be given with CACI No. 3720, *Scope of Employment*.

Under the going-and-coming rule, commute time is not within the scope of employment. However, if the employee is engaged in a "special errand" or a "special mission" for the employer while commuting, it will negate the going-and-coming rule and put the employee within the scope of employment. (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435–436 [98 Cal.Rptr.3d 837].)

Scope of employment ends once the employee abandons or substantially deviates from the special errand. The second paragraph sets forth factors that the jury may

consider in determining whether there has been abandonment of a business errand. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 907 [162 Cal.Rptr.3d 280] [opinion may be read to suggest that for the business-errand exception, CACI No. 3723, *Substantial Deviation*, should not be given].)

Sources and Authority

- " 'An offshoot of the doctrine of respondeat superior is the so-called "going and coming rule." Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. . . . This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. . . .' " (*Jeewarat, supra*, 177 Cal.App.4th at p. 435.)
- " 'The *special-errand* exception to the going-and-coming rule is stated as follows: "If the employee is not simply on his way from his home to his normal place of work or returning from said place to his home for his own purpose, but is coming from his home or returning to it on a *special errand* either as part of his regular duties or at a specific order or request of his employer, the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons." ' " (*Moradi, supra*, 219 Cal.App.4th at p. 906, original italics.)
- "When an employee is engaged in a 'special errand' or a 'special mission' for the employer it will negate the 'going and coming rule.' . . . The employer is 'liable for torts committed by its employee while traveling to accomplish a special errand because the errand benefits the employer. . . .' " (*Jeewarat, supra*, 177 Cal.App.4th at p. 436, internal citations omitted.)
- "The term 'special errand' is something of a misnomer because it implies that the employer must make a specific request for a particular errand. However, the 'special errand' can also be part of the employee's regular duties. Thus, we have chosen to use the term 'business errand' throughout this opinion, as it is more precise and descriptive." (*Sumrall, supra,* 10 Cal.App.5th at p. 968 fn.1, internal citation omitted.)
- "The special [errand] exception requires three factors to be met: (1) the activity is extraordinary in relation to the employee's routine duties, (2) the activity is within the course of the employee's employment, and (3) the activity was undertaken at the express or implied request of the employer and for the employer's benefit." (*Feltham v. Universal Protection Service, LP* (2022) 76 Cal.App.5th 1062, 1072 [292 Cal.Rptr.3d 183], internal citation omitted.)
- "[T]he jury's instruction on the business errand exception explains it concisely: . . . ." (*Sumrall, supra,* 10 Cal.App.5th at p. 969, quoting this instruction.)
- "It is not necessary that the employee is directly engaged in his job duties; included also are errands that incidentally or indirectly benefit the employer. It is

essential, however, that the errand be either part of the employee's regular duties or undertaken at the specific request of the employer." (*Morales-Simental v. Genentech, Inc.* (2017) 16 Cal.App.5th 445, 452–453 [224 Cal.Rptr.3d 319], internal citation omitted.)

- "[T]he mere fact that a trip may be related to an employee's job does not impose liability on the employer. . . . [T]o bring an employee's trip within the special errand exception, the employer must request or at least expect it of the employee." (*Morales-Simental*, *supra*, 16 Cal.App.5th at p. 455, internal citation omitted.)
- "[Plaintiffs] assert that [employee], as a supervisorial employee tasked with hiring, had authority to act on [employer]'s behalf and, in essence, request himself to complete a special errand connected to that task. This argument finds no support in the extensive body of going and coming case law, and we decline plaintiffs' invitation to expand the special errand exception in the manner they suggest. What they propose is an invitation to self-serving pretense by anyone with a plausible claim to supervisorial authority." (*Morales-Simental*, *supra*, 16 Cal.App.5th at p. 456.)
- "[I]n determining whether an employee has completely abandoned pursuit of a *business errand* for pursuit of a personal objective, a variety of relevant circumstances should be considered and weighed. Such factors may include [(1)] the intent of the employee, [(2)] the nature, time and place of the employee's conduct, [(3)] the work the employee was hired to do, [(4)] the incidental acts the employer should reasonably have expected the employee to do, [(5)] the amount of freedom allowed the employee in performing his duties, and [(6)] the amount of time consumed in the personal activity. . . . While the question of whether an employee has departed from his *special errand* is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law." (*Moradi, supra*, 219 Cal.App.4th at p. 907, original italics.)
- "Several general examples of the special-errand exception appear in the cases. One would be where an employee goes on a business errand for his employer leaving from his workplace and returning to his workplace. Generally, the employee is acting within the scope of his employment while traveling to the location of the errand and returning to his place of work. The exception also may be applicable to the employee who is called to work to perform a special task for the employer at an irregular time. The employee is within the scope of his employment during the entire trip from his home to work and back to his home. The exception is further applicable where the employer asks an employee to perform a special errand after the employee leaves work but before going home. In this case, as in the other examples, the employee is normally within the scope of his employment while traveling to the special errand and while traveling home from the special errand." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 931–932 [237 Cal.Rptr. 718], internal citations omitted.)

- "Plaintiffs contend an employee's attendance at an out-of-town business conference authorized and paid for by the employer may be a special errand for the benefit of the employer under the special errand doctrine. [Defendant] asserts that the special errand doctrine does not apply to commercial travel. We conclude that a special errand may include commercial travel such as the business trip in this case." (*Jeewarat, supra*, 177 Cal.App.4th at p. 436.)
- "An employee who has gone upon a special errand does not cease to be acting in the course of his employment upon his accomplishment of the task for which he was sent. He is in the course of his employment during the entire trip." (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 495 [48 Cal.Rptr. 765].)
- "Whether the transit is part of the employment relationship tends to be a more subtle issue than whether the transit was between home and work. . . . 'These are the extraordinary transits that vary from the norm because the employer requires a special, different transit, means of transit, or use of a car, for some particular reason of his own. When the employer gains that kind of a particular advantage, the job does more than call for routine transport to it; it plays a different role, bestowing a special benefit upon the employer by reason of the extraordinary circumstances. The employer's special request, his imposition of an unusual condition, removes the transit from the employee's choice or convenience and places it within the ambit of the employer's choice or convenience, restoring the employer-employee relationship.' " (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038–1039 [219 Cal.Rptr.3d 630].)
- "[W]here an employee is required by the employment to work at both the employer's premises and at home, he is in the course of employment while traveling between the employer's premises and home." (*Zhu*, *supra*, 12 Cal.App.5th at p. 1040.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 192–193

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.42[3] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05[4][a] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.11, 248.16[4] (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.28 et seq. (Matthew Bender)

California Civil Practice: Torts § 3:10 (Thomson Reuters)

3727. Going-and-Coming Rule—Compensated Travel Time Exception

If an employer has agreed to compensate an employee for the employee's commuting time, then the employee's conduct is within the scope of employment as long as the employee is going to the workplace or returning home.

New November 2017; Revised May 2020

Directions for Use

This instruction sets forth the compensated travel time exception to the going-and-coming rule. It may be given with CACI No. 3720, *Scope of Employment*. CACI No. 3723, *Substantial Deviation,* may also be given if the employee did not go directly from home to work or work to home.

Under the going-and-coming rule, commute time is generally not within the scope of employment. (*Jeewarat v. Warner Bros. Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435 [98 Cal.Rptr.3d 837].) However, commute time is within the scope of employment if the employer compensates the employee for the time spent commuting. (*Lynn v. Tatitlek Support Services, Inc.* (2017) 8 Cal.App.5th 1096, 1111 [214 Cal.Rptr.3d 449].)

Sources and Authority

- "[T]he employer may agree, either expressly or impliedly, that the relationship shall continue during the period of 'going and coming,' in which case the employee is entitled to the protection of the act during that period. Such an agreement may be inferred from the fact that the employer furnishes transportation to and from work as an incident of the employment. It seems equally clear that such an agreement may also be inferred from the fact that the employer compensates the employee for the time consumed in traveling to and from work." (*Kobe v. Industrial Acci. Com.* (1950) 35 Cal.2d 33, 35 [215 P.2d 736], internal citations omitted.)
- "There is a substantial benefit to an employer in one area to be permitted to reach out to a labor market in another area or to enlarge the available labor market by providing travel expenses and payment for travel time. It cannot be denied that the employer's reaching out to the distant or larger labor market increases the risk of injury in transportation. In other words, the employer, having found it desirable in the interests of his enterprise to pay for travel time and for travel expenses and to go beyond the normal labor market or to have located his enterprise at a place remote from the labor market, should be required to pay for the risks inherent in his decision." (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 962 [88 Cal.Rptr. 188, 471 P.2d 988].)
- "We are satisfied that, where, as here, the employer and employee have made the

travel time part of the working day by their contract, the [employee] should be treated as such during the travel time, and it follows that so long as the employee is using the time for the designated purpose, to return home, the doctrine of *respondeat superior* is applicable." (*Hinman, supra,* 2 Cal.3d at pp. 962.)

- "[C]ourts have excepted from the going and coming rule those cases in which the employer and employee have entered into an employment contract in which the employer agrees to pay the employee for travel time and expenses associated with commuting, thus making 'the travel time part of the working day by their contract.' " (*Lynn, supra,* 8 Cal.App.5th at p. 1111.)
- "To the same effect are the cases where the employer furnishes transportation to and from work. ' "The essential prerequisite to compensation is that the danger from which the injury results be one to which he is exposed as an employee in his particular employment," and '[t]his requirement is met when, as an employee and solely by reason of his relationship as such to his employer, he enters a vehicle regularly provided by his employer for the purpose of transporting him to or from the place of employment.' Here, again, it is the employer's decision to make the transit part of the employment relationship." (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1039 [219 Cal.Rptr.3d 630].)
- "[T]he mere payment of a travel allowance as shown in the present case does not reflect a sufficient benefit to defendant so that it should bear responsibility for plaintiff's injuries." (*Caldwell v. A.R.B., Inc.* (1986) 176 Cal.App.3d 1028, 1042 [222 Cal.Rptr. 494].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 194

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.42[3][c] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16[4] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.28 et seq. (Matthew Bender)

3728–3799. Reserved for Future Use

We answer the questions submitted to us as follows:

1. **Was [***name of agent***] negligent?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of agent***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of agent***] [***name of defendant***]'s [agent/employee/[***insert other relationship***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of agent***] acting within the scope of [his/her/***nonbinary pronoun***] [agency/employment/[***insert other relationship***]] when [he/she/***nonbinary pronoun***] harmed [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 3701, *Tort Liability Asserted Against Principal—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*.

This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3701–VF-3799. Reserved for Future Use

EQUITABLE INDEMNITY

3800. Comparative Fault Between and Among Tortfeasors

[*Name of indemnitee***] claims that [he/she/***nonbinary pronoun***] [is/was] required to pay [***describe liability, e.g., "a court judgment in favor of [name of plaintiff]"***] and that [***name of indemnitor***] must reimburse [***name of indemnitee***] based on [***name of indemnitor***]'s share of responsibility. In order for [***name of indemnitee***] to recover from [***name of indemnitor***], [***name of indemnitee***] must prove both of the following:**

1. **That [***name of indemnitor***] [was negligent/[***describe underlying tort***]]; and**
2. **That [***name of indemnitor***]'s [negligence/[***describe tortious conduct***]] contributed as a substantial factor in causing [***name of plaintiff***]'s harm.**

[[*Name of indemnitor***] claims that [***name of indemnitee***] [and] [***insert identification of others***] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm. To succeed, [***name of indemnitor***] must prove both of the following:**

1. **That [***name of indemnitee***] [and] [***insert identification of others***] [[was/were] negligent/[***other basis of responsibility***]]; and**
2. **That [***name of indemnitee***] [and] [***insert identification of others***] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm.**

You will be asked to determine the percentages of responsibility of [*name of indemnitor***] [,/ and] [[***name of indemnitee***][, and] all other persons responsible] for [***name of plaintiff***]'s harm.]**

New September 2003; Revised May 2020

Directions for Use

Read the last bracketed portion when the indemnitor claims that the indemnitor was not the sole cause of the indemnitee's liability or loss.

This instruction is intended for use in cases where the plaintiff seeks equitable indemnity from another responsible tortfeasor who was not a party to the original action or proceeding from which the liability in question arose. For cases in which the indemnitee seeks equitable indemnity against a co-defendant or cross-defendant as part of the original tort action, see CACI No. 406, *Apportionment of Responsibility*.

Sources and Authority

- "[T]he right to indemnity flows from payment of a joint legal obligation on another's behalf." (*AmeriGas Propane, LP v. Landstar Ranger, Inc.* (2014) 230

Cal.App.4th 1153, 1167 [179 Cal.Rptr.3d 330].)

- "The elements of a cause of action for indemnity are (1) a showing of fault on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is . . . equitably responsible." (*Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 217 [131 Cal.Rptr.3d 41].)
- "In order to attain . . . a system . . . in which liability for an indivisible injury caused by concurrent tortfeasors will be borne by each individual tortfeasor 'in direct proportion to [his] respective fault,' we conclude that the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis." (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 598 [146 Cal.Rptr. 182, 578 P.2d 899], internal citation omitted.)
- "Unlike subrogation, in which the claimant stands in the shoes of the injured party, 'The basis for the remedy of equitable indemnity is restitution. "[O]ne person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay." [Citations.] [¶] California common law recognizes a right of partial indemnity under which liability among multiple tortfeasors may be apportioned according to the comparative negligence of each.' The test for indemnity is thus whether the indemnitor and indemnitee jointly caused the plaintiff's injury." (*AmeriGas Propane, L.P. v. Landstar Ranger, Inc.* (2010) 184 Cal.App.4th 981, 989 [109 Cal.Rptr.3d 686], internal citation omitted.)
- "[C]omparative equitable indemnity includes the entire range of possible apportionments, from no right to any indemnity to a right of complete indemnity. Total indemnification is just one end of the spectrum of comparative equitable indemnification." (*Far West Financial Corp. v. D & S Co., Inc.* (1988) 46 Cal.3d 796, 808 [251 Cal.Rptr. 202, 760 P.2d 399], internal quotation marks and citation omitted.)
- "[W]e conclude that a cause of action for equitable indemnity is a legal action seeking legal relief. As such, the [defendant] was entitled to a jury trial." (*Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698 [59 Cal.Rptr.2d 303].)
- "[W]e hold that . . . the comparative indemnity doctrine may be utilized to allocate liability between a negligent and a strictly liable defendant." (*Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 332 [146 Cal.Rptr. 550, 579 P.2d 441].)
- "[Indemnitor]'s liability was not based on its independent acts or omissions, but was based solely on its role as retailer of [manufacturer]'s defectively designed product. As a matter of fundamental fairness, a manufacturer . . . cannot seek equitable indemnification from a retailer found not to have been negligent or independently at fault, but found to be liable solely under the strict liability theory of design defect. Under these limited circumstances the retailer is not 'at fault' within the meaning of a cause of action for equitable indemnification." (*Bailey, supra*, 199 Cal.App.4th at p. 215.)

- For purposes of equitable indemnity, "it matters not whether the tortfeasors acted in concert to create a single injury, or successively, in creating distinct and divisible injury." (*Blecker v. Wolbart* (1985) 167 Cal.App.3d 1195, 1203 [213 Cal.Rptr. 781].)
- "[W]e conclude comparative fault principles should be applied to intentional torts, at least to the extent that comparative equitable indemnification can be applied between concurrent intentional tortfeasors." (*Baird v. Jones* (1993) 21 Cal.App.4th 684, 690 [27 Cal.Rptr.2d 232].)
- Statutes may limit one's right to recover comparative indemnity. (See, e.g., *E.W. Bliss Co. v. Superior Court* (1989) 210 Cal.App.3d 1254, 1259 [258 Cal.Rptr. 783] [Lab. Code, § 4558(d) provides that there is no right of action for comparative indemnity against an employer for injuries resulting from the removal of an operation guard from a punch press].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 222, 225, 226, 230

California Tort Guide (Cont.Ed.Bar 3d ed.) General Principles, §§ 1.52–1.59

5 Levy et al., California Torts, Ch. 74, *Comparative Negligence*, §§ 74.01–74.13 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution*, § 300.61 (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.60 et seq. (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.26 et seq. (Matthew Bender)

California Civil Practice: Torts §§ 4:14–4:18 (Thomson Reuters)

3801. Implied Contractual Indemnity

[*Name of indemnitee***] claims that [he/she/***nonbinary pronoun***] [is/was/may be] required to pay [***describe liability, e.g., "a court judgment in favor of plaintiff John Jones"***] because [***name of indemnitor***] [failed to use reasonable care in performing work under an agreement with [***name of indemnitee***]/[***specify other basis of responsibility***]]. In order for [***name of indemnitee***] to recover from [***name of indemnitor***], [***name of indemnitee***] must prove both of the following:**

1. **That [***name of indemnitor***] [failed to use reasonable care in [performing the work/[***describe work or services, e.g., testing the soil***]] under an agreement with [***name of indemnitee***]/[***specify other basis of responsibility***]]; and**
2. **That [***name of indemnitor***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[[*Name of indemnitor***] claims that [[***name of indemnitee***] [and] [***insert identification of others***]] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm. To succeed, [***name of indemnitor***] must prove both of the following:**

1. **That [[***name of indemnitee***] [and] [***insert identification of others***]] [was/were] [negligent/[***specify other basis of responsibility***]]; and**
2. **That [[***name of indemnitee***] [and] [***insert identification of others***]] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm.**

You will be asked to determine the percentages of responsibility of [*name of indemnitor***][,/ and] [[***name of indemnitee***][, and] all other persons responsible] for [***name of plaintiff***]'s harm.]**

New September 2003; Revised December 2007, May 2020, November 2020

Directions for Use

The party identifications in this instruction assume a cross-complaint between indemnitor and indemnitee defendants. In a direct action by the indemnitee against the indemnitor, *"name of plaintiff"* will refer to the person to whom the indemnitee has incurred liability.

Implied contractual indemnity may arise for reasons other than the indemnitor's negligent performance under the contract. If the basis of the claim is other than negligence, specify the conduct involved. (See *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 974 [56 Cal.Rptr.3d 177] [breach of warranty].)

Read the last bracketed portion if the indemnitor claims that the indemnitor was not the sole cause of the indemnitee's liability or loss. Select options depending on whether the indemnitor alleges contributory conduct of the indemnitee, of others, or of both. Element 1 will have to be modified if there are different contributing acts alleged against the indemnitee and others; for example, if the indemnitee is alleged to have been negligent and another party is alleged to be strictly liable.

A special finding that an agreement existed may create a need for instructions, but it is a question of law whether an agreement implies a duty to indemnify. This instruction should be given only in cases in which the court has determined that the alleged indemnitor and the indemnitee have "a joint legal obligation to the injured party." (*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1160 [90 Cal.Rptr.3d 732, 202 P.3d 1115].)

Sources and Authority

- "In general, indemnity refers to 'the obligation resting on one party to make good a loss or damage another party has incurred.' Historically, the obligation of indemnity took three forms: (1) indemnity expressly provided for by contract (express indemnity); (2) indemnity implied from a contract not specifically mentioning indemnity (implied contractual indemnity); and (3) indemnity arising from the equities of particular circumstances (traditional equitable indemnity). [¶] Although the foregoing categories of indemnity were once regarded as distinct, we now recognize there are only two basic types of indemnity: express indemnity and equitable indemnity. Though not extinguished, implied contractual indemnity is now viewed simply as 'a form of equitable indemnity.' " (*Prince, supra,* 45 Cal.4th at p. 1157, internal citations omitted.)
- "The right to implied contractual indemnity is predicated upon the indemnitor's breach of contract, 'the rationale . . . being that a contract under which the indemnitor undertook to do work or perform services necessarily implied an obligation to do the work involved in a proper manner and to discharge foreseeable damages resulting from improper performance absent any participation by the indemnitee in the wrongful act precluding recovery.' . . . 'An action for implied contractual indemnity is not a claim for contribution from a joint tortfeasor; it is not founded upon a tort or upon any duty which the indemnitor owes to the injured third party. It is grounded upon the indemnitor's breach of duty *owing to the indemnitee* to properly perform its contractual duties.' " (*West v. Superior Court* (1994) 27 Cal.App.4th 1625, 1633 [34 Cal.Rptr.2d 409], internal citations omitted, original italics.)
- "[A]n implied contractual indemnity claim, like a traditional equitable indemnity claim, is subject to the *American Motorcycle* rule that a party's liability for equitable indemnity is based on its *proportional share of responsibility* for the damages to the injured party." (*Prince, supra,* 45 Cal.4th at p. 1165, original italics.)
- "[O]ur recognition that 'a claim for implied contractual indemnity is a form of equitable indemnity subject to the rules governing equitable indemnity claims'

corrects any misimpression that joint liability is not a component." (*Prince, supra,* 45 Cal.4th at p. 1166, internal citation omitted.)

- "[U]nder [Code of Civil Procedure] section 877.6, subsection (c), . . . an [implied contractual] indemnity claim, like other equitable indemnity claims, may not be pursued against a party who has entered into a good faith settlement." (*Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1031 [269 Cal.Rptr. 720, 791 P.2d 290].)
- "We conclude the trial court erred in denying [the indemnitee's] implied contractual indemnity based on [indemnitee's] failure to prove [the indemnitor's] breach of warranty was the product of [indemnitor's] failure to use reasonable care in performing its contractual duties. [Indemnitee] does not need to prove a negligent breach of contract to be entitled to implied contractual indemnity." (*Garlock Sealing Technologies, supra*, 148 Cal.App.4th at p. 974, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 224, 229

Haning et al., California Practice Guide: Personal Injury, Ch. 4-D, *Techniques Where Settlement Not Forthcoming*, ¶ 4:784 (The Rutter Group)

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.03[6] (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Contribution and Indemnity*, § 300.61[5] (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.91[3][a] (Matthew Bender)

California Civil Practice: Torts § 4:14 (Thomson Reuters)

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DAMAGES

3900. Introduction to Tort Damages—Liability Contested

If you decide that [*name of plaintiff*] has proved [his/her/*nonbinary pronoun*] claim against [*name of defendant*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages."

The amount of damages must include an award for each item of harm that was caused by [*name of defendant*]'s wrongful conduct, even if the particular harm could not have been anticipated.

[*Name of plaintiff*] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.

[The following are the specific items of damages claimed by [*name of plaintiff*]:]

[*Insert applicable instructions on items of damage.*]

New September 2003

Directions for Use

Read last bracketed sentence and insert instructions on items of damages here only if CACI No. 3902, *Economic and Noneconomic Damages*, is not being read. If CACI No. 3902 is not used, this instruction should be followed by applicable instructions (see CACI Nos. 3903A through 3903N, and 3905A) concerning the items of damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Sources and Authority

- Measure of Tort Damages. Civil Code section 3333.
- Recovery of Damages Generally. Civil Code section 3281.
- Recovery of Future Damages. Civil Code section 3283.
- Damages Must Be Reasonable. Civil Code section 3359.
- " 'Damages' are monetary compensation awarded to parties who suffer detriment for the unlawful act or omission of another; they are assessed by a court against wrongdoers for the commission of a legal wrong of a private nature." (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 396 [178 Cal.Rptr.3d 604].)
- Under Civil Code section 3333 "[t]ort damages are awarded to compensate a plaintiff for all of the damages suffered as a legal result of the defendant's wrongful conduct." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466], italics omitted.)
- "Whatever its measure in a given case, it is fundamental that 'damages which

are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.' However, recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party." (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88], internal citations omitted.)

- "In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish 'by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.' However, '[t]here is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.' " (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445, 707 P.2d 818], internal citations omitted.)
- " 'Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty.' 'The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. . . . .' " (*Meister*, *supra,* 230 Cal.App.4th at pp. 396–397, original italics, internal citation omitted.)
- "If plaintiff's inability to prove his damages with certainty is due to defendant's actions, the law does not generally require such proof." (*Clemente, supra,* 40 Cal.3d at p. 219, internal citations omitted.)
- "While a defendant is liable for all the damage that his tortuous act proximately causes to the plaintiff, regardless of whether or not it could have been anticipated, nevertheless a proximate causal connection must still exist between the damage sustained by the plaintiff and the defendant's wrongful act or omission, and the detriment inflicted on the plaintiff must still be the natural and probable result of the defendant's conduct." (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [2 Cal.Rptr. 879], internal citations omitted.)
- "The issue here is whether [defendant]—separate from other legal and practical reasons it had to prevent injury of any kind to the public—had a tort duty to guard against negligently causing what we and others have called 'purely economic loss[es].' We use that term as a shorthand for 'pecuniary or commercial loss that does not arise from actionable physical, emotional or reputational injury to persons or physical injury to property.' And although [defendant] of course had a tort duty to guard against the latter kinds of injury, we conclude it had no tort duty to guard against purely economic losses." (*Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 398 [247

Cal.Rptr.3d 632, 441 P.3d 881], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1715–1719, 1723–1726

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.2–1.6

4 Levy et al., California Torts, Ch. 50, *Damages*, § 50.02 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.41 (Matthew Bender)

California Civil Practice: Torts § 5:1 (Thomson Reuters)

3901. Introduction to Tort Damages—Liability Established

If you decide that [*name of plaintiff*] was harmed and that [*name of defendant*]'s [*insert description of cause of action, e.g., "negligence"*] was a substantial factor in causing the harm, you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages."

The amount of damages must include an award for each item of harm that was caused by [*name of defendant*]'s wrongful conduct, even if the particular harm could not have been anticipated.

[*Name of plaintiff***] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.**

[The following are the specific items of damages claimed by [*name of plaintiff*]:]

[*Insert applicable instructions on items of damage*.**]**

New September 2003; Revised October 2004, June 2005

Directions for Use

This instruction is intended for cases in which the defendant "admits" liability, but contests causation and damages. See CACI No. 424, *Negligence Not Contested—Essential Factual Elements*.

Read last bracketed sentence and insert instructions on items of damage here only if CACI No. 3902, *Economic and Noneconomic Damages*, is not being read. If CACI No. 3902 is not used, this instruction should be followed by applicable instructions (see CACI Nos. 3903A through 3903N, and CACI No. 3905A) concerning the items of damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Read CACI No. 430, *Causation: Substantial Factor*, as the definition of "substantial factor."

Sources and Authority

See the Sources and Authority to CACI No. 3900, Introduction to Tort Damages—Liability Contested.

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1715–1719, 1723–1726

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.2–1.6

4 Levy et al., California Torts, Ch. 50, *Damages*, § 50.02 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.41 (Matthew Bender)

California Civil Practice: Torts § 5:1 (Thomson Reuters)

3902. Economic and Noneconomic Damages

The damages claimed by [*name of plaintiff*] for the harm caused by [*name of defendant*] fall into two categories called economic damages and noneconomic damages. You will be asked on the verdict form to state the two categories of damages separately.

New September 2003

Directions for Use

This instruction may not be necessary in every case.

Sources and Authority

- Proposition 51. Civil Code section 1431.2.
- MICRA Limitation on Noneconomic Damages From Health Care Provider. Civil Code section 3333.2.
- The Supreme Court has noted that section 1431.2 "carefully" defines the "important distinction" between economic and noneconomic damages. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600 [7 Cal.Rptr.2d 238, 828 P.2d 140].) The court stated: "Proposition 51 . . . retains the joint liability of all tortfeasors, regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses. On the other hand, the more intangible and subjective categories of damages were limited by Proposition 51 to a rule of strict proportionate liability. With respect to these noneconomic damages, the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained from each person responsible for the injury." (*Ibid.,* internal citation omitted.)
- "Proposition 51 . . . allows an injured plaintiff to recover the full amount of economic damages suffered, regardless of which tortfeaser [sic] or tortfeasors are named as defendants. The tortfeasors are left to sort out payment in proportion to fault amongst themselves, and they must bear the risk of nonrecovery from impecunious tortfeasors. As to noneconomic damages, however, the plaintiff must sue all the tortfeasors to enable a full recovery. Failure to name a defendant will preclude recovery of that defendant's proportional share of damages, and the plaintiff will bear the risk of nonrecovery from an impecunious tortfeasor." (*Aetna Health Plans of California, Inc. v. Yucaipa-Calimesa Joint Unified School Dist.* (1999) 72 Cal.App.4th 1175, 1190 [85 Cal.Rptr.2d 672].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 159, 169, 170

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.5

4 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.04

(Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.20 et seq. (Matthew Bender)

California Civil Practice: Torts § 5:4 (Thomson Reuters)

3903. Items of Economic Damage

The following are the specific items of economic damages claimed by [*name of plaintiff*]:

[*Insert applicable instructions on items of economic damage.***]**

New September 2003

Directions for Use

This instruction may not be necessary in every case. For example, if the plaintiff is not claiming any noneconomic damages, there would be no need to define the claimed damages as "economic." If this instruction is used, it should be followed by applicable instructions (see CACI Nos. 3903A through 3903N) concerning the items of economic damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 159, 169, 170

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.5

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

California Civil Practice: Torts § 5:4 (Thomson Reuters)

3903A. Medical Expenses—Past and Future (Economic Damage)

[*Insert number, e.g.*, "1."**] [Past] [and] [future] medical expenses.**

[To recover damages for past medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she/***nonbinary pronoun***] has received.]**

[To recover damages for future medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she/***nonbinary pronoun***] is reasonably certain to need in the future.]**

New September 2003

Sources and Authority

- " 'In tort actions, medical expenses fall generally into the category of economic damages, representing actual pecuniary loss caused by the defendant's wrong.' 'A person who undergoes necessary medical treatment for tortiously caused injuries suffers an economic loss by taking on liability for the costs of treatment. Hence, any reasonable charges for treatment the injured person has paid or, having incurred, still owes the medical provider are recoverable as economic damages.' " (*Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 27 Cal.App.5th 225, 237 [238 Cal.Rptr.3d 809].)
- "[A] person injured by another's tortious conduct is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Hanif v. Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635, 640 [246 Cal.Rptr. 192], internal citations omitted; see also *Helfend v. Southern Cal Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6 [84 Cal.Rptr. 173, 465 P.2d 61 [collateral source rule].)
- "The jury in this case was properly instructed with CACI No. 3903A, which directs the jury to determine 'the reasonable cost of reasonably necessary medical care that [plaintiff] is reasonably certain to need in the future.' " (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050 [208 Cal.Rptr.3d 363]; see also *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 183 [217 Cal.Rptr.3d 519] [CACI 3903A is an accurate statement of the law].)
- "The jury was properly instructed in this case to determine 'the reasonable cost of reasonably necessary medical care that [plaintiff] has received' and 'the reasonable cost of reasonably necessary medical care that [plaintiff] is reasonably certain to need in the future.' But as a consequence of the discrepancy in recent decades between the amount patients are typically billed by health care providers and the lower amounts usually paid in satisfaction of the charges (whether by a health insurer or otherwise), controversy has arisen as to how to measure the reasonable costs of medical care in a variety of factual scenarios." (*Bermudez v.*

Ciolek (2015) 237 Cal.App.4th 1311, 1328 [188 Cal.Rptr.3d 820].)

- "[A] plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less. California decisions have focused on 'reasonable value' in the context of *limiting* recovery to reasonable expenditures, not expanding recovery beyond the plaintiff's actual loss or liability. To be recoverable, a medical expense must be both incurred *and* reasonable." (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 555 [129 Cal.Rptr.3d 325, 257 P.3d 1130], original italics, internal citations omitted.)
- "[A]n injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial. In so holding, we in no way abrogate or modify the collateral source rule as it has been recognized in California; we merely conclude the negotiated rate differential—the discount medical providers offer the insurer—is not a benefit provided to the plaintiff in compensation for his or her injuries and therefore does not come within the rule." (*Howell, supra,* 52 Cal.4th at p. 566.)
- "[W]hen a medical care provider has, by agreement with the plaintiff's private health insurer, accepted as full payment for the plaintiff's care an amount less than the provider's full bill, evidence of that amount is relevant to prove the plaintiff's damages for past medical expenses and, assuming it satisfies other rules of evidence, is admissible at trial. Evidence that such payments were made in whole or in part by an insurer remains, however, generally inadmissible under the evidentiary aspect of the collateral source rule. Where the provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses." (*Howell, supra,* 52 Cal.4th at p. 567, internal citation omitted.)
- "*Howell* offered no bright-line rule on how to determine 'reasonable value' when uninsured plaintiffs have incurred (but not paid) medical bills. [Defendant] is correct that the concept of market or exchange value was endorsed by *Howell* as the proper way to think about the 'reasonable value' of medical services. But she is incorrect to the extent she suggests (1) [Plaintiff] is necessarily in the same market as insured health care recipients or wealthy health care recipients who can pay cash; or (2) *Howell* prescribes a particular method for determining the 'reasonable value' of medical services." (*Bermudez, supra,* 237 Cal.App.4th at p. 1330.)
- "In sum, the measure of medical damages is the lesser of (1) the amount paid or incurred, and (2) the reasonable value of the medical services provided. In practical terms, the measure of damages in insured plaintiff cases will likely be the amount paid to settle the claim in full. It is theoretically possible to prove the reasonable value of services is lower than the rate negotiated by an insurer. But nothing in the available case law suggests this will be a particularly fruitful

avenue for tort defendants. Conversely, the measure of damages for uninsured plaintiffs who have not paid their medical bills will usually turn on a wide-ranging inquiry into the reasonable value of medical services provided, because uninsured plaintiffs will typically incur standard, nondiscounted charges that will be challenged as unreasonable by defendants." (*Bermudez, supra,* 237 Cal.App.4th at pp. 1330–1331.)

- "Here, we are confronted with an insured plaintiff who has chosen to treat with doctors and medical facility providers outside his insurance plan. We hold that such a plaintiff shall be considered uninsured, as opposed to insured, for the purpose of determining economic damages." (*Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1269 [232 Cal.Rptr.3d 404].)
- "[T]he inquiry into reasonable value for the medical services provided to an uninsured plaintiff is not necessarily limited to the billed amounts where a defendant seeks to introduce evidence that a lesser payment has been made to the provider by a factor . . . . In such cases, the inquiry requires some additional evidence showing a nexus between the amount paid by the factor and the reasonable value of the medical services." (*Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, 1007 [194 Cal.Rptr.3d 364].)
- "Where a medical provider has (1) rendered medical services to a plaintiff, (2) issued a bill for those services, and (3) subsequently written off a portion of the bill gratuitously, the amount written off constitutes a benefit that may be recovered by the plaintiff under the collateral source rule." (*Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, 769 [133 Cal.Rptr.3d 342].)
- "[T]he collateral source rule is not violated when a defendant is allowed to offer evidence of the market value of future medical benefits." (*Cuevas, supra,* 11 Cal.App.5th at p. 180.)
- "It is established that '[t]he reasonable value of nursing services required by the defendant's tortious conduct may be recovered from the defendant even though the services were rendered by members of the injured person's family and without an agreement or expectation of payment. Where services in the way of attendance and nursing are rendered by a member of the plaintiff's family, the amount for which the defendant is liable is the amount for which reasonably competent nursing and attendance by others could have been obtained. The fact that the injured party had a legal right to the nursing services (as in the case of a spouse) does not, as a general rule, prevent recovery of their value . . . .' " (*Hanif, supra,* 200 Cal.App.3d at pp. 644–645, internal citations omitted.)
- "Two points about the sufficiency of evidence to support a judgment can fairly be taken from *Howell*. First, the amount paid to settle in full an insured plaintiff's medical bills is likely substantial evidence on its own of the reasonable value of the services provided. Second, consistent with pre-*Howell* law, initial medical bills are generally insufficient on their own as a basis for determining the reasonable value of medical services. Ensuing cases have held that a plaintiff who relies solely on evidence of unpaid medical charges will not

meet his burden of proving the reasonable value of medical damages with substantial evidence." (*Bermudez, supra,* 237 Cal.App.4th at p. 1335, internal citations omitted.)

- Nor is it necessary that the amount of the award equal the alleged medical expenses for it has long been the rule that the costs alone of medical treatment and hospitalization do not govern the recovery of such expenses. It must be shown additionally that the services were attributable to the accident, that they were necessary, and that the charges for such services were reasonable." (*Dimmick v. Alvarez* (1961) 196 Cal.App.2d 211, 216 [16 Cal.Rptr. 308].)
- "The intervention of a third party in purchasing a medical lien does not prevent a plaintiff from recovering the amounts billed by the medical provider for care and treatment, as long as the plaintiff legitimately incurs those expenses and remains liable for their payment. Nor does the rule [that a plaintiff in a tort action cannot recover more than the amount of medical expenses he or she paid or incurred, even if the reasonable value of those services might be a greater sum] forbid the jury from considering the amounts billed by the provider as evidence of the reasonable value of the services." (*Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1291 [62 Cal.Rptr.3d 309]; see also *Moore v. Mercer* (2016) 4 Cal.App.5th 424, 436 [209 Cal.Rptr.3d 101] ["Nothing in *Howell* suggests a need to revisit the issues we addressed in *Katiuzhinsky"*].)
- "The fact that a hospital or doctor, for administrative or economic convenience, decides to sell a debt to a third party at a discount does not reduce the value of the services provided in the first place." (*Uspenskaya, supra*, 241 Cal.App.4th at p. 1003.)
- "Because the provider may no longer assert a lien for the full cost of its services, the Medicaid beneficiary may only recover the amount payable under Medicaid as his or her medical expenses in an action against a third party tortfeasor." (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827 [135 Cal.Rptr.2d 1, 69 P.3d 927], internal citation omitted.)
- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)
- "It is for the jury to determine the probabilities as to whether future detriment is reasonably certain to occur in any particular case. [Citation.] It is 'not required' for a doctor to 'testify that he [is] reasonably certain that the plaintiff would be disabled in the future. All that is required to establish future disability is that from all the evidence, including the expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty. [Citations.]' [Citation.] The fact that the amount of future damages may be difficult to measure or subject to various possible contingencies does not bar recovery." (*J.P., supra,* 232 Cal.App.4th at pp. 341–342.)

- "[W]hile an injured plaintiff is entitled to recover the reasonable value of medical services that are reasonably certain to be necessary in the future, evidence of the full amount billed for past medical services cannot support an expert opinion on the reasonable value of future medical services. It does not appear, however, that [expert] used the full amount billed for past medical services in making the calculations for her life care plan. We observe 'the "requirement of certainty . . . cannot be strictly applied where prospective damages are sought, because probabilities are really the basis for the award." ' At the time of trial, the precise medical costs a plaintiff will incur in the future are not known. Nor is it known how a plaintiff will necessarily pay for such expenses. It is unknown, for example, what, if any, insurance a plaintiff will have at any given time or what rate an insurer will have negotiated with any given medical provider for a particular service at the time and location the plaintiff will require the medical care. The fact finder is entrusted with the tasks of evaluating the probabilities based on the evidence presented and arriving at a reasonable result." (*Cuevas, supra,* 11 Cal.App.5th at p. 182, internal citations omitted.)
- "[I]t seems particularly appropriate for the trial court to perform its traditional gatekeeper role as to the admissibility of evidence and, pursuant to Evidence Code section 352, to determine whether evidence that is minimally probative should be admitted or whether it will require an undue consumption of time to try the collateral issues that evidence of what a third party paid for an account receivable and lien will necessarily raise." (*Moore, supra,* 4 Cal.App.5th at p. 443.)
- "[E]vidence which might be admissible in one case might not be admissible in another. '[T]he facts and circumstances of the particular case dictate what evidence is relevant to show the reasonable market value of the services at issue . . . .' " (*Moore, supra,* 4 Cal.App.5th at p. 442.)

Secondary Sources

9 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1846 et seq.

Haning et al., California Practice Guide: Personal Injury, Ch. 3-A, *Damages: Introduction*, ¶¶ 3:1–3:19.4 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:351 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.19–1.31

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.01, 52.03 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.45 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.192 (Matthew Bender)

California Civil Practice: Torts § 5:12 (Thomson Reuters)

3903B. Medical Monitoring—Toxic Exposure (Economic Damage)

[*Insert number, e.g.,* "2."**] The cost of future medical monitoring. To recover damages for this item, [***name of plaintiff***] must prove both of the following:**

1. **That as a result of the toxic exposure, the need for future monitoring is reasonably certain; and**
2. **That the monitoring is reasonable.**

In deciding these issues, you should consider the following:

(a) The significance and extent of [*name of plaintiff***]'s exposure to the chemical(s);**

(b) The toxicity of the chemical(s);

(c) The relative increase in [*name of plaintiff***]'s chance of getting the disease as a result of the exposure, when compared to:**

(i) [his/her/*nonbinary pronoun***] chances of developing the disease had [he/she/***nonbinary pronoun***] not been exposed, and**

(ii) the chances that members of the public at large will develop the disease;

(d) The seriousness of the disease that may result from the exposure; [and]

(e) The medical benefit of early detection and diagnosis; [and]

(f) [*Insert other relevant factor(s).***]**

[[*Name of defendant***] is not required to pay for medical monitoring that is required for reasons other than [***name of plaintiff***]'s exposure to toxic chemicals.]**

[[*Name of defendant***] is only required to pay for additional or different monitoring that is required because of the toxic exposure.]**

New September 2003

Sources and Authority

- "In the context of a toxic exposure action, a claim for medical monitoring seeks to recover the cost of future periodic medical examinations intended to facilitate early detection and treatment of disease caused by a plaintiff's exposure to toxic substances." (*Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 1004–1005 [25 Cal.Rptr.2d 550, 863 P.2d 795], internal citation omitted.)
- "[W]e hold that the cost of medical monitoring is a compensable item of

damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable. In determining the reasonableness and necessity of monitoring, the following factors are relevant: (1) the significance and extent of the plaintiff's exposure to chemicals; (2) the toxicity of the chemicals; (3) the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to (a) the plaintiff's chances of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large of developing the disease; (4) the seriousness of the disease for which the plaintiff is at risk; and (5) the clinical value of early detection and diagnosis. Under this holding, it is for the trier of fact to decide, on the basis of competent medical testimony, whether and to what extent the particular plaintiff's exposure to toxic chemicals in a given situation justifies future periodic medical monitoring." (*Potter, supra,* 6 Cal.4th at p. 1009.)

- "The crucial distinction, in other words, is in the nature of the monitoring, not the nature of the harm. '[E]ven if a defendant negligently exposes a smoker to toxins that significantly increase the smoker's risk of cancer, that defendant is not liable for reasonably certain future medical monitoring costs unless the recommended monitoring calls for tests or examinations that are in addition to or different from the type of monitoring that the smoker should prudently undertake regardless of the subsequent toxic exposure.' This accords with the policy concern being addressed in that part of [*Potter*], which was to avoid 'open[ing] the floodgates of litigation.' If 'the plaintiff already remains responsible for any monitoring that is shown to be medically advisable due solely to his or her smoking or other preexisting condition,' he or she will have no incentive to sue for contribution from a subsequent tortfeasor who has caused no need for additional or different monitoring." (*Gutierrez v. Cassiar Mining Corp.* (1998) 64 Cal.App.4th 148, 156 [75 Cal.Rptr.2d 132], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1846 et seq.

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.20A

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.01[3][b] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

3903C. Past and Future Lost Earnings (Economic Damage)

[*Insert number, e.g.,* "3."**] [Past] [and] [future] lost earnings.**

[To recover damages for past lost earnings, [*name of plaintiff***] must prove the amount of [***insert one or more of the following:* **income/earnings/salary/wages] that [he/she/***nonbinary pronoun***] has lost to date.]**

[To recover damages for future lost earnings, [*name of plaintiff***] must prove the amount of [***insert one or more of the following:* **income/earnings/salary/wages] [he/she/***nonbinary pronoun***] will be reasonably certain to lose in the future as a result of the injury.]**

New September 2003; Revised November 2020

Directions for Use

This instruction is not intended for use in employment cases.

Use this instruction along with CACI No. 3906, *Lost Earnings and Lost Earning Capacity—Jurors Not to Reduce Damages on Basis of Race, Ethnicity, or Gender (Economic Damage).*

Sources and Authority

- Estimations, Measures, or Calculations of Past, Present, or Future Damages. Civil Code section 3361.
- "We know of no rule of law that requires that a plaintiff establish the amount of his actual earnings at the time of the injury in order to obtain recovery for loss of wages although, obviously, the amount of such earnings would be helpful to the jury in particular situations." (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 656 [151 Cal.Rptr. 399].)
- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)
- " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)
- "Requiring the plaintiff to prove future economic losses are reasonably certain 'ensures that the jury's fixing of damages is not wholly, and thus impermissibly,

speculative.' " (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 738 [214 Cal.Rptr.3d 113].)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1842, 1843

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.39–1.41

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.10–52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* § 64.190 (Matthew Bender)

California Civil Practice: Torts §§ 5:14, 5:15 (Thomson Reuters)

3903D. Lost Earning Capacity (Economic Damage)

[*Insert number, e.g.*, "4."] The loss of [*name of plaintiff*]'s ability to earn money.

To recover damages for the loss of the ability to earn money as a result of the injury, [*name of plaintiff*] must prove:

1. **That it is reasonably certain that the injury that [*name of plaintiff*] sustained will cause [him/her/*nonbinary pronoun*] to earn less money in the future than [he/she/*nonbinary pronoun*] otherwise could have earned; and**
2. **The reasonable value of that loss to [him/her/*nonbinary pronoun*].**

In determining the reasonable value of the loss, compare what it is reasonably probable that [*name of plaintiff*] could have earned without the injury to what [he/she/*nonbinary pronoun*] can still earn with the injury. [Consider the career choices that [*name of plaintiff*] would have had a reasonable probability of achieving.] It is not necessary that [he/she/*nonbinary pronoun*] have a work history.

New September 2003; Revised April 2004, April 2008, May 2017, November 2020

Directions for Use

This instruction is not intended for use in employment cases.

Use this instruction along with CACI No. 3906, *Lost Earnings and Lost Earning Capacity—Jurors Not to Reduce Damages on Basis of Race, Ethnicity, or Gender (Economic Damage).*

If lost profits are asserted as an element of damages, see CACI No. 3903N, *Lost Profits (Economic Damage).*

If there is a claim for both lost future earnings and lost earning capacity, give also CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage).* The verdict form should ensure that the same loss is not computed under both standards.

In the last paragraph, include the bracketed sentence if the plaintiff is of sufficient age that reasonable probabilities can be projected about career opportunities.

Sources and Authority

- Estimations, Measures, or Calculations of Past, Present, or Future Damages. Civil Code section 3361.
- "Before [lost earning capacity] damages may be awarded, a jury must (1) find the injury that the plaintiff sustained will result in a loss of earning capacity, and (2) assign a value to that loss by comparing what the plaintiff could have earned without the injury to what she can still earn with the injury." (*Licudine v.*

Cedars-Sinai Medical Center (2016) 3 Cal.App.5th 881, 887 [208 Cal.Rptr.3d 170].)

- "Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money." (*Connolly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489 [319 P.2d 343].)
- "Because these damages turn on the plaintiff's earning capacity, the focus is 'not [on] what the plaintiff would have earned in the future[,] but [on] what she could have earned.' Consequently, proof of the plaintiff's prior earnings, while relevant to demonstrate earning capacity, is not a prerequisite to the award of these damages, nor a cap on the amount of those damages. Indeed, proof that the plaintiff had any prior earnings is not required because the 'vicissitudes of life might call upon [the plaintiff] to make avail of her capacity to work,' even if she had not done so previously." (*Licudine, supra,* 3 Cal.App.5th at pp. 893–894, internal citations omitted.)
- "Such damages are '. . . awarded for the purpose of *compensating* the plaintiff for injury suffered, i.e., restoring . . . [her] as nearly as possible to . . . [her] former position, or giving . . . [her] some pecuniary equivalent.' Impairment of the capacity or power to work is an injury separate from the actual loss of earnings." (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 412 [196 Cal.Rptr. 117], original italics, internal citations omitted.)
- "[T]he jury must fix a plaintiff's future earning capacity based on what it is 'reasonably probable' she could have earned." (*Licudine, supra,* 3 Cal.App.5th at p. 887.)
- "A plaintiff's earning capacity without her injury is a function of two variables—the career(s) the plaintiff could have pursued and the salaries attendant to such career(s)." (*Licudine, supra,* 3 Cal.App.5th at p. 894.)
- "How is the jury to assess what career(s) are available to the plaintiff? Is the sky the limit? In other words, can a plaintiff urge the jury to peg her earning capacity to the salary of a world-class athlete, neuroscientist, or best-selling author just by testifying that is what she wanted to do? Or must the jury instead determine a plaintiff's earning capacity by reference to the career choices the plaintiff stood a realistic chance of accomplishing? We conclude some modicum of scrutiny by the trier of fact is warranted, and hold that the jury must look to the earning capacity of the career choices that the plaintiff had a reasonable probability of achieving." (*Licudine, supra,* 3 Cal.App.5th at p. 894.)
- "Once the jury has determined which career options are reasonably probable for the plaintiff to achieve, how is the jury to value the earning capacity of those careers? Precedent suggests three methods: (1) by the testimony of an expert witness; (2) by the testimony of lay witnesses, including the plaintiff; or (3) by proof of the plaintiff's prior earnings in that same career. As these options suggest, expert testimony is not always required." (*Licudine, supra,* 3 Cal.App.5th at p. 897.)

- "[E]xpert testimony is not vital to a claim for loss of earning capacity." (*Lewis v. Ukran* (2019) 36 Cal.App.5th 886, 893 [248 Cal.Rptr.3d 839].)
- "A trier of fact may draw the inference that the plaintiff has suffered a loss of earning capacity from the nature of the injury, but it is not required to draw that inference." (*Martinez v. State Dept. of Health Care Services* (2017) 19 Cal.App.5th 370, 374 [227 Cal.Rptr.3d 483].)
- " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)
- "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 175 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1842, 1843

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.42

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.10, 52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.140, 64.175 (Matthew Bender)

California Civil Practice: Torts § 5:14 (Thomson Reuters)

3903E. Loss of Ability to Provide Household Services (Economic Damage)

[*Insert number, e.g.,* "5."**] The loss of [***name of plaintiff***]'s ability to provide household services.**

To recover damages for the loss of the ability to provide household services, [*name of plaintiff***] must prove the reasonable value of the services [he/she/***nonbinary pronoun***] would have been reasonably certain to provide to [his/her/***nonbinary pronoun***] household if the injury had not occurred.**

New September 2003

Sources and Authority

- "The first category consists of the reasonable value of nursing and other services that Decedent would have provided to his wife prior to his death, but was unable to provide due to his illness (replacement care). Again, [defendant] does not contest the recoverability of such damages here. Nor did it below. Such damages are recoverable. 'Generally, household services damages represent the detriment suffered when injury prevents a person from contributing some or all of his or her customary services to the family unit.' " (*Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 27 Cal.App.5th 225, 238 [238 Cal.Rptr.3d 809] [citing this instruction].)
- "The justification for awarding this type of damage as part of the loss of future earnings award is that the plaintiff should be compensated for the value of the services he would have performed during the lost years which, because of the injury, will now have to be performed by someone else." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171, fn. 5 [87 Cal.Rptr.2d 626], internal citation omitted.)
- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

Secondary Sources

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.64–1.66

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

3903F. Damage to Real Property (Economic Damage)

[*Insert number, e.g.,* "6."**] The harm to [***name of plaintiff***]'s property.**

To recover damages for harm to property, [*name of plaintiff***] must prove [the reduction in the property's value/ [or] the reasonable cost of repairing the harm]. [If there is evidence of both, [***name of plaintiff***] is entitled to the lesser of the two amounts. [However, if [***name of plaintiff***] has a genuine desire to repair the property for personal reasons, and if the costs of repair are reasonable given the damage to the property and the value after repair, then the costs of repair may be awarded even if they exceed the property's loss of value.]]**

[To determine the reduction in value, you must determine the fair market value of the property before the harm occurred and then subtract the fair market value of the property immediately after the harm occurred. The difference is the reduction of value.

"Fair market value" is the highest price for the property that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**
2. **That the buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.]**

[To determine whether the cost of repairing the harm is reasonable, you must decide if there is a reasonable relationship between the cost of repair and the harm caused by [*name of defendant***]'s conduct. You must consider the expense and time involved to restore the property to its original condition compared to the value of the property [and [***insert other applicable factors.***]].**

If you find that the cost of repairing the harm is not reasonable, then you may award any reduction in the property's value.]

New September 2003; Revised April 2008, April 2009

Directions for Use

Give this instruction for damages to real property caused by trespass, permanent nuisance, or other tortious conduct. See also CACI No. 3903G, *Loss of Use of Real Property (Economic Damage).*

If there is evidence of both diminution in value and cost of repair, include all optional paragraphs. However, include the last bracketed sentence in the first paragraph only if the judge has determined that the claimed personal reasons are legally sufficient to justify the costs of repair.

If only the cost of repair is at issue, give just the first paragraph. However, if the

reasonableness of the cost of repair is at issue, then the value of the property must be considered, and all paragraphs must be included. If only diminution of value is at issue, omit the last two optional paragraphs.

Sources and Authority

- Damages for Wrongful Occupation of Real Property. Civil Code section 3334(a).
- "The measure of damages for tortious injury to property, including trees, 'is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.' 'Such damages are generally determined as the difference between the value of the property before and after the injury.' But '[d]iminution in market value . . . is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss.' ' "There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case, will be adopted." ' One such alternative measure of damages is the cost of restoring the property to its condition prior to the injury, and a plaintiff may recover these costs even if they exceed diminution in value if there is a 'personal reason' for restoration." (*Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 643–644 [199 Cal.Rptr.3d 705], internal citations omitted.)
- "For tortious injury to real property, the general rule is that the plaintiff may recover the lesser of (1) the diminution in the property's fair market value, as measured immediately before and immediately after the damage; or (2) the cost to repair the damage and restore the property to its pretrespass condition, plus the value of any lost use. The practical effect of this rule is to limit damages to property to the fair market value of the property prior to the damage." (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 450 [102 Cal.Rptr.3d 32].)
- "Defendant . . . contends that the trial court awarded excessive damages, on the ground that when the cost of restoration is less than the depreciation in value, the former is the measure of damages. This contention cannot be sustained. Plaintiffs established their damages by showing the depreciation in value. It was then incumbent upon defendants to come forward with proof that the cost of restoration would be less." (*Herzog v. Grosso* (1953) 41 Cal.2d 219, 226 [259 P.2d 429], internal citations omitted.)
- "Where a plaintiff establishes damages by showing depreciation in the value of real property, courts have held defendants to the burden of coming forward with proof that cost of restoration would be less. It follows that when a plaintiff proves damages by showing the cost of repairs it should be incumbent on the defendant to introduce evidence that the repair costs exceed the value of the property." (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 [267 Cal.Rptr. 399], internal citations omitted.)
- "The 'fair market value' of real property is 'the best price obtainable from a purchaser on a cash sale.' It 'is measured by the highest price the property would command if offered for sale in the open market with a reasonable time

allowed to the seller to find a purchaser who will buy with a knowledge of all the uses to which it may be put.' " (*CMSH Co. v. Antelope Development, Inc.* (1990) 223 Cal.App.3d 174, 182 [272 Cal.Rptr. 605], internal citations omitted.)

- "Civil Code section 3334 requires that restoration costs be *reasonable*. In addition, general principles of damages in trespass cases require that the damages bear a *reasonable* relationship to the harm caused by the trespass. *Mangini* explains that whether abatement costs are *reasonable* requires an evaluation of a number of fundamental considerations, including the expense and time required to perform the abatement, along with other legitimate competing interests. (*Mangini, supra,* 12 Cal.4th at p. 1100; see also *Beck, supra,* 44 Cal.App.4th at pp. 1221–1222 [reasonableness includes consideration of monetary expense, burden on public, and costs of remediation versus value of land].)" (*Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 601 [63 Cal.Rptr.3d 165], original italics.)
- "The trial court must instruct the jury on how to determine whether the statutory requirement that any restoration costs be reasonable was met. It must also advise the jury what to do if the jury concludes the evidence shows the proposed restoration project to be unreasonable." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at pp. 600–601.)
- "Whether the restoration costs are reasonable is a question for the trier of fact in the first instance, but an award of such costs may be unreasonable as a matter of law if it is grossly disproportionate to the value of the property or the harm caused by the defendant." (*Kelly, supra,* 179 Cal.App.4th at p. 451.)
- "Trial courts in trespass actions have historically been given great flexibility to award damages that fit the particular facts of the case." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 604.)
- "[I]f a plaintiff has a personal reason to restore the property to its former condition, he or she may recover the restoration costs even if such costs exceed the diminution in value. This rule is sometimes referred to as the ' "personal reason" exception.' Even when this exception applies, however, restoration costs 'are allowed only if they are reasonable in light of the value of the real property before the injury and the actual damage sustained.' " (*Kelly, supra,* 179 Cal.App.4th at pp. 450–451, internal citations omitted.)
- "Whether the restoration costs are reasonable is a question for the trier of fact in the first instance, but an award of such costs may be unreasonable as a matter of law if it is grossly disproportionate to the value of the property or the harm caused by the defendant." (*Salazar, supra,* 245 Cal.App.4th at p. 644.)
- "Contrary to the defendants' argument, the 'personal reason' exception does not require that the [plaintiffs] own a 'unique' home. Rather, all that is required is some personal use by them and a bona fide desire to repair or restore." (*Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 688 [266 Cal.Rptr. 193].)
- "Under California law, damages for diminution in value may only be recovered

for permanent, not continuing, nuisances." (*Gehr v. Baker Hughes Oil Field Operations, Inc.* (2008) 165 Cal.App.4th 660, 663 [81 Cal.Rptr.3d 219].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1912, 1913

California Real Property Remedies Practice (Cont.Ed.Bar) Damages for Injury to Real Property, § 11.5

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss,* § 52.35 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.147 (Matthew Bender)

California Civil Practice: Torts § 5:19 (Thomson Reuters)

3903G. Loss of Use of Real Property (Economic Damage)

[*Insert number, e.g.,* "7."**] The loss of use of [***name of plaintiff***]'s [***insert identification of real property***].**

To recover damages for the loss of use, [*name of plaintiff***] must prove [the reasonable cost to rent similar property for the time when [he/she/***nonbinary pronoun***/it] could not use [his/her/***nonbinary pronoun***/its] own property/ [or] the benefits obtained by [***name of defendant***] because of [his/her/***nonbinary pronoun***/its] wrongful occupation]. [If there is evidence of both, [***name of plaintiff***] is entitled to the greater of the two amounts.]**

[Benefits obtained may include [*name of defendant***]'s profits if they are directly linked to the wrongful occupation.]**

New September 2003; Revised April 2008

Directions for Use

Use this instruction along with CACI No. 3903F, *Damage to Real Property (Economic Damage)*. Include the optional last paragraph if plaintiff claims that the measure of damages is the benefits obtained by the defendant and that these include the defendant's profits obtained because of the tortious conduct.

This instruction may be used if the general measure of damages under CACI No. 3903F will be the cost of repair rather than diminution in value. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 555 [87 Cal.Rptr.2d 886, 981 P.2d 978].)

If the jury determines that the cost of repair is not reasonable, it is not clear whether loss-of-use damages are recoverable. The rule has been that when real property has been damaged so that it cannot be restored, damages for loss of use may not be recovered. (*Ferraro v. Southern California Gas Co.* (1980) 102 Cal.App.3d 33, 50–51 [162 Cal.Rptr. 238].) But in 1992, the Legislature amended Civil Code section 3334 to allow for "benefits obtained" as an alternative to rental value as a measure of damages for loss of use. The legislative intent was to deter polluters from dumping toxic material on land of little value. (See *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 603 [63 Cal.Rptr.3d 165].) In *Starrh & Starrh Cotton Growers,* the court indicated that it was extremely unlikely in that case that the cost of repair could be considered to be reasonable, but also allowed the jury to consider awarding the defendant's profits as "benefits obtained." (*Id.* at pp. 598–606.) The court did not limit the jury's right to award profits as damages only if it found the cost of repair to be reasonable. And it seems that if the court believed there was such a limitation, it would have expressly said so. The legislative objective would not be achieved if one could pollute land to the point that it could not reasonably be restored and also not be required to pay for the benefits obtained. Therefore, it seems most likely that this limitation on loss-of-use

damages no longer applies in light of the 1992 amendment and its legislative history.

This instruction is not intended for cases in which the plaintiff is a landlord seeking to recover compensation for lost rents. A more appropriate instruction for that situation is CACI No. 3903N, *Lost Profits (Economic Damage)*.

Sources and Authority

- Damages for Wrongful Occupation of Real Property. Civil Code section 3334.
- "[T]he general measure of damages where injury to property is capable of being repaired is the reasonable cost of repair together with the value of lost use during the period of injury." (*Erlich, supra,* 21 Cal.4th at p.555, internal citation omitted.)
- "There is no question that when cost of restoration is the correct measure of damages for injury to real property, compensation for loss of use . . . would be appropriate." (*Ferraro, supra,* 102 Cal.App.3d at p 51.)
- "There is nothing in Civil Code section 3334 or its legislative history to suggest that the phrase 'benefits obtained' should be read narrowly. To the contrary, the intent of the Legislature was to eliminate *any* economic incentive to trespass as a means of waste disposal. (Sen. Com. on Judiciary, com. on Assem. Bill No. 2663 (1991–1992 Reg. Sess.) for June 23, 1992, hearing, p. 2.) If the Legislature had wanted to limit the phrase 'benefits obtained' to costs avoided, it could easily have done so. [¶] Further, this interpretation is consistent with the fundamental rule that the prime consideration in interpreting a statute is to achieve the objective of the statute. As we have indicated, the evil to be prevented by the 1992 amendments is identified in the legislative history—to prevent any economic advantage for polluters resulting from the wrongful dumping on another's land." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 604, original italics, internal citation omitted,)
- "Trial courts in trespass actions have historically been given great flexibility to award damages that fit the particular facts of the case. [Defendant] has admitted that it chose the challenged method for disposing of produced water because it was the least expensive alternative and maximized its profits. In light of these factors, we conclude that the term 'benefits obtained' may include profits enjoyed by [defendant] that are directly linked to the wrongful trespass." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 604, internal citations omitted.)
- Restatement Second of Torts section 931 provides:

  If one is entitled to a judgment for the detention of, or for preventing the use of, land or chattels, the damages include compensation for

  (a) the value of the use during the period of detention or prevention or the value of the use of or the amount paid for a substitute, and

  (b) harm to the subject matter or other harm of which the detention

is the legal cause.

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1913

California Real Property Remedies Practice (Cont.Ed.Bar) Damages for Injury to Real Property, § 11.5

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.36 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

California Civil Practice: Torts § 5:19 (Thomson Reuters)

3903H. Damage to Annual Crop (Economic Damage)

[*Insert number, e.g.,* "8."**] The harm to [***name of plaintiff***]'s crop.**

[Damages for the destruction of an entire annual crop are determined as follows:

1. **Determine the expected market value of the crop before the harm occurred; and**
2. **Subtract from this amount the estimated costs of producing and marketing the crop, excluding costs that have already been paid by [***name of plaintiff***].]**

[Damages for the destruction of part of an annual crop are determined as follows:

1. **Determine the expected market value of the crop before the harm occurred;**
2. **Subtract from this amount the estimated costs of producing and marketing the crop. This is the expected net profit.**
3. **Next, subtract the actual cost of producing and marketing the surviving crop from the actual receipts. This is actual net profit.**
4. **Subtract number 3 from number 2. This amount is [***name of plaintiff***]'s damages for this loss.]**

New September 2003

Directions for Use

Select one of the bracketed options depending on whether the plaintiff is seeking damages for the destruction of all or part of a crop.

Sources and Authority

- "They rely on the distinction drawn between the wrongful destruction of perennial crops, such as volunteer grass for grazing purposes, and annually planted crops. Thus, in the former case the proper measure of damages is the difference in the rental value of the property with and without the crops, while in the latter case the proper measure of damages is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the same." (*Wolfsen v. Hathaway* (1948) 32 Cal.2d 632, 644 [198 P.2d 1], internal citations omitted, overruled on other grounds in *Flores v. Arroyo* (1961) 56 Cal.2d 492 [15 Cal.Rptr. 87, 364 P.2d 263].)
- "We concede that the proper method is to show what the crop would have been and to deduct the probable cost of producing and selling such crop with the difference between market value and costs constituting the amount of damages.

We have so held in [cited cases]. The rule is clearly set forth also in other California cases and authorities." (*Spinelli v. Tallcott* (1969) 272 Cal.App.2d 589, 592 [77 Cal.Rptr. 481], internal citations omitted.)

- "The proper measure of damages is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the same." (*Parks v. Atwood Crop Dusters, Inc.* (1953) 118 Cal.App.2d 368, 373 [257 P.2d 653], internal citation omitted.)
- "The correct rule for the measurement of damages for the partial destruction of a growing crop was discussed in *Rystrom v. Sutter Butte Canal Co.* (1925) 72 Cal.App. 518, 522–523 [249 P. 53]. In that case a growing crop of rice had been damaged. The court pointed out that estimated costs of production must first be deducted from expected gross receipts to arrive at the expected net profit. Next, the court said, actual cost of production must be deducted from actual receipts to arrive at actual net profit. Finally, deducting actual net profit from expected net profit fixes the actual damage." (*Solis v. County of Contra Costa* (1967) 251 Cal.App.2d 844, 847–848 [60 Cal.Rptr. 99].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1920

California Real Property Remedies Practice (Cont.Ed.Bar) Damages for Injury to Real Property, § 11.14

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.34[1] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

California Civil Practice: Torts § 5:19 (Thomson Reuters)

3903I. Damage to Perennial Crop (Economic Damage)

[*Insert number, e.g.,* "9."**] The harm to [***name of plaintiff***]'s crop.**

[Damages for destruction of [*describe perennial crop***] are determined as follows. For the time period from the destruction of the crop until the crop can be restored you must:**

1. **Determine the rental value of the land with the crop; and**
2. **Subtract from this amount the rental value of the land without the crop.]**

[Damages for destruction of [*describe perennial crop***], which can be harvested and sold, are determined as follows:**

1. **Determine the expected market value of the crop before the harm occurred; and**
2. **Subtract from this amount the estimated costs of producing and marketing the crop, excluding costs that have already been paid by [***name of plaintiff***].]**

[If the [plants/roots/seeds] responsible for producing the crop are destroyed, the measure of damages may also include the costs of [reseeding/replanting].]

New September 2003

Directions for Use

If the plaintiff claims damages for multiple crops, damages must be calculated for each crop that would have been produced until the land was restored.

Sources and Authority

- "They rely on the distinction drawn between the wrongful destruction of perennial crops, such as volunteer grass for grazing purposes, and annually planted crops. Thus, in the former case the proper measure of damages is the difference in the rental value of the property with and without the crops, while in the latter case the proper measure of damages is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the same." (*Wolfsen v. Hathaway* (1948) 32 Cal.2d 632, 644 [198 P.2d 1], overruled on other grounds in *Flores v. Arroyo* (1961) 56 Cal.2d 492, 497 [15 Cal.Rptr. 87, 364 P.2d 263].)
- "Where the roots of the grass in a pasture have been destroyed by water or fire so as to prevent the matured stocks from automatically reseeding the field, the measure of damages includes not only the rental value of the pasture, but also the additional cost of reseeding the field." (*Miller & Lux, Inc. v. Pinelli* (1927) 84 Cal.App. 42, 49 [257 P. 573].)

- "Upon the foregoing authorities, and upon good reason, we conclude that the measure of damages for the appropriation or destruction of pasturage, which is used for grazing purposes, where the grass cannot be reasonably severed and marketed separate from the land, is the reasonable rental value thereof in that vicinity for pasture purposes." (*Miller & Lux, Inc., supra,* 84 Cal.App. at p. 51.)
- "The measure of damages for the destruction of or injury to fruit, nut, or other productive trees is generally the difference in the value of the land before and after the destruction or injury. Damages may be additionally measured by the value of the trees on the premises in their growing state. Some courts have also awarded damages for the resulting crop loss. Where annual crops are damaged each year for several years, a grower may recover for loss of the crops during those years, the increased labor in the care of the land, and damages for injury to the trees themselves. [¶] More recently, the measure of damages for the destruction of fruit trees has included the costs of replacing the trees or restoring the property to its condition prior to the injury. In *Baker v. Ramirez,* the court held that the cost of restoring an orange grove was the most appropriate measure of damages, where there was no impediment to replacing the orange trees and it was reasonable to replace the trees because only a small portion of the grove was damaged. The court noted that the difference between the value of the property before and after the injury was only one possible measure of damages." (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 447 [105 Cal.Rptr.2d 856, 861], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1920

California Real Property Remedies Practice (Cont.Ed.Bar) Damages for Injury to Real Property, § 11.14

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.34[1] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

California Civil Practice: Torts § 5:19 (Thomson Reuters)

3903J. Damage to Personal Property (Economic Damage)

[*Insert number, e.g.*, "10."**] The harm to [***name of plaintiff***]'s [***item of personal property, e.g., automobile***].**

To recover damages for harm to personal property, [*name of plaintiff***] must prove the reduction in the [***e.g., automobile***]'s value or the reasonable cost of repairing it, whichever is less. [If there is evidence of both, [***name of plaintiff***] is entitled to the lesser of the two amounts.]**

[However, if you find that the [*e.g., automobile***] can be repaired, but after repairs it will be worth less than it was before the harm, the damages are (1) the difference between its value immediately before the harm and its lesser value immediately after the repairs have been made; plus (2) the reasonable cost of making the repairs. The total amount awarded may not exceed the [***e.g., automobile***]'s value immediately before the harm occurred.]**

To determine the reduction in value if repairs cannot be made, you must determine the fair market value of the [*e.g., automobile***] immediately before the harm occurred and then subtract the fair market value immediately after the harm occurred.**

"Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**
2. **That both buyer and seller have reasonable knowledge of all relevant facts about the condition and quality of the [***e.g., automobile***].**

New September 2003; Revised December 2011, June 2013, December 2015, November 2018, November 2019

Directions for Use

Do not give this instruction if the property had no monetary value either before or after injury. (See *Kimes v. Grosser* (2011) 195 Cal.App.4th 1556, 1560 [126 Cal.Rptr.3d 581] [CACI No. 3903J has no application to prevent proof of out-of-pocket expenses to save the life of a pet cat].) See CACI No. 3903O, *Injury to Pet—Costs of Treatment (Economic Damage)*.

An insurer may draft around this rule in the policy by limiting recovery to either cost of repair or diminution in value, but not both. (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 550 [204 Cal.Rptr.3d 433].)

Give the optional second paragraph if the property can be repaired, but the value

after repair may be less than before the harm occurred. (See *Merchant Shippers Association v. Kellogg Express and Draying Co.* (1946) 28 Cal.2d 594, 600 [170 P.2d 923].)

There are exceptions to the general rule that recovery is limited to the lesser of cost of repair or diminution in value. (See *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 834 [274 Cal.Rptr. 820, 799 P.2d 1253].) If an exception is at issue, modifications will be required to the first two paragraphs.

The definition of "fair market value" has been adapted from Treasury regulations. (See 26 C.F.R. § 20.2031-1(b); *United States v. Cartwright* (1973) 411 U.S. 546, 550 [93 S.Ct. 1713, 36 L.Ed.2d 528]; see also CACI No. 3501, "*Fair Market Value" Explained*; Code Civ. Proc., § 1263.320 [definition for eminent domain].)

Sources and Authority

- "The general rule is that the measure of damages for tortious injury to personal property is the difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if that cost be less than the diminution in value. This rule stems from the basic code section fixing the measure of tort damage as 'the amount which will compensate for all the detriment proximately caused thereby.' [citations]" (*Pacific Gas & Electric Co. v. Mounteer* (1977) 66 Cal.App.3d 809, 812 [136 Cal.Rptr. 280].)
- "It has also been held that the price at which a thing can be sold at public sale, or in the open market, is some evidence of its market value. In *San Diego Water Co. v. San Diego*, the rule is announced that the judicial test of market value depends upon the fact that the property in question is marketable at a given price, which in turn depends upon the fact that sales of similar property have been and are being made at ascertainable prices. In *Quint v. Dimond*, it was held competent to prove market value in the nearest market." (*Tatone v. Chin Bing* (1936) 12 Cal.App.2d 543, 545–546 [55 P.2d 933], internal citations omitted.)
- " 'Where personal property is injured but not wholly destroyed, one rule is that the plaintiff may recover the depreciation in value (the measure being the difference between the value immediately before and after the injury), and compensation for the loss of use.' In the alternative, the plaintiff may recover the reasonable cost of repairs as well as compensation for the loss of use while the repairs are being accomplished. If the cost of repairs exceeds the depreciation in value, the plaintiff may only recover the lesser sum. Similarly, if depreciation is greater than the cost of repairs, the plaintiff may only recover the reasonable cost of repairs. If the property is wholly destroyed, the usual measure of damages is the market value of the property." (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870 [26 Cal.Rptr.2d 446], internal citations omitted.)
- The cost of replacement is not a proper measure of damages for injury to personal property. (*Hand Electronics Inc., supra,* 21 Cal.App.4th at p. 871.)
- "When conduct complained of consists of intermeddling with personal property

'the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.' " (*Itano v. Colonial Yacht Anchorage* (1968) 267 Cal.App.2d 84, 90 [72 Cal.Rptr. 823], internal citations omitted.)

- "The measure of damage for wrongful injury to personal property is the difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if such cost be less than the depreciation in value." (*Smith v. Hill* (1965) 237 Cal.App.2d 374, 388 [47 Cal.Rptr. 49], internal citations omitted.)
- "[I]t is said . . . that 'if the damaged property cannot be completely repaired, the measure of damages is the difference between its value before the injury and its value after the repairs have been made, plus the reasonable cost of making the repairs. The foregoing rule gives the plaintiff the difference between the value of the machine before the injury and its value after such injury, the amount thereof being made up of the cost of repairs and the depreciation notwithstanding such repairs.' The rule urged by defendant, which limits the recovery to the cost of repairs, is applicable only in those cases in which the injured property 'can be entirely repaired.' This latter rule presupposes that the damaged property can be restored to its former state with no depreciation in its former value." (*Merchant Shippers Association, supra,* 28 Cal.2d at p. 600, internal citations omitted.)
- "In personal property cases, the plaintiffs are entitled to present evidence of the cost of repairs even in cases where recovery is limited to the lost market value of property. The cost of repairs constitutes a prima facie measure of damages, and it is the defendant's burden to respond with proof of a lesser diminution in value." (*Kimes, supra,* 195 Cal.App.4th at p. 1560, internal citation omitted.)
- "[R]ecovery of tort damages is not invariably limited by the value of damaged property. The courts have recognized that recovery in excess of such value may be necessary to restore the plaintiff to the position it occupied prior to a defendant's wrongdoing." (*AIU Ins. Co., supra,* 51 Cal.3d at p. 834.)
- "In this case, the policy language was clear and explicit. Regarding coverage for car damage, it provided that [insurer] '*may* pay the loss in money *or* repair . . . damaged . . . property.' The policy's use of the term 'may' suggests [insurer] had the discretion to choose between the two options." (*Baldwin, supra,* 1 Cal.App.5th at p. 550, original italics.)
- "The trial court based its restitution order on the fair market value method, but it abused its discretion by also awarding the cost to [plaintiff] to repair the truck . . . . Having fully recovered the decrease in fair market value, [plaintiff] was not entitled to also recover the cost of repair because repairing the truck made it more valuable. Put another way, before the crime, [plaintiff] owned a truck that was worth more than $20,000. After the crime, Smith was left with a truck that was worth not much more than $3,000. [Plaintiff] was compensated for this decrease in fair market value. However, if the truck is repaired, the value

of the truck goes up, even though it does not go all the way up to the former fair market value. Therefore, adding the cost of repair improperly alters the results of the fair market value formula." (*People v. Sharpe* (2017) 10 Cal.App.5th 741, 747 [216 Cal.Rptr.3d 744].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:220 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Vehicles and Other Personal Property, §§ 13.8–13.11

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.31 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.41, 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.26 et seq. (Matthew Bender)

California Civil Practice: Torts § 5:16 (Thomson Reuters)

3903K. Loss or Destruction of Personal Property (Economic Damage)

[*Insert number, e.g.,* "11."**] The [loss/destruction] of [***name of plaintiff***]'s [***item of personal property***].**

To recover damages for the [loss/destruction], [*name of plaintiff***] must prove the fair market value of the [***item of personal property***] just before the harm occurred.**

"Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**
2. **That both buyer and seller have reasonable knowledge of all relevant facts about the condition and quality of the [***item of personal property***].**

New September 2003; Revised November 2019

Directions for Use

The definition of "fair market value" has been adapted from Treasury regulations. (See 26 C.F.R. § 20.2031-1(b); *United States v. Cartwright* (1973) 411 U.S. 546, 550 [93 S.Ct. 1713, 36 L.Ed.2d 528]; see also CACI No. 3501, "*Fair Market Value" Explained*; Code Civ. Proc., § 1263.320 [definition for eminent domain].)

Sources and Authority

- " 'As a general rule the measure of damage for the loss or destruction of personal property is the value of the property at the time of such loss or destruction.' " (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870 [26 Cal.Rptr.2d 446], internal citation omitted.)
- "It is well established that under [Civil Code] section 3333, the measure of damages for the loss or destruction of personal property is generally determined by the value of the property at the time of such loss or destruction." (*Pelletier v. Eisenberg* (1986) 177 Cal.App.3d 558, 567 [223 Cal.Rptr. 84].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1904

California Tort Damages (Cont.Ed.Bar) Vehicles & Other Personal Property, § 13.6

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.32 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

California Civil Practice: Torts § 5:17 (Thomson Reuters)

3903L. Damage to Personal Property Having Special Value (Civ. Code, § 3355) (Economic Damage)

[*Insert number, e.g.,* "12."**] The unique value of [***name of plaintiff***]'s [***item of personal property***].**

To recover damages for the unique value, [*name of plaintiff***] must prove all of the following:**

1. **That the [***item of personal property***] had some market value;**
2. **That the [***item of personal property***] had unique value to [***name of plaintiff***]; and**
3. **[That [***name of defendant***] had notice of this unique value before the harm;]**

   [or]

   [That [*name of defendant***]'s conduct was intentional and wrongful.]**

No fixed standard exists for deciding the amount of this value. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

New September 2003

Directions for Use

The judge should determine whether the peculiar value claimed by the plaintiff is legally sufficient. While the subcommittee been unable to locate cases that state this rule explicitly, cases have upheld the giving of this type of instruction where there is substantial evidence of peculiar value.

Sources and Authority

- Damages for Loss of Property With Special Value. Civil Code section 3355.
- "[T]his section deals with property which has a market value and also a peculiar value to the owner, and not with property having no market value." (*Zvolanek v. Bodger Seeds, Ltd.* (1935) 5 Cal.App.2d 106, 110 [42 P.2d 92].)
- "Peculiar value under Civil Code section 3355 refers to a property's unique economic value, not its sentimental or emotional value." (*McMahon v. Craig* (2009) 176 Cal.App.4th 1502, 1518 [97 Cal.Rptr.3d 555] ["peculiar value" refers to special characteristics that increase an animal's monetary value, not its abstract value as a companion to its owner].)
- "[T]he question of whether plaintiff proved 'peculiar value' was a factual question for the determination of the jury and that question was properly

submitted to it for decision." (*King v. Karpe* (1959) 170 Cal.App.2d 344, 349 [338 P.2d 979].)

Secondary Sources

California Tort Damages (Cont.Ed.Bar) Vehicles and Other Personal Property, § 13.7

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.33 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.47 (Matthew Bender)

California Civil Practice: Torts § 5:17 (Thomson Reuters)

3903M. Loss of Use of Personal Property (Economic Damage)

[*Insert number, e.g.,* "13."**] The loss of use of [***name of plaintiff***]'s [***item of personal property***].**

To recover damages for loss of use, [*name of plaintiff***] must prove the reasonable cost to rent a similar [***item of personal property***] for the amount of time reasonably necessary to repair or replace the [***item of personal property***].**

New September 2003

Sources and Authority

- "[A]n owner's recovery for being deprived of the use of a damaged vehicle is generally to be determined with reference to the period of time reasonably required for the making of repairs." (*Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 844 [147 P.2d 558].)
- "There appears to be no logical or practical reason why a distinction should be drawn between cases in which the property is totally destroyed and those in which it has been injured but is repairable, and we have concluded that when the owner of a negligently destroyed commercial vehicle has suffered injury by being deprived of the use of the vehicle during the period required for replacement, he is entitled, upon proper pleading and proof, to recover for loss of use in order to 'compensate for all the detriment proximately caused' by the wrongful destruction." (*Reynolds v. Bank of America National Trust & Savings Assn.* (1959) 53 Cal.2d 49, 50–51 [345 P.2d 926].)
- " 'Loss of use' of property is different from 'loss' of property. To take a simple example, assume that an automobile is stolen from its owner. The value of the 'loss of use' of the car is the rental value of a substitute vehicle; the value of the 'loss' of the car is its replacement cost. The nature of 'loss of use' damages is described in California Jurisprudence Third as: 'The measure of damages for the loss of use of personal property may be determined with reference to the rental value of similar property which the plaintiff can hire for use during the period when he is deprived of the use of his own property.' " (*Collin v. American Empire Insurance Co.* (1994) 21 Cal.App.4th 787, 818 [26 Cal.Rptr.2d 391], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1905

California Tort Damages (Cont.Ed.Bar) Vehicles and Other Personal Property, § 13.6

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.32 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)
California Civil Practice: Torts § 5:17 (Thomson Reuters)

3903N. Lost Profits (Economic Damage)

[*Insert number, e.g.*, "13."**] Lost profits.**

To recover damages for lost profits, [*name of plaintiff***] must prove it is reasonably certain [he/she/***nonbinary pronoun***/it] would have earned profits but for [***name of defendant***]'s conduct.**

To decide the amount of damages for lost profits, you must determine the gross amount [*name of plaintiff***] would have received but for [***name of defendant***]'s conduct and then subtract from that amount the expenses [including the value of the [***specify categories of evidence, such as labor/materials/rents/all expenses/interest of the capital employed***]] [***name of plaintiff***] would have had if [***name of defendant***]'s conduct had not occurred.**

The amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

New September 2003

Directions for Use

This instruction is not intended for personal injury cases. Instead, use CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*. (See *Pretzer v. California Transit Co.* (1930) 211 Cal. 202, 207–208 [294 P. 382].)

Insertion of specified types of costs to be deducted from gross earnings is optional, depending on the facts of the case. Other types of costs may be inserted as appropriate.

Sources and Authority

- "The measure of damages in this state for the commission of a tort, as provided by statute, is that amount which will compensate the plaintiff for all detriment sustained by him as the proximate result of the defendant's wrong, regardless of whether or not such detriment could have been anticipated by the defendant. It is well established in California, moreover, that such damages may include loss of anticipated profits where an established business has been injured." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 Cal.App.2d 675, 702 [39 Cal.Rptr. 64], internal citations omitted.)
- "In business cases, damages are based on net profits, as opposed to gross revenue." (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 397 [178 Cal.Rptr.3d 604].)
- " 'Lost profits, if recoverable, are more commonly special rather than general damages . . . , and subject to various limitations. Not only must such damages

be pled with particularity [citation], but they must also be proven to be certain both as to their occurrence and their extent, albeit not with "mathematical precision." ' " (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 754 [118 Cal.Rptr.3d 531].)

- " '[T]he general principle [is] that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.' Such damages must 'be proven to be certain both as to their occurrence and their extent, albeit not with 'mathematical precision.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773–774 [149 Cal.Rptr.3d 614, 288 P.3d 1237]), internal citation omitted.)
- "It is for the jury to determine the probabilities as to whether damages are reasonably certain to occur in any particular case." (*Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 972 [166 Cal.Rptr.3d 134].)
- "It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits." (*S. C. Anderson, Inc. v. Bank of America N.T. & S.A.* (1994) 24 Cal.App.4th 529, 536 [30 Cal.Rptr.2d 286], internal citations omitted.)
- "Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. [Citations.] In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. [Citations.]" (*Sargon Enterprises, Inc.*, *supra,* 55 Cal.4th at p. 773.)
- "Regarding lost business profits, the cases have generally distinguished between established and unestablished businesses. '[W]here the operation of an established business is prevented or interrupted, as by a . . . breach of contract . . . , damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.' " (*Sargon Enterprises, Inc.*, *supra,* 55 Cal.4th at p. 774.)
- "[T]he lost profit inquiry is always speculative to some degree. Inevitably, there will always be an element of uncertainty. Courts must not be too quick to exclude expert evidence as speculative merely because the expert cannot say with absolute certainty what the profits would have been. Courts must not eviscerate the possibility of recovering lost profits by too broadly defining what is too speculative. A reasonable certainty only is required, not absolute certainty." (*Orozco v. WPV San Jose, LLC* (2019) 36 Cal.App.5th 375, 397–398 [248 Cal.Rptr.3d 623].)
- " 'On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. [Citations.] . . . But

although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability.' " (*Sargon Enterprises, Inc.*, *supra,* 55 Cal.4th at p. 774.)

"[I]f the business is . . . new . . . or . . . speculative . . . , damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." (*Meister*, *supra,* 230 Cal.App.4th at p. 397.)

- "In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. In either case, recovery is limited to net profits." (*Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 161–162 [190 Cal.Rptr. 815], internal citations omitted.)
- "Even in cases of unestablished businesses, while a plaintiff may base its lost profits on the experience of comparable businesses, there is no requirement that it must do so." (*Orozco, supra,* 36 Cal.App.5th at p. 399.)
- "[T]he case law requires reasonable certainty, not absolute certainty, and once the occurrence of lost profits is established a plaintiff has greater leeway in establishing the extent of lost profits, particularly if the defendant was shown to have prevented the relevant data from being collected through its wrongful behavior." (*Asahi Kasei Pharma Corp., supra,* 222 Cal.App.4th at p. 975.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1914

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶¶ 3:66–3:233 (The Rutter Group)

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.12, 52.37 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.27 (Matthew Bender)

3903O. Injury to Pet—Costs of Treatment (Economic Damage)

[*Insert number, e.g.,* "15."**] The harm to [***name of plaintiff***]'s pet [***specify kind of pet, e.g., dog***].**

To recover damages for injury to [*name of plaintiff***]'s pet, [he/she/***nonbinary pronoun***] must prove the reasonable costs that [he/she/***nonbinary pronoun***] incurred for the care and treatment of the pet because of [***name of defendant***]'s conduct.**

New June 2013

Directions for Use

Give this instruction to recover the expenses of treating a tortious injury to a pet. Pets are no longer exclusively treated as property with regard to damages. The general standard for damages to personal property based on market value (see CACI No. 3903J, *Damage to Personal Property (Economic Damage)*), is often inappropriate because pets generally have no value to anyone except the owner. Therefore, recovery of reasonable medical expenses is allowed. The rule applies regardless of the tortious cause of injury, including what may be referred to as veterinary malpractice. (See *Martinez v. Robledo* (2012) 210 Cal.App.4th 384 [147 Cal.Rptr.3d 921].) CACI No. 3903J may be given if diminution in value is alleged.

Emotional distress damages have been allowed for intentional injury to a pet. (See *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1606–1608 [146 Cal.Rptr.3d 585] [claim for trespass to chattels]; see also CACI No. 2101, *Trespass to Chattels—Essential Factual Elements*.) CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, may also be given.

Sources and Authority

- "There can be little doubt that most pets have minimal to no market value, particularly elderly pets. . . . [W]hile people typically place substantial value on their own animal companions, as evidenced by the large sums of money spent on food, medical care, toys, boarding and grooming, etc., there is generally no market for *other people's* pets." (*Martinez, supra,* 210 Cal.App.4th at p. 390, original italics.)
- "[T]he determination of a pet's value cannot be made solely by looking to the marketplace. If the rule were otherwise, an injured animal's owner would bear most or all of the costs for the medical care required to treat the injury caused by a tortfeasor, while the tortfeasor's liability for such costs would in most cases be minimal, no matter how horrific the wrongdoer's conduct or how gross the negligence of a veterinarian or other animal professional. [¶] Moreover, allowing a pet owner to recover the reasonable costs of the care and treatment of an injured pet reflects the basic purpose of tort law, which is to make plaintiffs whole, or to approximate wholeness to the greatest extent judicially possible."

(*Martinez, supra,* 210 Cal.App.4th at p. 390.)

- "In this case, plaintiff is not plucking a number out of the air for the sentimental value of damaged property; he seeks to present evidence of costs incurred for [the cat]'s care and treatment by virtue of the shooting—a 'rational way' of demonstrating a measure of damages apart from the cat's market value. That evidence is admissible as proof of plaintiff's compensable damages, and the trial court erred in granting the motions to exclude it. Plaintiff is entitled to have a jury determine whether the amounts he expended for [the cat]'s care because of the shooting were reasonable." (*Kimes v. Grosser* (2011) 195 Cal.App.4th 1556, 1561–1562 [126 Cal.Rptr.3d 581], internal citations omitted.)
- "Plaintiff is not seeking loss of companionship, unique noneconomic value, or the emotional value of the cat, but rather the costs incurred as a result of the shooting." (*Kimes, supra,* 195 Cal.App.4th at p. 1560, fn. 3.)
- "We recognize the love and loyalty a dog provides creates a strong emotional bond between an owner and his or her dog. But given California law does not allow parents to recover for the loss of companionship of their children, we are constrained not to allow a pet owner to recover for loss of the companionship of a pet." (*McMahon v. Craig* (2009) 176 Cal.App.4th 1502, 1519–1520 [97 Cal.Rptr.3d 555].)
- "We believe good cause exists to allow the recovery of damages for emotional distress under the circumstances of this case. In the early case of *Johnson v. McConnell, supra,* 80 Cal. 545, the court noted 'while it has been said that [dogs] have nearly always been held "to be entitled to less regard and protection than more harmless domestic animals," it is equally true that there are no other domestic animals to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt.' " (*Plotnik, supra,* 208 Cal.App.4th at p. 1607, internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1902

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:220 et seq. (The Rutter Group)

4 Levy et al., California Torts, Ch. 52, *Recovery for Medical Expenses and Economic Loss*, § 52.33 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability*, § 23.15 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.192 (Matthew Bender)

3903P. Damages From Employer for Wrongful Discharge (Economic Damage)

[*Insert number, e.g.,* "3."**] Past and future lost earnings.**

If you find that [*name of defendant***] [constructively] discharged [***name of plaintiff***] in violation of [***specify, e.g., public policy and the Fair Employment and Housing Act***], then you must decide the amount of past and future lost earnings that [***name of plaintiff***] has proven [he/she/***nonbinary pronoun***] is entitled to recover, if any. To make that decision, you must:**

1. **Decide the amount that [***name of plaintiff***] would have earned up to today, including any benefits and pay increases; and**
2. **Add the present cash value of any future wages and benefits that [he/she/***nonbinary pronoun***] would have earned for the length of time the employment with [***name of defendant***] was reasonably certain to continue.**

In determining the period that [*name of plaintiff***]'s employment was reasonably certain to have continued, you should consider such things as:**

(a) [*Name of plaintiff***]'s age, work performance, and intent regarding continuing employment with [***name of defendant***];**

(b) [*Name of defendant***]'s prospects for continuing the operations involving [***name of plaintiff***]; and**

(c) Any other factor that bears on how long [*name of plaintiff***] would have continued to work.**

New September 2003; Revised and Renumbered from CACI No. 2433 November 2018

Directions for Use

Give this instruction for any claim in which the plaintiff seeks to recover damages for past and future lost earnings from an employer for a wrongful termination of employment, for example in violation of public policy (see CACI No. 2400 et seq.) or under the Fair Employment and Housing Act (see CACI No. 2500 et seq.) Include "constructively" in the opening paragraph if the plaintiff alleges constructive discharge instead of an actual discharge. (See CACI No. 2510, "*Constructive Discharge" Explained*.)

This instruction should be followed by CACI No. 3963, *Affirmative Defense—Employee's Duty to Mitigate Damages,* if the employee's duty to mitigate damages is at issue. Also give CACI No. 3904A, *Present Cash Value,* and CACI No. 3904B, *Use of Present-Value Tables.*

Other types of tort damages may be available to a plaintiff. For an instruction on emotional distress damages, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage).* See punitive damages instructions in the Damages series (CACI No. 3940 et seq.).

Sources and Authority

- Standard for Punitive Damages. Civil Code section 3294(a).
- Employer Liability for Punitive Damages. Civil Code section 3294(b).
- A tortious termination subjects the employer " 'to liability for compensatory and punitive damages under normal tort principles.' " (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1101 [4 Cal.Rptr.2d 874, 824 P.2d 680], internal citation omitted.)
- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 518 [241 Cal.Rptr. 916].)
- "A plaintiff may recover for detriment reasonably certain to result in the future. While there is no clearly established definition of 'reasonable certainty,' evidence of future detriment has been held sufficient based on expert medical opinion which considered the plaintiff's particular circumstances and the expert's experience with similar cases." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995 [16 Cal.Rptr.2d 787], internal citations omitted, disapproved of on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179].)
- "[I]t is our view that in an action for wrongful discharge, and pursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employe (sic) but also the other benefits to which he is entitled as a part of his compensation." (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607 [83 Cal.Rptr. 202, 463 P.2d 426].)
- In determining the period that plaintiff's employment was reasonably certain to have continued, the trial court took into consideration plaintiff's " 'physical condition, his age, his propensity for hard work, his expertise in managing defendants' offices, the profit history of his operation, [and] the foreseeability of the continued future demand for tax return service to small taxpayers . . . .' " (*Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705 [101 Cal.Rptr. 169].)
- In adding subdivision (b) to section 3294 in 1980, "[t]he drafters' goals were to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate

liability for punitive damages." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944], see *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1150–1151 [74 Cal.Rptr.2d 510].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-B, *Contract Damages*, ¶¶ 17:237, 17:362, 17:365 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.64–5.67

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[2] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.50–249.55, 249.80–249.81, 249.90 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.41–100.59B (Matthew Bender)

3904A. Present Cash Value

[*Name of defendant***] claims that [***name of plaintiff***]'s future [economic] damages for [loss of earnings/future medical expenses/lost profits/[***insert other economic damages***]], if any, should be reduced to present cash value. This is because money received now will, through investment, grow to a larger amount in the future. Present cash value is the amount of money that, if reasonably invested today, will provide [***name of plaintiff***] with the amount of [his/her/***nonbinary pronoun***/its] future damages.**

[[*Name of defendant***] must prove, through expert testimony, the present cash value of [***name of plaintiff***]'s future [economic] damages. It is up to you to decide the present cash value of [***name of plaintiff***]'s future [economic] damages in light of all the evidence presented by the parties.]**

[If you decide that [*name of plaintiff***]'s harm includes future [economic] damages for [loss of earnings/future medical expenses/lost profits/[***insert other economic damages***]], then you must reduce the amount of those future damages to their present cash value. You must [use the interest rate of _____ percent/ [and] [***specify other stipulated information***]] as agreed to by the parties in determining the present cash value of future [economic] damages.]**

New September 2003; Revised April 2008; Revised and renumbered from former CACI No. 3904 December 2010; Revised June 2013, May 2020, May 2021

Directions for Use

Give this instruction if future economic damages are sought and there is evidence from which a reduction to present value can be made. Include "economic" if future noneconomic damages are also sought. Future noneconomic damages are not reduced to present cash value because the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]; CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*.)

The defendant bears the burden of presenting expert evidence of an appropriate present value calculation, including the appropriate discount rate, to enable the fact finder to make a rational determination on the issue. (*Lewis v. Ukran* (2019) 36 Cal.App.5th 886, 896 [248 Cal.Rptr.3d 839].) Unless there is a stipulation, expert testimony is required to accurately establish present values for future economic losses. (*Id.*)

Give the last bracketed paragraph if there has been a stipulation as to the interest rate to use or any other facts related to present cash value, and omit the second

paragraph to account for the parties' stipulation.

The parties may stipulate to use present-value tables to assist the jury in making its determination of present cash value. Tables, worksheets, and an instruction on how to use them are provided in CACI No. 3904B, *Use of Present-Value Tables*.

Sources and Authority

- "The present value of a gross award of future damages is that sum of money prudently invested at the time of judgment which will return, over the period the future damages are incurred, the gross amount of the award. 'The concept of present value recognizes that money received after a given period is worth less than the same amount received today. This is the case in part because money received today can be used to generate additional value in the interim.' The present value of an award of future damages will vary depending on the gross amount of the award, and the timing and amount of the individual payments." (*Holt v. Regents of the University of California* (1999) 73 Cal.App.4th 871, 878 [86 Cal.Rptr.2d 752], internal citations omitted.)
- "[I]n a contested case, a party (typically a defendant) seeking to reduce an award of future damages to present value bears the burden of proving an appropriate method of doing so, including an appropriate discount rate. A party (typically a plaintiff) who seeks an upward adjustment of a future damages award to account for inflation bears the burden of proving an appropriate method of doing so, including an appropriate inflation rate. This aligns the burdens of proof with the parties' respective economic interests. A trier of fact should not reduce damages to present value, or adjust for inflation, absent such evidence or a stipulation of the parties." (*Lewis, supra,* 36 Cal.App.5th at p. 889.)
- "[W]e hold a defendant seeking reduction to present value of a sum awarded for future damages has the burden of presenting expert evidence of an appropriate present value calculation, including the appropriate discount rate, to enable the fact finder to make a rational determination on the issue." (*Lewis, supra,* 36 Cal.App.5th at p. 896.)
- "Exact actuarial computation should result in a lump-sum, present-value award which if prudently invested will provide the beneficiaries with an investment return allowing them to regularly withdraw matching support money so that, by reinvesting the surplus earnings during the earlier years of the expected support period, they may maintain the anticipated future support level throughout the period and, upon the last withdrawal, have depleted both principal and interest." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 521 [196 Cal.Rptr. 82].)
- "[I]t is not a violation of the plaintiff's jury trial right for the court to submit only the issue of the gross amount of future economic damages to the jury, with the timing of periodic payments—and hence their present value—to be set by the court in the exercise of its sound discretion." (*Salgado, supra,* 19 Cal.4th at p. 649, internal citation omitted.)
- "Neither party introduced any evidence of compounding or discounting factors,

including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the 'jury would have been put to sheer speculation in determining . . . "the present sum of money which . . . will pay to the plaintiff . . . the equivalent of his [future economic] loss . . . ." ' " (*Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1719

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.96

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.21–52.22 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

1 California Civil Practice: Torts § 5:22 (Thomson Reuters)

3904B. Use of Present-Value Tables

[*For Table A:***]**

[Use Worksheet A and Table A to compute the present value of [*specify future damages that can be expressed as a regular dollar amount over a determinable period of time, e.g., lost future income or the cost of permanent medical care***].**

1. **Determine the amount of [***name of plaintiff***]'s future loss for [***e.g., lost income***] each year. Enter this amount into Worksheet A, Step 1.**
2. **Determine the number of years that this loss will continue. Enter this amount into Worksheet A, Step 2.**
3. **Select the interest rate that you decide [based on the expert testimony that you have heard] represents the most likely rate of return on money invested today over that period of years. Enter this amount into Worksheet A, Step 3.**
4. **Select the appropriate Present Value Factor from Table A. To locate this factor, use the Number of Years from Step 2 on the worksheet and the Interest Rate from Step 3 on the worksheet and find the number that is the intersection of the Interest Rate column and Number of Years row. (For example, if the number of years is 15 and the interest rate is 10 percent, the corresponding Present Value Factor is 7.61.) Enter the factor into Worksheet A, Step 4.**
5. **Multiply the amount of [***name of plaintiff***]'s annual future loss from Step 1 by the factor from Step 4. This is the present value of [***name of plaintiff***]'s total future loss for [***e.g., lost income***]. Enter this amount into Worksheet A, Step 5.**

WORKSHEET A

Step 1:	**Repeating identical annual dollar amount of future loss:**	**$** _____
Step 2:	**Number of years that this loss will continue:**	_____
Step 3:	**Interest rate that represents a reasonable rate of return on money invested today over that period of years:**	_____**%**
Step 4:	**Present Value Factor from Table A:**	_____

Step 5: Amount from Step 1 times Factor from Step 4: $ _____

Enter the amount from Step 5 on your verdict form as [*name of plaintiff***]'s total future economic loss for [***e.g., lost income***].]**

[*For Table B:***]**

[Use Worksheet B and Table B to compute the present value of [*specify future damages that cannot be expressed as a repeating identical dollar amount over a determinable period of time, e.g., future surgeries***].**

1. **Determine the future years in which a future loss will occur. In Column A, starting with the current year, enter each year through the last year that you determined a future loss will occur.**
2. **Determine the amount of [***name of plaintiff***]'s future loss for [***e.g., future surgeries***] for each year that you determine the loss will occur. Enter these future losses in Column B on the worksheet. Enter $0 if no future loss occurs in a given year.**
3. **Select the interest rate that you decide [based on the expert testimony that you have heard] represents a reasonable rate of return on money invested today over the number of years determined in Step 2. Enter this rate in Column C on the worksheet for each year that future-loss amounts are entered in Column B.**
4. **Select the appropriate Present Value Factor from Table B for each year for which you have determined that a loss will occur. To locate this factor, use the Number of Years from Column A on the worksheet and the Interest Rate in Column C on the worksheet and find the number that is the intersection of the Interest Rate column and Number of Years row from the table. (For example, for year 15, if the interest rate is 10 percent, the corresponding Present Value Factor is 0.239.) Enter the appropriate Present Value Factors in Column D. For the current year, the Present Value Factor is 1.000. It is not necessary to select an interest rate for the current year in Step 3.**
5. **Multiply the amount in Column B by the factor in Column D for each year for which you determined that a loss will occur and enter these amounts in Column E.**
6. **Add all of the entries in Column E and enter this sum into Total Present Value of Future Loss.**

Enter the amount from Step 6 on your verdict form as [*name of*

plaintiff]**'s total future economic loss for [***e.g., future surgeries***].]**

WORKSHEET B

A	B	C	D	E
Year	**Dollar Amount of Future Loss Each Year**	**Interest Rate**	**Present Value Factor**	**Present Value of Future Loss**
Current year (20___)	$	Not applicable	1.000	$
Year 1 (20___)	$	%		$
Year 2 (20___)	$	%		$
Year 3 (20___)	$	%		$
Year 4 (20___)	$	%		$
Year 5 (20___)	$	%		$
Year 6 (20___)	$	%		$
Year 7 (20___)	$	%		$
Year 8 (20___)	$	%		$
Year 9 (20___)	$	%		$
Year 10 (20___)	$	%		$
Year 11 (20___)	$	%		$
Year 12 (20___)	$	%		$
Year 13 (20___)	$	%		$
Year 14 (20___)	$	%		$
Year 15 (20___)	$	%		$
Year 16 (20___)	$	%		$
Year 17 (20___)	$	%		$
Year 18 (20___)	$	%		$
Year 19 (20___)	$	%		$
Year 20 (20___)	$	%		$
Year 21 (20___)	$	%		$
Year 22 (20___)	$	%		$
Year 23 (20___)	$	%		$
Year 24 (20___)	$	%		$
Year 25 (20___)	$	%		$
Total Present Value of Future Loss (add all amounts in Column E)				$

New December 2010

Directions for Use

Give this instruction if one of the accompanying tables is to be given to the jury. Also give CACI No. 359, *Present Cash Value of Future Damages*, in a contract action, or CACI No. 3904A, *Present Cash Value*, in a tort action.

Use Worksheet A and Table A if future economic loss will occur over multiple years and the amount of the loss will be the same every year. For example, lost future income may be capable of being expressed in a fixed annual dollar figure. Similarly, the cost of future medical care may be reduced to present value under Table A if it will be a regular amount over a determinable period of time.

Use Worksheet B and Table B in all other instances of future economic loss. In some cases, it may be necessary to give the jury both worksheets and tables if there are categories of both regular recurring future economic loss and irregular or varying loss.

The interest rate to be used in the tables must be established by stipulation or by the evidence. Expert testimony will usually be required to accurately establish present values for future economic losses. It would appear that because reduction to present value benefits the defendant, the defendant bears the burden of proof on the discount rate. (See *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613–614 [102 Cal.Rptr. 31] [no error to refuse instruction on reduction to present value when defendant presented no evidence].)

Tables should not be used for future noneconomic damages. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]; CACI No. 3904A, Present Cash Value.)

Sources and Authority

- "Neither party introduced any evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the 'jury would have been put to sheer speculation in determining . . . "the present sum of money which . . . will pay to the plaintiff . . . the equivalent of his [future economic] loss . . . ." ' " (*Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716], internal citations omitted.)
- "[W]e cannot presume that the jurors were unable to make the various computations without the proffered aid of court and counsel after first reaching necessary agreement on the various determinables comprising the formula. Further, defendant's counsel took a calculated risk in this regard; he produced neither statistician nor economist to aid his cause in this regard. Too, we have found no California cases which hold that use of the present table is indispensable to a proper award of damages for loss of future earning capacity . . . ." (*Howard v. Global Marine, Inc.* (1972) 28 Cal.App.3d 809, 816 [105 Cal.Rptr. 50].)
- "The trial court was also correct in refusing the proposed instruction, on its

merits, for lack of evidence which would have supported a jury finding of the 'present cash value' of any sum assessed as the value of [plaintiff]'s future earning capacity . . . . The computation of such 'present cash value' is 'difficult and confusing . . . to present to a jury' and, in the pertinent cases, the computation was apparently reached by the respective juries upon the basis of real evidence. Absent such evidence in the present case (and there was none), this jury would have been put to sheer speculation in determining (as the proposed instruction would have had it do) 'the present sum of money which, together with interest thereon when invested so as to yield the highest rate of interest consistent with reasonable security, will pay to the plaintiff . . . the equivalent of his loss of earning capacity . . . in the future . . . .' The instruction would have required the jury to reach this result without the benefit of evidence or advice as to the complicated factors of compounding and discounting which the instruction necessarily involved. There are 'present cash value' tables which might have assisted the jury in this regard, if judicially noticed for instruction purposes, but the proposed instruction included no reference to them. For these reasons, and on the instruction's merits, the trial court did not err in refusing to give it." (*Wilson, supra,* 25 Cal.App.3d at pp. 613–614, internal citations omitted.)

- "Anticipated future increases of medical costs may be presented to the jury. Expert testimony may be used with regard to a 'subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; . . .' Future medical expenses are such a subject. Testimony by actuaries is frequently used to show discount rates and the present value of future benefits. [¶] The expert testimony was substantial evidence supporting the portion of the award relating to the future cost of attendant care. The substantial evidence test is applied in view of the entire record; other than a vigorous cross-examination of plaintiffs' expert, appellants presented no evidence on the cost of attendant care. The elaborate economic arguments presented in the briefs of appellants and amicus curiae might better have been presented to the jury in opposition to respondents' expert testimony." (*Niles v. City of San Rafael* (1974) 42 Cal.App.3d 230, 243 [116 Cal.Rptr. 733], internal citations omitted.)
- "Appellants claim that the 5 percent discount rate presented by the expert was too low. A discount rate, similar to an interest rate, is used to determine the present value of future expenses. The expert, in arriving at a 5 percent rate, used commercial investment studies pertaining to the riskiness of corporate bonds, charts compiled by the Federal Reserve System showing interest yields on various bonds since 1920, and tables published by the United States Savings and Loan League showing interest rates on savings accounts since 1929. He took into account the need for reasonable security of investment over the period of [plaintiff]'s life. All of this was apparently within the competence of the expert." (*Niles, supra,* 42 Cal.App.3d at pp. 243–244.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1719

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.96

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.21, 52.22 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.40 et seq. (Matthew Bender)

Table A - Present Value Factor of Repeating Identical Amount (Present value of $1 per period for t periods at r%)

Number of Years	Interest Rate																			
	1%	2%	3%	4%	5%	6%	7%	8%	9%	10%	11%	12%	13%	14%	15%	16%	17%	18%	19%	20%
1	0.99	0.98	0.97	0.96	0.95	0.94	0.93	0.93	0.92	0.91	0.90	0.89	0.88	0.88	0.87	0.86	0.85	0.85	0.84	0.83
2	1.97	1.94	1.91	1.89	1.86	1.83	1.81	1.78	1.76	1.74	1.71	1.69	1.67	1.65	1.63	1.61	1.59	1.57	1.55	1.53
3	2.94	2.88	2.83	2.78	2.72	2.67	2.62	2.58	2.53	2.49	2.44	2.40	2.36	2.32	2.28	2.25	2.21	2.17	2.14	2.11
4	3.90	3.81	3.72	3.63	3.55	3.47	3.39	3.31	3.24	3.17	3.10	3.04	2.97	2.91	2.85	2.80	2.74	2.69	2.64	2.59
5	4.85	4.71	4.58	4.45	4.33	4.21	4.10	3.99	3.89	3.79	3.70	3.60	3.52	3.43	3.35	3.27	3.20	3.13	3.06	2.99
6	5.80	5.60	5.42	5.24	5.08	4.92	4.77	4.62	4.49	4.36	4.23	4.11	4.00	3.89	3.78	3.68	3.59	3.50	3.41	3.33
7	6.73	6.47	6.23	6.00	5.79	5.58	5.39	5.21	5.03	4.87	4.71	4.56	4.42	4.29	4.16	4.04	3.92	3.81	3.71	3.60
8	7.65	7.33	7.02	6.73	6.46	6.21	5.97	5.75	5.53	5.33	5.15	4.97	4.80	4.64	4.49	4.34	4.21	4.08	3.95	3.84
9	8.57	8.16	7.79	7.44	7.11	6.80	6.52	6.25	6.00	5.76	5.54	5.33	5.13	4.95	4.77	4.61	4.45	4.30	4.16	4.03
10	9.47	8.98	8.53	8.11	7.72	7.36	7.02	6.71	6.42	6.14	5.89	5.65	5.43	5.22	5.02	4.83	4.66	4.49	4.34	4.19
11	10.37	9.79	9.25	8.76	8.31	7.89	7.50	7.14	6.81	6.50	6.21	5.94	5.69	5.45	5.23	5.03	4.84	4.66	4.49	4.33
12	11.26	10.58	9.95	9.39	8.86	8.38	7.94	7.54	7.16	6.81	6.49	6.19	5.92	5.66	5.42	5.20	4.99	4.79	4.61	4.44
13	12.13	11.35	10.63	9.99	9.39	8.85	8.36	7.90	7.49	7.10	6.75	6.42	6.12	5.84	5.58	5.34	5.12	4.91	4.71	4.53
14	13.00	12.11	11.30	10.56	9.90	9.29	8.75	8.24	7.79	7.37	6.98	6.63	6.30	6.00	5.72	5.47	5.23	5.01	4.80	4.61
15	13.87	12.85	11.94	11.12	10.38	9.71	9.11	8.56	8.06	7.61	7.19	6.81	6.46	6.14	5.85	5.58	5.32	5.09	4.88	4.68
16	14.72	13.58	12.56	11.65	10.84	10.11	9.45	8.85	8.31	7.82	7.38	6.97	6.60	6.27	5.95	5.67	5.41	5.16	4.94	4.73
17	15.56	14.29	13.17	12.17	11.27	10.48	9.76	9.12	8.54	8.02	7.55	7.12	6.73	6.37	6.05	5.75	5.47	5.22	4.99	4.77
18	16.40	14.99	13.75	12.66	11.69	10.83	10.06	9.37	8.76	8.20	7.70	7.25	6.84	6.47	6.13	5.82	5.53	5.27	5.03	4.81
19	17.23	15.68	14.32	13.13	12.09	11.16	10.34	9.60	8.95	8.36	7.84	7.37	6.94	6.55	6.20	5.88	5.58	5.32	5.07	4.84
20	18.05	16.35	14.88	13.59	12.46	11.47	10.59	9.82	9.13	8.51	7.96	7.47	7.02	6.62	6.26	5.93	5.63	5.35	5.10	4.87
21	18.86	17.01	15.42	14.03	12.82	11.76	10.84	10.02	9.29	8.65	8.08	7.56	7.10	6.69	6.31	5.97	5.66	5.38	5.13	4.89
22	19.66	17.66	15.94	14.45	13.16	12.04	11.06	10.20	9.44	8.77	8.18	7.64	7.17	6.74	6.36	6.01	5.70	5.41	5.15	4.91
23	20.46	18.29	16.44	14.86	13.49	12.30	11.27	10.37	9.58	8.88	8.27	7.72	7.23	6.79	6.40	6.04	5.72	5.43	5.17	4.92
24	21.24	18.91	16.94	15.25	13.80	12.55	11.47	10.53	9.71	8.98	8.35	7.78	7.28	6.84	6.43	6.07	5.75	5.45	5.18	4.94
25	22.02	19.52	17.41	15.62	14.09	12.78	11.65	10.67	9.82	9.08	8.42	7.84	7.33	6.87	6.46	6.10	5.77	5.47	5.20	4.95
26	22.80	20.12	17.88	15.98	14.38	13.00	11.83	10.81	9.93	9.16	8.49	7.90	7.37	6.91	6.49	6.12	5.78	5.48	5.21	4.96
27	23.56	20.71	18.33	16.33	14.64	13.21	11.99	10.94	10.03	9.24	8.55	7.94	7.41	6.94	6.51	6.14	5.80	5.49	5.22	4.96
28	24.32	21.28	18.76	16.66	14.90	13.41	12.14	11.05	10.12	9.31	8.60	7.98	7.44	6.96	6.53	6.15	5.81	5.50	5.22	4.97
29	25.07	21.84	19.19	16.98	15.14	13.59	12.28	11.16	10.20	9.37	8.65	8.02	7.47	6.98	6.55	6.17	5.82	5.51	5.23	4.97
30	25.81	22.40	19.60	17.29	15.37	13.76	12.41	11.26	10.27	9.43	8.69	8.06	7.50	7.00	6.57	6.18	5.83	5.52	5.23	4.98
31	26.54	22.94	20.00	17.59	15.59	13.93	12.53	11.35	10.34	9.48	8.73	8.08	7.52	7.02	6.58	6.19	5.84	5.52	5.24	4.98
32	27.27	23.47	20.39	17.87	15.80	14.08	12.65	11.43	10.41	9.53	8.77	8.11	7.54	7.03	6.59	6.20	5.84	5.53	5.24	4.99
33	27.99	23.99	20.77	18.15	16.00	14.23	12.75	11.51	10.46	9.57	8.80	8.14	7.56	7.05	6.60	6.20	5.85	5.53	5.25	4.99
34	28.70	24.50	21.13	18.41	16.19	14.37	12.85	11.59	10.52	9.61	8.83	8.16	7.57	7.06	6.61	6.21	5.85	5.54	5.25	4.99
35	29.41	25.00	21.49	18.66	16.37	14.50	12.95	11.65	10.57	9.64	8.86	8.18	7.59	7.07	6.62	6.22	5.86	5.54	5.25	4.99
36	30.11	25.49	21.83	18.91	16.55	14.62	13.04	11.72	10.61	9.68	8.88	8.19	7.60	7.08	6.62	6.22	5.86	5.54	5.25	4.99
37	30.80	25.97	22.17	19.14	16.71	14.74	13.12	11.78	10.65	9.71	8.90	8.21	7.61	7.09	6.63	6.22	5.86	5.54	5.25	4.99
38	31.48	26.44	22.49	19.37	16.87	14.85	13.19	11.83	10.69	9.73	8.92	8.22	7.62	7.09	6.63	6.23	5.87	5.55	5.26	5.00
39	32.16	26.90	22.81	19.58	17.02	14.95	13.26	11.88	10.73	9.76	8.94	8.23	7.63	7.10	6.64	6.23	5.87	5.55	5.26	5.00
40	32.83	27.36	23.11	19.79	17.16	15.05	13.33	11.92	10.76	9.78	8.95	8.24	7.63	7.11	6.64	6.23	5.87	5.55	5.26	5.00
41	33.50	27.80	23.41	19.99	17.29	15.14	13.39	11.97	10.79	9.80	8.96	8.25	7.64	7.11	6.65	6.24	5.87	5.55	5.26	5.00
42	34.16	28.23	23.70	20.19	17.42	15.22	13.45	12.01	10.81	9.82	8.98	8.26	7.65	7.11	6.65	6.24	5.87	5.55	5.26	5.00
43	34.81	28.66	23.98	20.37	17.55	15.31	13.51	12.04	10.84	9.83	8.99	8.27	7.65	7.12	6.65	6.24	5.88	5.55	5.26	5.00
44	35.46	29.08	24.25	20.55	17.66	15.38	13.56	12.08	10.86	9.85	9.00	8.28	7.66	7.12	6.65	6.24	5.88	5.55	5.26	5.00
45	36.09	29.49	24.52	20.72	17.77	15.46	13.61	12.11	10.88	9.86	9.01	8.28	7.66	7.12	6.65	6.24	5.88	5.55	5.26	5.00
46	36.73	29.89	24.78	20.88	17.88	15.52	13.65	12.14	10.90	9.88	9.02	8.29	7.66	7.13	6.66	6.24	5.88	5.55	5.26	5.00
47	37.35	30.29	25.02	21.04	17.98	15.59	13.69	12.16	10.92	9.89	9.02	8.29	7.67	7.13	6.66	6.24	5.88	5.55	5.26	5.00
48	37.97	30.67	25.27	21.20	18.08	15.65	13.73	12.19	10.93	9.90	9.03	8.30	7.67	7.13	6.66	6.24	5.88	5.55	5.26	5.00
49	38.59	31.05	25.50	21.34	18.17	15.71	13.77	12.21	10.95	9.91	9.04	8.30	7.67	7.13	6.66	6.25	5.88	5.55	5.26	5.00
50	39.20	31.42	25.73	21.48	18.26	15.76	13.80	12.23	10.96	9.91	9.04	8.30	7.68	7.13	6.66	6.25	5.88	5.55	5.26	5.00

Note: The factors in this table are calculated as $\left(\frac{1}{r}\right)-\left(\frac{1}{r\times(1+r)^t}\right)$, where r is the interest rate and t is the number of years. This formula can be used to calculate any present value factors not shown on this table.

Table B - Present Value Factor for Lump Sum (Present value of $1 from period *t* at *r*%)

Number of Years	Interest Rate																			
	1%	2%	3%	4%	5%	6%	7%	8%	9%	10%	11%	12%	13%	14%	15%	16%	17%	18%	19%	20%
1	0.990	0.980	0.971	0.962	0.952	0.943	0.935	0.926	0.917	0.909	0.901	0.893	0.885	0.877	0.870	0.862	0.855	0.847	0.840	0.833
2	0.980	0.961	0.943	0.925	0.907	0.890	0.873	0.857	0.842	0.826	0.812	0.797	0.783	0.769	0.756	0.743	0.731	0.718	0.706	0.694
3	0.971	0.942	0.915	0.889	0.864	0.840	0.816	0.794	0.772	0.751	0.731	0.712	0.693	0.675	0.658	0.641	0.624	0.609	0.593	0.579
4	0.961	0.924	0.888	0.855	0.823	0.792	0.763	0.735	0.708	0.683	0.659	0.636	0.613	0.592	0.572	0.552	0.534	0.516	0.499	0.482
5	0.951	0.906	0.863	0.822	0.784	0.747	0.713	0.681	0.650	0.621	0.593	0.567	0.543	0.519	0.497	0.476	0.456	0.437	0.419	0.402
6	0.942	0.888	0.837	0.790	0.746	0.705	0.666	0.630	0.596	0.564	0.535	0.507	0.480	0.456	0.432	0.410	0.390	0.370	0.352	0.335
7	0.933	0.871	0.813	0.760	0.711	0.665	0.623	0.583	0.547	0.513	0.482	0.452	0.425	0.400	0.376	0.354	0.333	0.314	0.296	0.279
8	0.923	0.853	0.789	0.731	0.677	0.627	0.582	0.540	0.502	0.467	0.434	0.404	0.376	0.351	0.327	0.305	0.285	0.266	0.249	0.233
9	0.914	0.837	0.766	0.703	0.645	0.592	0.544	0.500	0.460	0.424	0.391	0.361	0.333	0.308	0.284	0.263	0.243	0.225	0.209	0.194
10	0.905	0.820	0.744	0.676	0.614	0.558	0.508	0.463	0.422	0.386	0.352	0.322	0.295	0.270	0.247	0.227	0.208	0.191	0.176	0.162
11	0.896	0.804	0.722	0.650	0.585	0.527	0.475	0.429	0.388	0.350	0.317	0.287	0.261	0.237	0.215	0.195	0.178	0.162	0.148	0.135
12	0.887	0.788	0.701	0.625	0.557	0.497	0.444	0.397	0.356	0.319	0.286	0.257	0.231	0.208	0.187	0.168	0.152	0.137	0.124	0.112
13	0.879	0.773	0.681	0.601	0.530	0.469	0.415	0.368	0.326	0.290	0.258	0.229	0.204	0.182	0.163	0.145	0.130	0.116	0.104	0.093
14	0.870	0.758	0.661	0.577	0.505	0.442	0.388	0.340	0.299	0.263	0.232	0.205	0.181	0.160	0.141	0.125	0.111	0.099	0.088	0.078
15	0.861	0.743	0.642	0.555	0.481	0.417	0.362	0.315	0.275	0.239	0.209	0.183	0.160	0.140	0.123	0.108	0.095	0.084	0.074	0.065
16	0.853	0.728	0.623	0.534	0.458	0.394	0.339	0.292	0.252	0.218	0.188	0.163	0.141	0.123	0.107	0.093	0.081	0.071	0.062	0.054
17	0.844	0.714	0.605	0.513	0.436	0.371	0.317	0.270	0.231	0.198	0.170	0.146	0.125	0.108	0.093	0.080	0.069	0.060	0.052	0.045
18	0.836	0.700	0.587	0.494	0.416	0.350	0.296	0.250	0.212	0.180	0.153	0.130	0.111	0.095	0.081	0.069	0.059	0.051	0.044	0.038
19	0.828	0.686	0.570	0.475	0.396	0.331	0.277	0.232	0.194	0.164	0.138	0.116	0.098	0.083	0.070	0.060	0.051	0.043	0.037	0.031
20	0.820	0.673	0.554	0.456	0.377	0.312	0.258	0.215	0.178	0.149	0.124	0.104	0.087	0.073	0.061	0.051	0.043	0.037	0.031	0.026
21	0.811	0.660	0.538	0.439	0.359	0.294	0.242	0.199	0.164	0.135	0.112	0.093	0.077	0.064	0.053	0.044	0.037	0.031	0.026	0.022
22	0.803	0.647	0.522	0.422	0.342	0.278	0.226	0.184	0.150	0.123	0.101	0.083	0.068	0.056	0.046	0.038	0.032	0.026	0.022	0.018
23	0.795	0.634	0.507	0.406	0.326	0.262	0.211	0.170	0.138	0.112	0.091	0.074	0.060	0.049	0.040	0.033	0.027	0.022	0.018	0.015
24	0.788	0.622	0.492	0.390	0.310	0.247	0.197	0.158	0.126	0.102	0.082	0.066	0.053	0.043	0.035	0.028	0.023	0.019	0.015	0.013
25	0.780	0.610	0.478	0.375	0.295	0.233	0.184	0.146	0.116	0.092	0.074	0.059	0.047	0.038	0.030	0.024	0.020	0.016	0.013	0.010
26	0.772	0.598	0.464	0.361	0.281	0.220	0.172	0.135	0.106	0.084	0.066	0.053	0.042	0.033	0.026	0.021	0.017	0.014	0.011	0.009
27	0.764	0.586	0.450	0.347	0.268	0.207	0.161	0.125	0.098	0.076	0.060	0.047	0.037	0.029	0.023	0.018	0.014	0.011	0.009	0.007
28	0.757	0.574	0.437	0.333	0.255	0.196	0.150	0.116	0.090	0.069	0.054	0.042	0.033	0.026	0.020	0.016	0.012	0.010	0.008	0.006
29	0.749	0.563	0.424	0.321	0.243	0.185	0.141	0.107	0.082	0.063	0.048	0.037	0.029	0.022	0.017	0.014	0.011	0.008	0.006	0.005
30	0.742	0.552	0.412	0.308	0.231	0.174	0.131	0.099	0.075	0.057	0.044	0.033	0.026	0.020	0.015	0.012	0.009	0.007	0.005	0.004
31	0.735	0.541	0.400	0.296	0.220	0.164	0.123	0.092	0.069	0.052	0.039	0.030	0.023	0.017	0.013	0.010	0.008	0.006	0.005	0.004
32	0.727	0.531	0.388	0.285	0.210	0.155	0.115	0.085	0.063	0.047	0.035	0.027	0.020	0.015	0.011	0.009	0.007	0.005	0.004	0.003
33	0.720	0.520	0.377	0.274	0.200	0.146	0.107	0.079	0.058	0.043	0.032	0.024	0.018	0.013	0.010	0.007	0.006	0.004	0.003	0.002
34	0.713	0.510	0.366	0.264	0.190	0.138	0.100	0.073	0.053	0.039	0.029	0.021	0.016	0.012	0.009	0.006	0.005	0.004	0.003	0.002
35	0.706	0.500	0.355	0.253	0.181	0.130	0.094	0.068	0.049	0.036	0.026	0.019	0.014	0.010	0.008	0.006	0.004	0.003	0.002	0.002
36	0.699	0.490	0.345	0.244	0.173	0.123	0.088	0.063	0.045	0.032	0.023	0.017	0.012	0.009	0.007	0.005	0.004	0.003	0.002	0.001
37	0.692	0.481	0.335	0.234	0.164	0.116	0.082	0.058	0.041	0.029	0.021	0.015	0.011	0.008	0.006	0.004	0.003	0.002	0.002	0.001
38	0.685	0.471	0.325	0.225	0.157	0.109	0.076	0.054	0.038	0.027	0.019	0.013	0.010	0.007	0.005	0.004	0.003	0.002	0.001	0.001
39	0.678	0.462	0.316	0.217	0.149	0.103	0.071	0.050	0.035	0.024	0.017	0.012	0.009	0.006	0.004	0.003	0.002	0.002	0.001	0.001
40	0.672	0.453	0.307	0.208	0.142	0.097	0.067	0.046	0.032	0.022	0.015	0.011	0.008	0.005	0.004	0.003	0.002	0.001	0.001	0.001
41	0.665	0.444	0.298	0.200	0.135	0.092	0.062	0.043	0.029	0.020	0.014	0.010	0.007	0.005	0.003	0.002	0.002	0.001	0.001	0.001
42	0.658	0.435	0.289	0.193	0.129	0.087	0.058	0.039	0.027	0.018	0.012	0.009	0.006	0.004	0.003	0.002	0.001	0.001	0.001	0.000
43	0.652	0.427	0.281	0.185	0.123	0.082	0.055	0.037	0.025	0.017	0.011	0.008	0.005	0.004	0.002	0.002	0.001	0.001	0.001	0.000
44	0.645	0.418	0.272	0.178	0.117	0.077	0.051	0.034	0.023	0.015	0.010	0.007	0.005	0.003	0.002	0.001	0.001	0.001	0.000	0.000
45	0.639	0.410	0.264	0.171	0.111	0.073	0.048	0.031	0.021	0.014	0.009	0.006	0.004	0.003	0.002	0.001	0.001	0.001	0.000	0.000
46	0.633	0.402	0.257	0.165	0.106	0.069	0.044	0.029	0.019	0.012	0.008	0.005	0.004	0.002	0.002	0.001	0.001	0.000	0.000	0.000
47	0.626	0.394	0.249	0.158	0.101	0.065	0.042	0.027	0.017	0.011	0.007	0.005	0.003	0.002	0.001	0.001	0.001	0.000	0.000	0.000
48	0.620	0.387	0.242	0.152	0.096	0.061	0.039	0.025	0.016	0.010	0.007	0.004	0.003	0.002	0.001	0.001	0.001	0.000	0.000	0.000
49	0.614	0.379	0.235	0.146	0.092	0.058	0.036	0.023	0.015	0.009	0.006	0.004	0.003	0.002	0.001	0.001	0.000	0.000	0.000	0.000
50	0.608	0.372	0.228	0.141	0.087	0.054	0.034	0.021	0.013	0.009	0.005	0.003	0.002	0.001	0.001	0.001	0.000	0.000	0.000	0.000

Note: The factors in this table are calculated as $\frac{1}{(1+r)^t}$, where r is the interest rate and t is the number of years. This formula can be used to calculate any present value factors not shown on this table.

3905. Items of Noneconomic Damage

The following are the specific items of noneconomic damages claimed by [*name of plaintiff*]:

[*Insert applicable instructions on items of noneconomic damage.***]**

New September 2003

Directions for Use

This instruction may not be needed in every case. For example, if the plaintiff is not claiming any economic damages, there is no need to define the claimed damages as "noneconomic." If this instruction is used, it should be followed by applicable instructions concerning the items of noneconomic damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 159, 169, 170

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.5

4 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.04 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

California Civil Practice: Torts § 5:4 (Thomson Reuters)

3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress/[***insert other damages***]].**

No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[To recover for future [*insert item of pain and suffering***], [***name of plaintiff***] must prove that [he/she/***nonbinary pronoun***] is reasonably certain to suffer that harm.**

For future [*insert item of pain and suffering***], determine the amount in current dollars paid at the time of judgment that will compensate [***name of plaintiff***] for future [***insert item of pain and suffering***]. [This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]]**

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*New September 2003; Revised April 2008, December 2009, December 2011, May 2022, November 2023**

Directions for Use

Insert the bracketed terms that best describe the damages claimed by the plaintiff.

If future noneconomic damages are sought, include the last two paragraphs. Do not instruct the jury to further reduce the award to present cash value. (See CACI No. 3904A, *Present Cash Value*, and CACI No. 3904B, *Use of Present-Value Tables*.) The amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585].) Include the last sentence only if the plaintiff is claiming both future economic and noneconomic damages.

For actions or proceedings filed on or after January 1, 2022, and before January 1, 2026 (or if granted a preference under Code of Civil Procedure section 36 before January 1, 2022), the survival action statute allows for recovery of a decedent's noneconomic damages for pain, suffering, or disfigurement. (Code Civ. Proc., § 377.34(b).) (See CACI No. 3919, *Survival Damages*.) Insert only the bracketed terms that apply in a survival action, and modify the instruction to make clear that the damages are for the decedent's pre-death pain, suffering, or disfigurement.

The jury's consideration of shortened life expectancy as an item of noneconomic damages is unsettled. (Compare, e.g., *Phipps v. Copeland Corp. LLC* (2021) 64

Cal.App.5th 319, 337 [278 Cal.Rptr.3d 688] with *Johnson v. Monsanto Co.* (2020) 52 Cal.App.5th 434, 454 [266 Cal.Rptr.3d 111]; see also *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 549 [46 Cal.Rptr.3d 147], judg. vacated on other grounds *sub nom. Ford Motor Co. v. Buell-Wilson* (2007) 550 U.S. 931 [127 S.Ct. 2250, 167 L.Ed.2d 1087].) To the extent these cases refer to previous versions of this instruction (CACI No. 3905A), prior published volumes of the *Judicial Council of California Civil Jury Instructions* do not reflect that shortened life expectancy was ever previously listed or removed as an item of noneconomic damages in CACI No. 3905A.

Sources and Authority

- Term-Limited Exception for Survival Damages. Code of Civil Procedure section 377.34(b).
- "One of the most difficult tasks imposed on a fact finder is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. The inquiry is inherently subjective and not easily amenable to concrete measurement." (*Pearl v. City of Los Angeles* (2019) 36 Cal.App.5th 475, 491 [248 Cal.Rptr.3d 508], internal citations omitted.)
- "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.' " (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892–893 [103 Cal.Rptr. 856, 500 P.2d 880], internal citations and footnote omitted.)
- "[N]oneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300 [213 Cal.Rptr.3d 82].)
- " ' " Noneconomic damages compensate an injured plaintiff for nonpecuniary injuries . . . ." [Citation.] Such injuries include pain and suffering, emotional distress, as well as "such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy." ' " (*Phipps, supra,* 64 Cal.App.5th at pp. 337–338.)
- "We accept that there may be valid policy arguments to support allowing the

recovery of damages for a shortened life expectancy. But our holding rests on California law as was reflected in CACI No. 3905A, which was given to the jury without any objection to the part requiring [plaintiff] to prove he was 'reasonably certain to suffer' the harm for which compensation was sought. By limiting future noneconomic damages to those [plaintiff] was reasonably certain to suffer, the instruction disallowed damages for years beyond his expected life expectancy at the time of trial." (*Johnson, supra,* 52 Cal.App.5th at p. 454, internal citations and footnote omitted.)

- " ' " '[T]here is no fixed or absolute standard by which to compute the monetary value of emotional distress,' " ' and a ' "jury is entrusted with vast discretion in determining the amount of damages to be awarded . . . ." [Citation.]' " (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602 [146 Cal.Rptr.3d 585].)
- "Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. 'For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.' " (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664–1665 [28 Cal.Rptr.2d 88], internal citations omitted.)
- "The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." (*Crisci v. The Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 433 [58 Cal.Rptr. 13, 426 P.2d 173], internal citations omitted.)
- "We note that there may be certain cases where testimony of an expert witness would be necessary to support all or part of an emotional distress damages claim. For example, expert testimony would be required to the extent a plaintiff's damages are alleged to have arisen from a psychiatric or psychological disorder caused or made worse by a defendant's actions and the subject matter is beyond common experience. We are not addressing such a case here. In this case, the emotional distress damages arose from feelings of anxiety, pressure, betrayal, shock, and fear of others to which [plaintiff] herself could and did testify. Expert testimony was not required." (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1099 [236 Cal.Rptr.3d 473].)
- "The law in this state is that the testimony of a single person, *including the*

plaintiff, may be sufficient to support an award of emotional distress damages." (*Knutson*, *supra,* 25 Cal.App.5th at p. 1096, original italics.)

- "[W]here a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted, and the jury has expressly found that defendant's negligence was a cause of plaintiff's injury, the failure to award any damages for pain and suffering results in a damage award that is inadequate as a matter of law." (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 933 [64 Cal.Rptr.3d 920].)
- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)
- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647.)
- "[R]ecovery for emotional distress caused by injury to property is permitted only where there is a preexisting relationship between the parties or an intentional tort." (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 203 [147 Cal.Rptr.3d 41].)
- "[W]e uphold both the economic and emotional distress damages plaintiffs recovered for trespass to personal property arising from [defendant]'s act of intentionally striking [plaintiff's dog] with a bat." (*Plotnik*, *supra,* 208 Cal.App.4th at p. 1608 [under claim for trespass to chattels].)
- "Furthermore, 'the *negligent* infliction of emotional distress—anxiety, worry, discomfort—is compensable without physical injury in cases involving the tortious interference with *property rights* [citations].' Thus, if [defendant]'s failure to repair the premises constitutes a tort grounded on negligence, appellant is entitled to prove his damages for emotional distress because the failure to repair must be deemed to constitute an injury to his tenancy interest (right to habitable premises), which is a species of property." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1299 [173 Cal.Rptr.3d 159], original italics, internal citation omitted.)
- "[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply

damage to property or financial interests." (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 156 [184 Cal.Rptr.3d 26].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1850–1854

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:140 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.68–1.74

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, §§ 51.01–51.51 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.145 et seq. (Matthew Bender)

California Civil Practice: Torts § 5:10 (Thomson Reuters)

3906. Lost Earnings and Lost Earning Capacity—Jurors Not to Reduce Damages on Basis of Race, Ethnicity, or Gender (Economic Damage)

In determining a reasonable amount of [*name of plaintiff*]'s [lost earnings/ [and] lost ability to earn money], you must not use race, ethnicity, or gender as a basis for reducing [*name of plaintiff*]'s [lost earnings/ [and] lost ability to earn money].

New November 2020

Directions for Use

Give this instruction in cases in which the plaintiff seeks damages for lost earnings and/or lost earning capacity from personal injury or wrongful death. Depending on the circumstances, select the type(s) of damages at issue: lost earnings, lost ability to earn money, or both. If this instruction is used, it should follow the applicable instruction(s) in the Items of Economic Damage series. See CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*, and CACI No. 3903D, *Lost Earning Capacity (Economic Damage)*.

Sources and Authority

- Estimations, Measures, or Calculations of Past, Present, or Future Damages. Civil Code section 3361.

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1843, 1871

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 17-A, *Verdicts*, ¶ 17:13 (The Rutter Group)

4 Levy et al., California Torts, Ch. 52, *Recovery for Medical Expense and Economic Loss*, § 52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.45, 177.46 (Matthew Bender)

3907–3918. Reserved for Future Use

3919. Survival Damages (Code Civ. Proc., § 377.34)

If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***] claim against [***name of defendant***] for the death of [***name of decedent***], you must also decide the amount of damages that [***name of decedent***] sustained before death and that [he/she/***nonbinary pronoun***] would have been entitled to recover because of [***name of defendant***]'s conduct[, including any [penalties/ [or] punitive damages] as explained in the other instructions that I will give you].**

[*Name of plaintiff***] may recover the following damages:**

[1. The reasonable cost of reasonably necessary medical care that [*name of decedent***] received;]**

[2. The amount of [income/earnings/salary/wages] that [he/she/*nonbinary pronoun***] lost before death;]**

[3. The reasonable cost of health care services that [*name of decedent***] would have provided to [***name of family member***] before [***name of decedent***]'s death;]**

[4. [*Specify other recoverable economic damage.***];]**

[5. The [pain/ [,/or] suffering/ [,/or] disfigurement] [*name of decedent***] suffered before [his/her/***nonbinary pronoun***] death.]**

You may not award damages for any loss for [*name of decedent***]'s shortened life span attributable to [his/her/***nonbinary pronoun***] death.**

New May 2019; Revised November 2019, May 2020; Revised and Renumbered from CACI No. 3903Q May 2022

Directions for Use

Give this instruction if a deceased person's estate claims survival damages for harm that the decedent incurred in the decedent's lifetime. This instruction addresses survival damages in a claim against a defendant who is alleged to have caused the decedent's death. However, survival damages are available for any claim incurred while alive, not just a claim based on the decedent's death. (See *County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 294 [87 Cal.Rptr.2d 441, 981 P.2d 68].) In a case that does not involve conduct that caused the decedent's death, modify the instruction to include the damages recoverable under the particular claim rather than the damages attributable to the death.

Survival damages can include punitive damages and penalties. (See Code Civ. Proc., § 377.34.) Include the bracketed language in the last sentence of the opening paragraph if either or both are sought. If punitive damages are claimed, give the appropriate instruction from CACI Nos. 3940–3949.

If items 1 and 2 are given, do not also give CACI No. 3903A, *Medical Expenses—Past and Future (Economic Damages)*, and CACI No. 3903C, *Past and Future Lost Earnings (Economic Damages),* as the future damages parts of those instructions are not applicable. Other 3903 group instructions may be omitted if their items of damages are included under item 3 and must not be given if they include future damages.

Though damages for pain, suffering, or disfigurement are generally not recoverable in a survival action (except at times in an elder abuse case), Code of Civil Procedure section 337.34(b) permits the recovery of these noneconomic damages by the decedent's personal representative or successor in interest for those actions or proceedings filed on or after January 1, 2022, and before January 1, 2026 (or if granted a preference under Code of Civil Procedure section 36 before January 1, 2022). (Code Civ. Proc., § 377.34; see *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1265 [45 Cal.Rptr.3d 222]; see also instructions in the 3100 Series, Elder Abuse and Dependent Adult Civil Protection Act.)

For actions or proceedings covered by section 337.34(b), and depending on the case, include item 5 (an item of noneconomic damages) and give CACI No. 3905, *Items of Noneconomic Damage*, with a version of CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, that includes only pain, suffering, or disfigurement. Note that many Sources and Authority below do not recognize the availability of noneconomic damages as a result of this temporary change in law. (Sen. Bill 447; Stats. 2021, ch. 448.)

Sources and Authority

- Survival Damages. Code of Civil Procedure section 377.34.
- Term-Limited Exception for Survival Damages. Code of Civil Procedure section 377.34(b).
- "In California, 'a cause of action for or against a person is not lost by reason of the person's death' and no 'pending action . . . abate[s] by the death of a party . . .' In a survival action by the deceased plaintiff's estate, the damages recoverable expressly exclude 'damages for pain, suffering, or disfigurement.' They do, however, include all 'loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages.' Thus, under California's survival law, an estate can recover not only the deceased plaintiff's lost wages, medical expenses, and any other pecuniary losses incurred before death, but also punitive or exemplary damages." (*County of Los Angeles, supra,* 21 Cal.4th at pp. 303–304, internal citations omitted.)
- "The first category consists of the reasonable value of nursing and other services that Decedent would have provided to his wife prior to his death, but was unable to provide due to his illness (replacement care). Again, [defendant] does not contest the recoverability of such damages here. Nor did it below. Such damages are recoverable. (See . . . CACI No. 3903E ["Loss of Ability to Provide Household Services (Economic Damage)"].)" (*Williams v. The Pep Boys Manny*

Moe & Jack of California (2018) 27 Cal.App.5th 225, 238 [238 Cal.Rptr.3d 809], internal citations omitted.)

- "The second category requires more discussion. That consists of the reasonable value of 24-hour nursing care that Decedent *would have provided* to his wife *after* his death and before she passed away in 2014, nearly four years later. As appellants explain this claim, 'to the extent his children were forced to provide gratuitous home health care and other household services to [wife] up to the time of her death, [Decedent's] estate is also entitled to recover those costs as damages since he had been providing those services for his wife before he died.' . . . The parties disagree as to whether such damages are recoverable. Appellants contend that they are properly recovered as ' "lost years" damages,' representing economic losses the decedent incurred during the period by which his life expectancy was shortened; [defendant], in contrast, contends that they are not recoverable because they were not 'sustained or incurred before death,' as required by section 377.34. We conclude that [defendant] has the better argument." (*Williams, supra,* 27 Cal.App.5th at p. 238, original italics.)
- "By expressly authorizing recovery of only penalties or punitive damages that the decedent would have been entitled to recover had the decedent lived, the Legislature necessarily implied that *other* categories of damages that the decedent would have been entitled to recover had the decedent lived would not be recoverable in a survival action." (*Williams, supra,* 27 Cal.App.5th at p. 239, original italics.)
- "In survival actions, . . . damages are narrowly limited to 'the loss or damage that the decedent sustained or incurred before death', which by definition excludes future damages. For a trial court to award ' "lost years" damages' in a survival action—that is, damages for 'loss of future economic benefits that [a decedent] would have earned during the period by which his life expectancy was shortened'—would collapse this fundamental distinction and render the plain language of 377.34 meaningless." (*Williams, supra,* 27 Cal.App.5th at p. 240, original italics, internal citations omitted.)
- "The same conclusion [that they are not recoverable in a survival action] would seem to follow as to the trial court's award of damages for the value of Decedent's lost pension benefits and Social Security benefits." (*Williams, supra,* 27 Cal.App.5th at p. 240, fn. 21.)
- "[T]here is at least one exception to the rule that damages for the decedent's predeath pain and suffering are not recoverable in a survivor action. Such damages are expressly recoverable in a survivor action under the Elder Abuse Act if certain conditions are met." (*Quiroz, supra,* 140 Cal.App.4th at p. 1265.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 27

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, § 55.21 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions*,

§ 181.45 (Matthew Bender)

6 California Points and Authorities, Ch. 66, *Death and Survival Actions*, § 66.63 et seq. (Matthew Bender)

3920. Loss of Consortium (Noneconomic Damage)

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] has been harmed by the injury to [his/her/*nonbinary pronoun*] [husband/wife]. If you decide that [*name of injured spouse*] has proved [his/her/*nonbinary pronoun*] claim against [*name of defendant*], you also must decide how much money, if any, will reasonably compensate [*name of plaintiff*] for loss of [his/her/*nonbinary pronoun*] [husband/wife]'s companionship and services, including:

1. **The loss of love, companionship, comfort, care, assistance, protection, affection, society, and moral support; and**
2. **The loss of the enjoyment of sexual relations [or the ability to have children].**

[[*Name of plaintiff*] may recover for harm [he/she/*nonbinary pronoun*] proves [he/she/*nonbinary pronoun*] has suffered to date and for harm [he/she/*nonbinary pronoun*] is reasonably certain to suffer in the future.

For future harm, determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff*] for that harm. This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]

No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

Do not include in your award any compensation for the following:

1. **The loss of financial support from [*name of injured spouse*];**
2. **Personal services, such as nursing, that [*name of plaintiff*] has provided or will provide to [*name of injured spouse*];**
3. **Any loss of earnings that [*name of plaintiff*] has suffered by giving up employment to take care of [*name of injured spouse*]; or**
4. **The cost of obtaining domestic household services to replace services that would have been performed by [*name of injured spouse*].**

New September 2003; Revised December 2010

Directions for Use

Loss of consortium is considered a noneconomic damages item under Proposition 51. (Civ. Code, § 1431.2(b)(2).) Loss of future consortium is recoverable, including

loss of consortium because of reduced life expectancy. (See *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 799–800 [108 Cal.Rptr.3d 806, 230 P.3d 342].) In such a case, this instruction may need to be modified.

Give the second and third paragraphs if recovery for loss of future consortium is sought. Future noneconomic damages should not be reduced to present value. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585].)

Sources and Authority

- Noneconomic Damages for Loss of Consortium. Civil Code section 1431.2(b)(2).
- "We . . . declare that in California each spouse has a cause of action for loss of consortium, as defined herein, caused by a negligent or intentional injury to the other spouse by a third party." (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 408 [115 Cal.Rptr. 765, 525 P.2d 669].)
- "There are four elements to a cause of action for loss of consortium: '(1) a valid and lawful marriage between the plaintiff and the person injured at the time of the injury; [¶] (2) a tortious injury to the plaintiff's spouse; [¶] (3) loss of consortium suffered by the plaintiff; and [¶] (4) the loss was proximately caused by the defendant's act.' " (*Vanhooser v. Superior Court* (2012) 206 Cal.App.4th 921, 927 [142 Cal.Rptr.3d 230].)
- "The concept of consortium includes not only loss of support or services; it also embraces such elements as love, companionship, comfort, affection, society, sexual relations, the moral support each spouse gives the other through the triumph and despair of life, and the deprivation of a spouse's physical assistance in operating and maintaining the family home." (*Ledger v. Tippitt* (1985) 164 Cal.App.3d 625, 633 [210 Cal.Rptr. 814], disapproved of on other grounds in *Elden v. Sheldon* (1988) 46 Cal.3d 267, 277 [250 Cal.Rptr. 254, 758 P.2d 582].)
- "Since he has no cause of action in tort his spouse has no cause of action for loss of consortium." (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1067 [272 Cal.Rptr. 250].)
- "The California Supreme Court in *Rodriguez, supra,* 12 Cal.3d at page 409, expressly recognized the right to recover damages for the 'loss or impairment' of the plaintiff's rights of consortium, and we see no basis to conclude that a loss of consortium must be so extensive as to be considered complete in order to be compensable. Instead, a partial loss, or diminution, of consortium is compensable." (*Mealy v. B-Mobile, Inc.* (2011) 195 Cal.App. 4th 1218, 1224 [124 Cal.Rptr.3d 804].)
- "[S]hould [husband] prevail in his own cause of action against these defendants, he will be entitled to recover, among his medical expenses, the full cost of whatever home nursing is necessary. To allow [wife] also to recover the value of her nursing services, however personalized, would therefore constitute double recovery." (*Rodriguez, supra,* 12 Cal.3d at p. 409, internal citations omitted.)
- "For the same reason, [wife] cannot recover for the loss of her earnings and

earning capacity assertedly incurred when she quit her job in order to furnish [husband] these same nursing services. To do so would be to allow her to accomplish indirectly that which we have just held she cannot do directly." (*Rodriguez, supra,* 12 Cal.3d at p. 409.)

- "The deprivation of a husband's physical assistance in operating and maintaining the home is a compensable item of loss of consortium." (*Rodriguez, supra,* 12 Cal.3d at p. 409, fn. 31, internal citations omitted.)
- "Although the trial court labeled the damages awarded [plaintiff] as being for 'loss of consortium' (a noneconomic damages item under Proposition 51), much of the testimony at trial actually involved the 'costs of obtaining substitute domestic services' on her behalf (an economic damage item in the statute)." (*Kellogg v. Asbestos Corp. Ltd.* (1996) 41 Cal.App.4th 1397, 1408 [49 Cal.Rptr.2d 256].)
- "Whether the degree of harm suffered by the plaintiff's spouse is sufficiently severe to give rise to a cause of action for loss of consortium is a matter of proof. When the injury is emotional rather than physical, the plaintiff may have a more difficult task in proving negligence, causation, and the requisite degree of harm; but these are questions for the jury, as in all litigation for loss of consortium. In *Rodriguez* we acknowledged that the loss is 'principally a form of mental suffering,' but nevertheless declared our faith in the ability of the jury to exercise sound judgment in fixing compensation. We reaffirm that faith today." (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 933 [167 Cal.Rptr. 831, 616 P.2d 813], internal citations omitted.)
- "We . . . conclude that we should not recognize a cause of action by a child for loss of parental consortium." (*Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 451 [138 Cal.Rptr. 302, 563 P.2d 858].)
- A parent may not recover loss of consortium damages for injury to his or her child. (*Baxter v. Superior Court* (1977) 19 Cal.3d 461 [138 Cal.Rptr. 315, 563 P.2d 871].)
- Unmarried cohabitants may not recover damages for loss of consortium. (*Elden, supra,* 46 Cal.3d at p. 277.)
- Under Proposition 51, damages for loss of consortium may be reduced by the negligence of the injured spouse. (*Craddock v. Kmart Corp.* (2001) 89 Cal.App.4th 1300, 1309–1310 [107 Cal.Rptr.2d 881]; *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1810–1811 [34 Cal.Rptr.2d 732].)
- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)
- "[I]n a common law action for loss of consortium, the plaintiff can recover not

only for the loss of companionship and affection through the time of the trial but also for any future loss of companionship and affection that is sufficiently certain to occur. In *Rodriguez*, we held that when a plaintiff's spouse is permanently disabled as a result of a defendant's wrongdoing, future (posttrial) loss of companionship and affection is sufficiently certain to permit an award of prospective damages. If instead the injured spouse will soon die as a result of his or her injuries, the future (posttrial) loss of companionship and affection is no less certain. In short, we see no reason to make an exception here to the general rule permitting an award of prospective damages in civil tort actions. Therefore, under long-standing principles of tort liability, the recovery of prospective damages in a common law action for loss of consortium includes damages for lost companionship and affection resulting from the anticipated (and sufficiently certain) premature death of the injured spouse." (*Boeken*, *supra,* 48 Cal.4th at pp. 799–800, internal citation omitted.)

- "[T]he plaintiff in a common law action for loss of consortium may not recover for loss during a period in which the companionship and affection of the injured spouse would have been lost anyway, irrespective of the defendant's wrongdoing, and therefore the life expectancy of the plaintiff and the life expectancy of the injured spouse, whichever is shorter, necessarily places an outer limit on damages." (*Boeken*, *supra,* 48 Cal.4th at p. 800.)
- "[W]here an injury to a spouse that in turn causes injury to the plaintiff's right to consortium in the marital relationship is not discovered or discoverable until after the couple's marriage, and the underlying cause of action thus accrues during the marriage, the plaintiff has a valid claim for loss of consortium even though the negligent conduct may have predated the marriage." (*Leonard v. John Crane, Inc.* (2012) 206 Cal.App.4th 1274, 1290 [142 Cal.Rptr.3d 700]; see also *Vanhooser, supra,* 206 Cal.App.4th at pp. 927–930 [reaching same result].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1857–1864

California Tort Damages (Cont.Ed.Bar) Loss of Consortium, §§ 2.6–2.7

4 Levy et al., California Torts, Ch. 56, *Loss of Consortium*, § 56.08 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 354, *Loss of Consortium,* §§ 354.12, 354.14 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* § 64.25 (Matthew Bender)

California Civil Practice: Torts §§ 10:10–10:16 (Thomson Reuters)

3921. Wrongful Death (Death of an Adult)

If you decide that [*name of plaintiff*] has proved [his/her/*nonbinary pronoun*] claim against [*name of defendant*] for the death of [*name of decedent*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the death of [*name of decedent*]. This compensation is called "damages."

[*Name of plaintiff*] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.

The damages claimed by [*name of plaintiff*] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.

[*Name of plaintiff*] claims the following economic damages:

1. **The financial support, if any, that [*name of decedent*] would have contributed to the family during either the life expectancy that [*name of decedent*] had before [his/her/*nonbinary pronoun*] death or the life expectancy of [*name of plaintiff*], whichever is shorter;**
2. **The loss of gifts or benefits that [*name of plaintiff*] would have expected to receive from [*name of decedent*];**
3. **Funeral and burial expenses; and**
4. **The reasonable value of household services that [*name of decedent*] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff*] also claims the following noneconomic damages:

1. **The loss of [*name of decedent*]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support[; [and]/.]**

[2. The loss of the enjoyment of sexual relations[; [and]/.]]

[3. The loss of [*name of decedent*]'s training and guidance.]

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[For these noneconomic damages, determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff*] for those damages. This amount of noneconomic damages

should not be further reduced to present cash value because that reduction should only be performed with respect to future economic damages.]

In determining [*name of plaintiff*]'s loss, do not consider:

1. **[*Name of plaintiff*]'s grief, sorrow, or mental anguish;**
2. **[*Name of decedent*]'s pain and suffering; or**
3. **The poverty or wealth of [*name of plaintiff*].**

In deciding a person's life expectancy, you may consider, among other factors, the average life expectancy of a person of that age, as well as that person's health, habits, activities, lifestyle, and occupation. According to [*insert source of information*], the average life expectancy of a [*insert number*]-year-old [male/female] is [*insert number*] years, and the average life expectancy of a [*insert number*]-year-old [male/female] is [*insert number*] years. This published information is evidence of how long a person is likely to live but is not conclusive. Some people live longer and others die sooner.

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003; Revised December 2005, February 2007, April 2008, December 2009, June 2011, December 2013, May 2020

Directions for Use

If the decedent recovered damages for lost earning capacity in the decedent's lifetime, an heir's recovery for lost financial support (economic damages item 1) is to be measured by the decedent's physical condition at the time of death. There is no similar limitation on recovery for loss of consortium (noneconomic damages item 1). (*Boeken v. Philip Morris USA Inc.* (2013) 217 Cal.App.4th 992, 997–1000 [159 Cal.Rptr.3d 195]; see *Blackwell v. American Film Co.* (1922) 189 Cal. 689, 694 [209 P. 999].)

One of the life-expectancy subjects in the second sentence of the second-to-last paragraph should be the decedent, and the other should be the plaintiff. This definition is intended to apply to the element of damages pertaining to the financial support that the decedent would have provided to the plaintiff.

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table—Male and Life Expectancy Table—Female, following the Damages series.) The first column shows the age interval between the two exact ages indicated. For example, 50–51 means the one-year interval between the fiftieth and fifty-first birthdays.

For an instruction, worksheets, and tables for use in reducing future economic damages to present value, see CACI No. 3904B, *Use of Present-Value Tables*.

The paragraph concerning not reducing noneconomic damages to present cash value is bracketed because the law is not completely clear. It has been held that all damages, pecuniary and nonpecuniary, must be reduced to present value. (See *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87]; cf. Restat.2d of Torts, § 913A [future *pecuniary* losses must be reduced to present value].) The view of the court in *Fox* was that damages for lost value of society, comfort, care, protection and companionship must be monetarily quantified, and thus become pecuniary and subject to reduction to present value. However, the California Supreme Court subsequently held that with regard to future pain and suffering, the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]), so there is no further reduction to present value. (See CACI No. 3904A, *Present Cash Value*, and CACI No. 3904B, *Use of Present-Value Tables*.) While it seems probable that *Salgado* should apply to wrongful death actions, no court has expressly so held.

Assuming that *Salgado* applies to wrongful death, this paragraph is important to ensure that the jury does not apply any tables and worksheets provided to reduce future economic damages to present value (see CACI No. 3904B) to the noneconomic damages also. Note that because only future economic damages are to be reduced to present value, the jury must find separate amounts for economic and noneconomic damages and for past and present economic damages. (See CACI No. VF-3905, *Damages for Wrongful Death (Death of an Adult)*.)

Sources and Authority

- Cause of Action for Wrongful Death. Code of Civil Procedure section 377.60.
- Damages for Wrongful Death. Code of Civil Procedure section 377.61.
- "Generally, wrongful death claims are legally distinct from claims for personal injury and loss of consortium. 'A cause of action for wrongful death is a statutory claim that compensates specified heirs of the decedent for losses suffered as a result of a decedent's death.' Although each heir has a 'personal and separate' claim, the wrongful death statutes ordinarily require joint litigation of the heirs' claims in order to prevent a series of suits against the tortfeasor. However, that requirement does not deprive a court of subject matter jurisdiction to try a wrongful death action when an heir fails to participate in the action." (*LAOSD Asbestos Cases* (2018) 28 Cal.App.5th 862, 872 [240 Cal.Rptr.3d 1], internal citations omitted.)
- "A cause of action for wrongful death is purely statutory in nature, and therefore 'exists only so far and in favor of such person as the legislative power may declare.' " (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304], internal citations omitted.)
- "There are three distinct public policy considerations involved in the legislative

creation of a cause of action for wrongful death: '(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.' " (*Barrett, supra,* 222 Cal.App.3d at p. 1185, internal citation omitted.)

- "The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the *pecuniary loss* suffered by the *heirs*." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [191 Cal.Rptr.3d 766], original italics.)
- " '[W]rongful act' as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce." (*Barrett, supra,* 222 Cal.App.3d at p. 1191.)
- "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Novak v. Continental Tire North America* (2018) 22 Cal.App.5th 189, 195 [231 Cal.Rptr.3d 324].)
- "Under Code of Civil Procedure section 377.61, damages for wrongful death "are measured by the financial benefits the heirs were receiving at the time of death, those reasonably to be expected in the future, and the monetary equivalent of loss of comfort, society, and protection." (*Boeken, supra,* 217 Cal.App.4th at p. 997.)
- "These benefits include the personal services, advice, and training the heirs would have received from the deceased, and the value of her society and companionship. 'The services of children, elderly parents, or nonworking spouses often do not result in measurable net income to the family unit, yet unquestionably the death of such a person represents a substantial "injury" to the family for which just compensation should be paid.' " (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)
- " 'The pecuniary value of the society, comfort, and protection that is lost through the wrongful death of a spouse, parent, or child may be considerable in cases where, for instance, the decedent had demonstrated a "kindly demeanor" toward the statutory beneficiary and rendered assistance or "kindly offices" to that person. [Citation.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 198–199 [191 Cal.Rptr.3d 263].)
- "Factors such as the closeness of a family unit, the depth of their love and affection, and the character of the decedent as kind, attentive, and loving are proper considerations for a jury assessing noneconomic damages . . . ." (*Soto, supra,* 239 Cal.App.4th at p. 201.)
- "California permits recovery in a child's wrongful death action for loss of a parent's consortium." (*Boeken, supra,* 217 Cal.App.4th at pp. 997–998.)
- "Code of Civil Procedure section 377 has long allowed the recovery of funeral expenses in California wrongful death actions." (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209].)

- "Where, as here, decedent was a husband and father, a significant element of damages is the loss of financial benefits he was contributing to his family by way of support at the time of his death and that support reasonably expected in the future. The total future lost support must be reduced by appropriate formula to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 520–521 [196 Cal.Rptr. 82], internal citations omitted.)
- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount *in current dollars paid at the time of judgment* that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647, original italics.)
- "The California statutes and decisions . . . have been interpreted to bar the recovery of punitive damages in a wrongful death action." (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14, 551 P.2d 334], internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)
- "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action." (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022], internal citations omitted.)
- "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra,* 19 Cal.3d at p. 69.)
- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin, supra,* 148 Cal.App.3d at pp. 535–536.)
- "[W]here all statutory plaintiffs, properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra,* 148 Cal.App.3d at p. 536.)
- "We note that the court instructed the jury that in determining pecuniary loss

they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with 'the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased. . . .' This was a correct statement of the law." (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 120–121 [34 Cal.Rptr. 754], internal citation omitted.)

- "It is the shorter expectancy of life that is to be taken into consideration; for example; if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents." (*Parsons v. Easton* (1921) 184 Cal. 764, 770–771 [195 P. 419], internal citation omitted.)
- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen, supra,* 109 Cal.App.3d at p. 424, internal citations omitted.)
- "Accordingly, the trial court in this case did not err in refusing [defendant]'s two proposed jury instructions, and in denying its request to modify CACI No. 3921, its motion for a directed verdict, its motion for a judgment notwithstanding the verdict, and its motion for a new trial, all of which were based on the erroneous ground that [plaintiff]'s loss of consortium damages were to be measured from [decedent]'s physical condition at the time of his death." (*Boeken, supra*, 217 Cal.App.4th at p. 1000.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1873–1880

California Tort Damages (Cont.Ed.Bar 2d ed.) Wrongful Death, §§ 3.1–3.58

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, §§ 55.10–55.13 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.163–177.167 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.25 (Matthew Bender)

California Civil Practice: Torts §§ 23:8–23:8.2 (Thomson Reuters)

3922. Wrongful Death (Parents' Recovery for Death of a Minor Child)

If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***] claim against [***name of defendant***] for the death of [***name of minor***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the death of [***name of minor***]. This compensation is called "damages."**

[*Name of plaintiff***] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.**

The damages claimed by [*name of plaintiff***] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.**

[*Name of plaintiff***] claims the following economic damages:**

1. **The value of the financial support, if any, that [***name of minor***] would have contributed to the family during either the life expectancy that [***name of minor***] had before [his/her/***nonbinary pronoun***] death or the life expectancy of [***name of plaintiff***], whichever is shorter;**
2. **The loss of gifts or benefits that [***name of plaintiff***] could have expected to receive from [***name of minor***];**
3. **Funeral and burial expenses; and**
4. **The reasonable value of household services that [***name of minor***] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff***] also claims the following noneconomic damages: The loss of [***name of minor***]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support.**

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[For these noneconomic damages, determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff***] for those damages. This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to future economic damages.]**

Do not include in your award any compensation for the following:

1. **[***Name of plaintiff***]'s grief, sorrow, or mental anguish; or**
2. **[***Name of minor***]'s pain and suffering.**

In computing these damages, you should deduct the present cash value of the probable costs of [*name of minor***]'s support and education.**

In deciding a person's life expectancy, consider, among other factors, that person's health, habits, activities, lifestyle, and occupation. Life expectancy tables are evidence of a person's life expectancy but are not conclusive.

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003; Revised December 2005, April 2008, December 2009, June 2011

Directions for Use

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table—Male and Life Expectancy Table—Female, following the Damages series.) The first column shows the age interval between the two exact ages indicated. For example, 50–51 means the one-year interval between the fiftieth and fifty-first birthdays.

For an instruction, worksheets, and tables for use in reducing future economic damages to present value, see CACI No. 3904B, *Use of Present-Value Tables*.

The paragraph concerning not reducing noneconomic damages to present cash value is bracketed because the law is not completely clear. It has been held that all damages, pecuniary and nonpecuniary, must be reduced to present value. (See *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87]; cf. Restat. 2d of Torts, § 913A [future *pecuniary* losses must be reduced to present value].) The view of the court in *Fox* was that damages for lost value of society, comfort, care, protection and companionship must be monetarily quantified, and thus become pecuniary and subject to reduction to present value. However, the California Supreme Court subsequently held that with regard to future pain and suffering, the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]), so there is no further reduction to present value. (See CACI No. 3904A, *Present Cash Value*, and CACI No. 3904B, *Use of Present-Value Tables*.) While it seems probable that *Salgado* should apply to wrongful death actions, no court has expressly so held.

Assuming that *Salgado* applies to wrongful death, this paragraph is important to

ensure that the jury does not apply any tables and worksheets provided to reduce future economic damages to present value (see CACI No. 3904B) to the noneconomic damages also. Note that because only future economic damages are to be reduced to present value, the jury must find separate amounts for economic and noneconomic damages and for past and present economic damages. (See CACI No. VF-3906, *Damages for Wrongful Death (Parents' Recovery for Death of a Minor Child)*.)

Sources and Authority

- Cause of Action for Wrongful Death. Code of Civil Procedure section 377.60.
- Damages for Wrongful Death. Code of Civil Procedure section 377.61.
- "Generally, wrongful death claims are legally distinct from claims for personal injury and loss of consortium. 'A cause of action for wrongful death is a statutory claim that compensates specified heirs of the decedent for losses suffered as a result of a decedent's death.' Although each heir has a 'personal and separate' claim, the wrongful death statutes ordinarily require joint litigation of the heirs' claims in order to prevent a series of suits against the tortfeasor. However, that requirement does not deprive a court of subject matter jurisdiction to try a wrongful death action when an heir fails to participate in the action." (*LAOSD Asbestos Cases* (2018) 28 Cal.App.5th 862, 872 [240 Cal.Rptr.3d 1], internal citations omitted.)
- "A cause of action for wrongful death is purely statutory in nature, and therefore 'exists only so far and in favor of such person as the legislative power may declare.' " (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304], internal citations omitted.)
- "Where the deceased was a minor child, recovery is based on the present value of reasonably probable future services and contributions, deducting the probable cost of rearing the child." (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1695.)
- "There is authority in such cases for deducting from the loss factors—including the pecuniary loss a parent suffers by being deprived of the comfort, protection and society of a child—the prospective cost to the parent of the child's support and education. [¶] Although neither the loss factors nor such offsets are readily measurable in a particular case—nor need they be measured in precise terms of dollars and cents—in the case at bench the jury had before it for consideration a court order subject to mathematical computation which required plaintiff to pay support for his child in the sum of $125 monthly. The jury was entitled and required to take into consideration the prospective cost to plaintiff of the boy's maintenance and rearing, and they may well have offset their reasonable appraisal of such costs, under the general verdict, against any pecuniary loss which they found that plaintiff suffered." (*Fields v. Riley* (1969) 1 Cal.App.3d 308, 315 [81 Cal.Rptr. 671], internal citations omitted.)
- "There are three distinct public policy considerations involved in the legislative

creation of a cause of action for wrongful death: '(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.' " (*Barrett, supra,* 222 Cal.App.3d at p. 1185, internal citation omitted.)

- "We therefore conclude, on this basis as well, that 'wrongful act' as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce." (*Barrett, supra,* 222 Cal.App.3d at p. 1191.)
- "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105 [11 Cal.Rptr.2d 468], internal citation omitted.)
- "Damages for wrongful death are not limited to compensation for losses with 'ascertainable economic value.' Rather, the measure of damages is the value of the benefits the heirs could reasonably expect to receive from the deceased if she had lived." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)
- "Code of Civil Procedure section 377 has long allowed the recovery of funeral expenses in California wrongful death actions." (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209].)
- "The California statutes and decisions . . . have been interpreted to bar the recovery of punitive damages in a wrongful death action." (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14, 551 P.2d 334], internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)
- "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action." (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022], internal citations omitted.)
- "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra,* 19 Cal.3d at p. 69.)
- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount *in current dollars paid at the time of judgment* that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647, original italics.)
- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with

minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish [that] apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 535–536 [196 Cal.Rptr. 82].)

- "[W]here all statutory plaintiffs properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra,* 148 Cal.App.3d at p. 536.)
- "We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with 'the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased. . . .' This was a correct statement of the law." (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 120–121 [34 Cal.Rptr. 754], internal citation omitted.)
- "It is the shorter expectancy of life that is to be taken into consideration; for example, if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents." (*Parsons v. Easton* (1921) 184 Cal. 764, 770–771 [195 P. 419], internal citation omitted.)
- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen, supra,* 109 Cal.App.3d at p. 424, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1878

California Tort Damages (Cont.Ed.Bar) Wrongful Death, §§ 3.1–3.52

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, §§ 55.10–55.13 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.162–177.167 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.25 (Matthew Bender)

California Civil Practice: Torts §§ 23:8–23:8.2 (Thomson Reuters)

3923. Public Entities—Collateral Source Payments (Gov. Code, § 985)

You must award damages in an amount that fully compensates [*name of plaintiff*] for [his/her/*nonbinary pronoun*/its] damages in accordance with instructions from the court. You may not speculate or consider any other possible sources of benefit that [*name of plaintiff*] may have received. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.

New September 2003; Revised June 2016

Directions for Use

Per Government Code section 985(j), this language is mandatory.

Sources and Authority

- Collateral Source Evidence Inadmissible in Action Against Public Entity. Government Code section 985(b).
- Mandatory Instruction. Government Code section 985(j).
- "[T]he [collateral source rule] also covers payments *such as pensions* paid to a plaintiff who, as a result of his injuries, can no longer work. Like insurance benefits, such payments are considered to have been secured by the plaintiff's efforts as part of his employment contract, and the tortfeasor is entitled to no credit for them. 'With respect to pension benefits, the justification for the rule is that the plaintiff secured the benefits by his labors, and the fact that he may obtain a double recovery is not relevant.' Pension benefits are a commonly cited example of a collateral source that may not be used to decrease a plaintiff's recovery." (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 872–873 [136 Cal.Rptr.3d 259], original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1811

California Tort Damages (Cont.Ed.Bar) Restrictions on Recovery, § 15.21

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.50 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Torts*, § 64.190 et seq. (Matthew Bender)

California Civil Practice: Torts § 31:47 (Thomson Reuters)

3924. No Punitive Damages

You must not include in your award any damages to punish or make an example of [*name of defendant***]. Such damages would be punitive damages, and they cannot be a part of your verdict. You must award only the damages that fairly compensate [***name of plaintiff***] for [his/her/** *nonbinary pronoun***/its] loss.**

New September 2003

Directions for Use

Do not use this instruction if punitive damages are being sought in the phase of the trial in which these instructions are given.

Sources and Authority

- No Governmental Liability for Punitive Damages. Government Code section 818.
- "Punitive damages are not permitted in wrongful death actions." (*Cortez v. Macias* (1980) 110 Cal.App.3d 640, 657 [167 Cal.Rptr. 905].)
- "[P]unitive damages are prohibited in an action against a public entity." (*Pearl v. City of Los Angeles* (2019) 36 Cal.App.5th 475, 486 [248 Cal.Rptr.3d 508].)
- "The punitive damages theory cannot be predicated on the breach of contract cause of action without an underlying tort." (*Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 536 [238 Cal.Rptr. 363], internal citations omitted.)
- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1751

California Tort Damages (Cont.Ed.Bar) Punitive Damages, § 14.3

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.05, 54.08 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

3925. Arguments of Counsel Not Evidence of Damages

The arguments of the attorneys are not evidence of damages. Your award must be based on your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during trial.

New September 2003

Directions for Use

If a pleading is admitted into evidence, the following may be added: "The amount of damages that [*name of plaintiff*] has claimed in [his/her/*nonbinary pronoun*] written pleadings is not evidence of [*name of plaintiff*]'s damages."

Sources and Authority

- "[T]he trial court can and should instruct the jury that the argument of counsel as to the amount of damages claimed by the plaintiff is not evidence and that its duty is only to award such damages as will reasonably compensate the plaintiff for his pain and suffering." (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 180–181 [53 Cal.Rptr. 129, 417 P.2d 673], internal citation omitted.)
- Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1854

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.74

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, §§ 51.50–51.51 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

3926. Settlement Deduction

You have heard evidence that [*name of plaintiff*] has settled [his/her/*nonbinary pronoun*/its] claim against [*name of defendant*]. Any award of damages to [*name of plaintiff*] should be made without considering any amount that [he/she/*nonbinary pronoun*/it] may have received under this settlement. I will make the proper deduction from any award of damages.

New September 2003; Revised December 2010

Sources and Authority

- Effect of Good-Faith Settlement. Code of Civil Procedure section 877.
- "When the plaintiff stipulates to the fact and amount of settlement before the court, an approved procedure is for the court to reduce the verdict award by the amount paid in settlement before entering judgment on the verdict." (*Syverson v. Heitmann* (1985) 171 Cal.App.3d 106, 111 [214 Cal.Rptr. 581], internal citations omitted.)
- Courts have held that it is "proper to exclude evidence of the pretrial settlement by one joint tortfeasor from the jury's consideration, leaving it to the court to apply Code of Civil Procedure section 877 to reduce the verdict." (*Knox v. County of Los Angeles* (1980) 109 Cal.App.3d 825, 834–835 [167 Cal.Rptr. 463], internal citation omitted.)
- "[W]here there is an admission 'that a settlement has been made with one or more joint tortfeasors in a certain amount there is no factual question to be resolved by the jury respecting the settlement.' " (*Albrecht v. Broughton* (1970) 6 Cal.App.3d 173, 177 [85 Cal.Rptr. 659], internal citation omitted.)
- "Where the purpose of introducing evidence of a settlement is to reduce any recovery that might be awarded pro tanto, this result can be achieved by a simple calculation made by the court after the verdict has been rendered." (*Shepherd v. Walley* (1972) 28 Cal.App.3d 1079, 1082 [105 Cal.Rptr. 387], footnote omitted.)
- "The presentation of evidence concerning the amount or fact of settlement to the jury . . . is not only confusing, but also can lead to abuse in argument as it did here." (*Shepherd, supra,* 28 Cal.App.3d at p. 1083.)
- "[E]vidence of the fact and amount of settlement made by [plaintiff] with [settling witness] might be admissible under proper limiting instructions for the purpose of showing bias since he was a witness." (*Shepherd, supra,* 28 Cal.App.3d at p. 1082, fn. 2, internal citation omitted.)
- "Under Civil Code section 1431.2, a defendant is only responsible for its share of noneconomic damages as that share has been determined by the jury.

'Therefore, a nonsettling defendant may not receive any setoff under [Code of Civil Procedure] section 877 for the portion of a settlement by another defendant that is attributable to noneconomic damages.' After application of Civil Code section 1431.2, '. . . there is no amount that represents a common claim for noneconomic damages against the settling and nonsettling defendants' and thus Code of Civil Procedure section 877 has no applicability to noneconomic damages." (*Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1319 [87 Cal.Rptr.2d 363], internal citations omitted.)

- "[A]n undifferentiated settlement must be apportioned between economic and noneconomic damages so that the setoff applies only to economic damages." (*Ehret, supra,* 73 Cal.App.4th at p. 1320, internal citation omitted.)
- It has been held that, "[i]n the absence of any other allocation . . . the percentage of economic damages reflected in the jury verdict [should] be applied to determine the percentage of the settlements to be offset." (*Ehret, supra,* 73 Cal.App.4th at p. 1320, internal citation omitted.)
- "Where there is a complete dismissal of a defendant, and a plaintiff seeks an allocation of the settlement with that defendant for purposes of limiting the setoff against another defendant's liability, the burden is on the plaintiff to establish facts to justify the allocation." (*Ehret, supra,* 73 Cal.App.4th at p. 1322, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 204, 207

California Tort Damages (Cont.Ed.Bar) Restrictions on Recovery, § 15.12

4 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, §§ 74.20–74.28 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.45 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution*, § 300.73 (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.150 et seq. (Matthew Bender)

3927. Aggravation of Preexisting Condition or Disability

[*Name of plaintiff***] is not entitled to damages for any physical or emotional condition that [he/she/***nonbinary pronoun***] had before [***name of defendant***]'s conduct occurred. However, if [***name of plaintiff***] had a physical or emotional condition that was made worse by [***name of defendant***]'s wrongful conduct, you must award damages that will reasonably and fairly compensate [him/her/***nonbinary pronoun***] for the effect on that condition.**

New September 2003

Sources and Authority

- "[A] tortfeasor may be held liable in an action for damages where the effect of his negligence is to aggravate a preexisting condition or disease. Plaintiff may recover to the full extent that his condition has worsened as a result of defendant's tortious act." (*Sanchez v. Kern Emergency Medical Transportation Corp.* (2017) 8 Cal.App.5th 146, 168 [213 Cal.Rptr.3d 830].)
- "It is by no means self-evident that an act which precipitates a flare-up of a preexisting condition should be considered a 'cause which, in natural and continuous sequence, produces the injury.' Thus, general instructions on proximate cause were not sufficient to inform the jury on the more specific issue of aggravation of preexisting conditions." (*Ng v. Hudson* (1977) 75 Cal.App.3d 250, 256 [142 Cal.Rptr. 69], internal citations omitted, overruled on another ground in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574 [34 Cal.Rptr.2d 607, 882 P.2d 298].)
- "[An instruction on preexisting condition] is proper only where the injured is the claimant seeking compensation for his injuries. That is not the case here in a wrongful death action." (*Vecchione v. Carlin* (1980) 111 Cal.App.3d 351, 358 [168 Cal.Rptr. 571].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1855

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.86

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, § 51.23[3] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.45 (Matthew Bender)

California Civil Practice: Torts § 5:11 (Thomson Reuters)

3928. Unusually Susceptible Plaintiff

You must decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for all damages caused by the wrongful conduct of [*name of defendant*], even if [*name of plaintiff*] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

New September 2003

Sources and Authority

- "That a plaintiff without such a [preexisting] condition would probably have suffered less injury or no injury does not exonerate a defendant from liability." (*Ng v. Hudson* (1977) 75 Cal.App.3d 250, 255 [142 Cal.Rptr. 69], internal citations omitted, overruled on another ground in *Soule v. G.M. Corp.* (1994) 8 Cal.4th 548, 574 [34 Cal.Rptr.2d 607, 882 P.2d 298].)
- "The tortfeasor takes the person he injures as he finds him. If, by reason of some preexisting condition, his victim is more susceptible to injury, the tortfeasor is not thereby exonerated from liability." (*Rideau v. Los Angeles Transit Lines* (1954) 124 Cal.App.2d 466, 471 [268 P.2d 772], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1855

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.86

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, § 51.23[3] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

California Civil Practice: Torts § 5:11 (Thomson Reuters)

3929. Subsequent Medical Treatment or Aid

If you decide that [*name of defendant*] is legally responsible for [*name of plaintiff*]'s harm, [he/she/*nonbinary pronoun*/it] is also responsible for any additional harm resulting from the acts of others in providing medical treatment or other aid that [*name of plaintiff*]'s injury reasonably required, even if those acts were negligently performed.

New September 2003; Revised December 2007, October 2008

Directions for Use

Under Proposition 51 (Civ. Code § 1431.2), the original tortfeasor is entitled to have the jury allocate fault to any subsequent tortfeasors with regard to the subsequent aggravation of the injury. Each is responsible only for a comparative share of the noneconomic damages attributable to the aggravated injury. (*Henry v. Superior Court* (2008) 160 Cal.App.4th 440, 455 [72 Cal.Rptr.3d 808]; see also *Marina Emergency Medical Group v. Superior Court* (2000) 84 Cal.App.4th 435 [100 Cal.Rptr.2d 866].)

Sources and Authority

- "It has long been the rule that a tortfeasor responsible for the original accident is also liable for injuries or death occurring during the course of medical treatment to treat injuries suffered in that accident. In *Ash v. Mortensen* (1944) 24 Cal.2d 654 [150 P.2d 876], the Supreme Court stated: 'It is settled that where one who has suffered personal injuries by reason of the tortious act of another exercises due care in securing the services of a doctor and his injuries are aggravated by the negligence of such doctor, the law regards the act of the original wrongdoer as a proximate cause of the damages flowing from the subsequent negligent medical treatment and holds him liable therefor.' " (*Anaya v. Superior Court* (2000) 78 Cal.App.4th 971, 974 [93 Cal.Rptr.2d 228].)
- "Obviously, if the original tortfeasor is liable for injuries or death suffered during the course of the treatment of injuries suffered in the accident, the original tortfeasor is liable for injuries or death suffered during transportation of the victim to a medical facility for treatment of the injuries resulting from the accident." (*Anaya, supra,* 78 Cal.App.4th at p. 975.)
- "To the extent damages for [plaintiff]'s injured shoulder can in fact be divided by causation into distinct component parts—the original injury that resulted from the fall at the [defendants]' property and the aggravation of that injury caused by [plaintiff]'s negligent treatment by . . . physicians—liability for each indivisible component part should be considered separately. The [defendants], if they were negligent, are solely responsible for the initial injury; liability for the indivisible enhanced or aggravated injury, however, is properly apportioned between the [defendants] and the . . . physicians in accordance with the rules of comparative

fault and section 1431.2." (*Henry, supra,* 160 Cal.App.4th at p. 455.)

- "While it is true the original tortfeasor is liable for additional harm (even death) resulting from the negligent care and treatment of the original injury by physicians and hospitals, such liability is not limited to negligently caused additional harm or that caused by malpractice." (*Hastie v. Handeland* (1969) 274 Cal.App.2d 599, 604–605 [79 Cal.Rptr. 268], internal citations and footnote omitted.)
- This rule applies to the first doctor who treats a patient who subsequently is treated by other doctors. (*Maxwell v. Powers* (1994) 22 Cal.App.4th 1596, 1607–1608 [28 Cal.Rptr.2d 62].)
- Restatement Second of Torts section 457, states: "If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner."

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1855

Flahavan et al., California Practice Guide: Personal Injury, Ch. 4-C, *Effective Settlement Negotiations*, ¶¶ 4:175-4:177 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.85

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.04[3], [4] (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Contribution and Indemnity*, § 300.63[2] (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.74[3][a] (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.61 (Matthew Bender)

3930. Mitigation of Damages (Personal Injury)

If you decide [*name of defendant***] is responsible for the original harm, [***name of plaintiff***] is not entitled to recover damages for harm that [***name of defendant***] proves [***name of plaintiff***] could have avoided with reasonable efforts or expenditures.**

You should consider the reasonableness of [*name of plaintiff***]'s efforts in light of the circumstances facing [him/her/***nonbinary pronoun***] at the time, including [his/her/***nonbinary pronoun***] ability to make the efforts or expenditures without undue risk or hardship.**

If [*name of plaintiff***] made reasonable efforts to avoid harm, then your award should include reasonable amounts that [he/she/***nonbinary pronoun***] spent for this purpose.**

New September 2003

Sources and Authority

- "It has been the policy of the courts to promote the mitigation of damages. The doctrine applies in tort, wilful as well as negligent. A plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures." (*Green v. Smith* (1968) 261 Cal.App.2d 392, 396 [67 Cal.Rptr. 796], internal citations omitted.)
- "The frequent statement of the principle in the terms of a 'duty' imposed on the injured party has been criticized on the theory that a breach of the 'duty' does not give rise to a correlative right of action. It is perhaps more accurate to say that the wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part." (*Green, supra,* 261 Cal.App.2d at p. 396, internal citations omitted.)
- "The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. 'If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.' The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law. It is sufficient if he acts reasonably and with due diligence, in good faith." (*Green, supra,* 261 Cal.App.2d at pp. 396–397, internal citations omitted.)
- "The correct rule is that an injured person must use reasonable diligence in caring for his injuries. What is reasonable diligence depends upon all the facts

and circumstances of each case. There is no hard and fast rule that the injured person must seek medical care of a particular type. Self-care may be reasonable under the circumstances, and the jury should be so instructed where that factor is relevant." (*Christiansen v. Hollings* (1941) 44 Cal.App.2d 332, 346 [112 P.2d 723], internal citations omitted.)

- " 'The rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights.' " (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691 [32 Cal.Rptr.2d 329], internal citations omitted.)
- "The duty to minimize damages does not require an injured person to do what is unreasonable or impracticable, and, consequently, when expenditures are necessary for minimization of damages, the duty does not run to a person who is financially unable to make such expenditures." (*Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 846 [147 P.2d 558], internal citations omitted.)
- "Contributory negligence was closely allied and easily confused with the rule of mitigation of damages, on which the jury was also instructed. Both doctrines involved the plaintiff's duty to act reasonably. Contributory negligence was concerned with the plaintiff's negligence before being injured, while the mitigation rule was concerned with a lack of due care after the injury. The effect of contributory negligence was to bar all recovery by the plaintiff. In contrast, a plaintiff's failure to mitigate barred recovery of only the portion of damages which could have been avoided by ordinary care after the injury." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 874–875 [148 Cal.Rptr. 355, 582 P.2d 946], internal citations omitted.)
- " 'The rule of [mitigation of damages] comes into play after a legal wrong has occurred, but while some damages may still be averted . . . .' " (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1066 [232 Cal.Rptr. 528, 728 P.2d 1163], internal citations omitted.)
- "[W]hile the burden of proving the extent of injury . . . actually incurred as a result of a defendant's tortious conduct lies with the plaintiff, the burden of proving the plaintiff failed to act reasonably in limiting his or her consequential damages—that is, failed to mitigate damages—is on the defendant . . . ." (*Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 97 [101 Cal.Rptr.3d 303].)
- "One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured. It is incumbent upon the party alleging injury to prove the amount of damages. Respondent sustained that burden in this case. If the damages proven could be reduced proportionately, that burden rested upon appellant." (*Oakland v. Pacific Gas & Electric Co.* (1941) 47 Cal.App.2d 444, 450 [118 P.2d 328], internal citations omitted.)
- "It is true that plaintiff is in duty bound to minimize his damage in any way that he reasonably can, and if he negligently refuses to do so he cannot recover for that which he might have prevented. It is for appellant to establish that the steps taken by plaintiff to so minimize his loss or damage falls short of the obligation

so fixed. In other words, the burden is on defendant to establish matters asserted by him in mitigation or reduction of the amount of plaintiff's damage, and defendant here has not met that burden." (*McNary v. Hanley* (1933) 131 Cal.App. 188, 190 [20 P.2d 966].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1798–1801

California Tort Damages (Cont.Ed.Bar) Restrictions on Recovery, §§ 15.22–15.23

4 Levy et al., California Torts, Ch. 53, *Mitigation and Collateral Source Rule*, §§ 53.01–53.04 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.48 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.171 et seq. (Matthew Bender)

California Civil Practice: Torts §§ 6:1–6:6 (Thomson Reuters)

3931. Mitigation of Damages (Property Damage)

If you decide [*name of defendant***] is responsible for the original harm, [***name of plaintiff***] is not entitled to recover damages for harm to [his/her/** *nonbinary pronoun***] property that [***name of defendant***] proves [***name of plaintiff***] could have avoided with reasonable efforts or expenditures.**

You should consider the reasonableness of [*name of plaintiff***]'s efforts in light of the circumstances facing [him/her/***nonbinary pronoun***] at the time, including [his/her/***nonbinary pronoun***] ability to make the efforts or expenditures without undue risk or hardship.**

If [*name of plaintiff***] made reasonable efforts to avoid harm, then your award should include reasonable amounts that [he/she/***nonbinary pronoun***] spent for this purpose.**

New September 2003

Sources and Authority

- "It has been the policy of the courts to promote the mitigation of damages. The doctrine applies in tort, wilful as well as negligent. A plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures." (*Green v. Smith* (1968) 261 Cal.App.2d 392, 396 [67 Cal.Rptr. 796], internal citations omitted.)
- "The frequent statement of the principle in the terms of a 'duty' imposed on the injured party has been criticized on the theory that a breach of the 'duty' does not give rise to a correlative right of action. It is perhaps more accurate to say that the wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part." (*Green, supra,* 261 Cal.App.2d at p. 396, internal citations omitted.)
- "The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. 'If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.' The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law. It is sufficient if he acts reasonably and with due diligence, in good faith." (*Green, supra,* 261 Cal.App.2d at pp. 396–397, internal citations omitted.)
- "A plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not

be able to recover for any losses which could have been thus avoided. Here the jury determined that 25 percent of the 'property damage to the house' could have been avoided. That damage was measured by the cost of repair, i.e., $130,000. The court was obligated to give effect to the jury's finding and reduce this aspect of the award to $97,500." (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 41 [21 Cal.Rptr.2d 110], internal citations omitted.)

- "A plaintiff has a duty to mitigate damages and cannot recover losses it could have avoided through reasonable efforts. Thrifty-Tel's only response is that mitigation does not ' "require a complex series of doubtful acts and expenditures." ' Picking up the telephone to reach out and touch the Bezeneks or sending them a letter was complex, doubtful, or expensive? Based on Myron Bezenek's unchallenged testimony, we must presume that simple expedient would have averted the second hacking episode. Accordingly, Thrifty-Tel is not entitled to recover damages for the February 1992 event." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568–1569 [54 Cal.Rptr.2d 468], internal citations omitted.)
- "Contributory negligence was closely allied and easily confused with the rule of mitigation of damages, on which the jury was also instructed. Both doctrines involved the plaintiff's duty to act reasonably. Contributory negligence was concerned with the plaintiff's negligence before being injured, while the mitigation rule was concerned with a lack of due care after the injury. The effect of contributory negligence was to bar all recovery by the plaintiff. In contrast, a plaintiff's failure to mitigate barred recovery of only the portion of damages which could have been avoided by ordinary care after the injury." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 874–875 [148 Cal.Rptr. 355, 582 P.2d 946], internal citations omitted.)
- " 'The rule of [mitigation of damages] comes into play after a legal wrong has occurred, but while some damages may still be averted . . . .' " (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1066 [232 Cal.Rptr. 528, 728 P.2d 1163], internal citations omitted.)
- "Generally, '[a] person injured by the wrongful act of another is bound . . . to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part.' The burden of proving facts in mitigation of damages rests upon the defendant." (*Hunter v. Croysdill* (1959) 169 Cal.App.2d 307, 318 [337 P.2d 174], internal citations omitted.)
- "One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured. It is incumbent upon the party alleging injury to prove the amount of damages. Respondent sustained that burden in this case. If the damages proven could be reduced proportionately, that burden rested upon appellant." (*Oakland v. Pacific Gas & Electric Co.* (1941) 47 Cal.App.2d 444, 450 [118 P.2d 328], internal citations omitted.)
- Restatement Second of Torts section 918 provides:

(1) Except as stated in Subsection (2), one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.

(2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1798–1801

California Tort Damages (Cont.Ed.Bar) Restrictions on Recovery, §§ 15.22–15.23

4 Levy et al., California Torts, Ch. 53, *Mitigation and Collateral Source Rule*, §§ 53.01–53.04 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

California Civil Practice: Torts §§ 6:1–6:6 (Thomson Reuters)

3932. Life Expectancy

If you decide [*name of plaintiff*] has suffered damages that will continue for the rest of [his/her/*nonbinary pronoun*] life, you must determine how long [he/she/*nonbinary pronoun*] will probably live. According to [*insert source of information*], a [*insert number*]-year-old [male/female] is expected to live another [*insert number*] years. This is the average life expectancy. Some people live longer and others die sooner.

This published information is evidence of how long a person is likely to live but is not conclusive. In deciding a person's life expectancy, you should also consider, among other factors, that person's health, habits, activities, lifestyle, and occupation.

New September 2003; Revised February 2005, February 2007

Directions for Use

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table—Male and Life Expectancy Table—Female, following the Damages series.) The first column shows the age interval between the two exact ages indicated. For example, 50–51 means the one-year interval between the fiftieth and fifty-first birthdays.

Sources and Authority

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive. Here the jury was correctly told the figure given was not conclusive evidence of Charlene's life expectancy. It was merely 'a factor which you may consider,' along with the evidence of Charlene's health, habits, occupation and activities." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 424 [167 Cal.Rptr. 270], internal citations omitted.)
- "Mortality tables are admissible to assist the jury but they are not indispensable. It has been held, for example, that, absent mortality tables, the trier of fact may still approximate the life expectancy of a statutory beneficiary who appeared in court." (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 121 [34 Cal.Rptr. 754], internal citations omitted.)
- "It is a matter of common knowledge that many persons live beyond the period of life allotted them by the mortality roles." (*Temple v. De Mirjian* (1942) 51 Cal.App.2d 559, 566 [125 P.2d 544], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1843

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, § 51.42[2][c], Ch. 52, *Medical Expenses and Economic Loss*, § 52.20 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

3933. Damages From Multiple Defendants

In this case, [*name of plaintiff***] seeks damages from more than one defendant. You must determine the liability of each defendant to [***name of plaintiff***] separately.**

If you determine that more than one defendant is liable to [*name of plaintiff***] for damages, you will be asked to find [***name of plaintiff***]'s total damages [and the comparative fault of [[***name of plaintiff***]/each defendant/ [and] other nonparties]].**

In deciding on the amount of damages, consider only [*name of plaintiff***]'s claimed losses. Do not attempt to divide the damages [between/among] the defendants. The allocation of responsibility for payment of damages among multiple defendants is to be done by the court after you reach your verdict.**

New December 2010

Directions for Use

Give this instruction in any case involving the joint and several liability of multiple defendants or several liability only for noneconomic damages under Proposition 51. (See Civ. Code, § 1431.2.) It is designed to deter the jury from awarding different damages against each defendant after factoring in the respective culpability of the defendants. Do not give this instruction in a case in which separate tortfeasors have caused separate injuries. (See *Carr v. Cove* (1973) 33 Cal.App.3d 851, 854 [109 Cal.Rptr. 449].)

If comparative fault is at issue, give the bracketed language in the second paragraph. Comparative fault may involve each defendant, the plaintiff, and other nonparties. "Nonparties" include the universe of tortfeasors who are not present at trial, including defendants who settled before trial and nonjoined alleged tortfeasors. (*Dafonte v. Up-Right* (1992) 2 Cal.4th 593, 603 [7 Cal.Rptr.2d 238, 828 P.2d 140].) See also CACI No. 406, *Apportionment of Responsibility*, and CACI No. VF-402, *Negligence—Fault of Plaintiff and Others at Issue*.

Sources and Authority

- Proposition 51. Civil Code section 1431.2(a).
- "The *pro tanto* reduction provision works to prevent settlements from producing double recoveries in the case of a *single* injury caused by joint tortfeasors. The general theory of compensatory damages bars double recovery for the same wrong. The principal situation is where joint or concurrent tortfeasors are jointly and severally liable for the *same wrong*. Only one complete satisfaction is permissible, and, if partial satisfaction is received from one, the liability of others will be correspondingly reduced." (*Carr*, *supra,* 33 Cal.App.3d at p. 854,

original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1518

1 Levy et al., California Torts, Ch. 11, *Conflicts of Law and Preemption*, § 11.07 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution*, § 300.60 et seq. (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.130 et seq. (Matthew Bender)

3934. Damages on Multiple Legal Theories

[*Name of plaintiff***] seeks damages from [***name of defendant***] under more than one legal theory. However, each item of damages may be awarded only once, regardless of the number of legal theories alleged.**

You will be asked to decide whether [*name of defendant***] is liable to [***name of plaintiff***] under the following legal theories [***list***]:**

1. **[***e.g., breach of employment contract***];**
2. **[***e.g., wrongful termination in violation of public policy***];**
3. **[***continue***].**

The following items of damages are recoverable only once under all of the above legal theories:

1. **[***e.g., lost past income***];**
2. **[***e.g., medical expenses***];**
3. **[***continue***].**

[The following additional items of damages are recoverable only once for [*specify legal theories***]:**

1. **[***e.g., emotional distress***];**
2. **[***continue***].**

[*Continue until all items of damages recoverable under any legal theory have been listed.***]]**

New December 2010

Directions for Use

This instruction is to guide the jury in awarding damages in a case involving multiple claims, causes of action, or counts in which different damages are recoverable under different legal theories. It should be used with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This instruction and verdict form are designed to help avoid juror confusion in filling out the damages table or tables when multiple causes of action, counts, or legal theories are to be decided and the potential damages are different on some or all of them. (See, e.g., *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 701–705 [101 Cal.Rptr.3d 773, 219 P.3d 749].) It is not necessary to give this instruction if the same damages are recoverable on all causes of action, counts, or legal theories, although giving only the opening paragraph might be appropriate.

First list all of the causes of action, counts, or legal theories that the jury must

address. Then list the items of damages recoverable under all of the theories. Then list the additional damages that may be awarded on each of the other causes of action. Each item of damages should be listed somewhere, but only once.

If there are multiple plaintiffs with different claims for different damages, repeat the entire instruction for each plaintiff except for the opening paragraph.

Often it will be necessary to identify items of damages with considerable specificity. For example, instead of just "emotional distress," it may be necessary to specify "emotional distress from harassment before termination of employment" and "additional emotional distress because of termination of employment." (See, e.g., *Roby*, *supra,* 47 Cal.4th at pp. 701–705.)

Sources and Authority

- "Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. [Citation.] Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited. [Citation.] [¶] . . . [¶] In contrast, where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories." (*Roby*, *supra,* 47 Cal.4th at p. 702.)
- "As for the Court of Appeal's statement that under the instructions plaintiff was entitled to recover the same amount of damages under any of plaintiff's various theories, we have reviewed the instructions and none of them would preclude a finding of differing amounts of damage for each theory of recovery. Indeed, as a matter of logic, it would seem unlikely that plaintiff's damages from being defamed by defendants would be identical to the damages he incurred from being ousted from [the] board of directors. . . . [T]hese theories of recovery seem based on different 'primary' rights and duties of the parties." (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158 [17 Cal.Rptr.2d 608, 847 P.2d 574.)
- "The trial court instructed the jury . . . that [plaintiff] could not be awarded duplicative damages on different counts, thus suggesting that it was the jury's responsibility to avoid awarding duplicative damages. But neither the instructions nor the special verdict form told the jury how to avoid awarding duplicative damages. With a single general verdict or a general verdict with special findings, where the verdict includes a total damages award, the jury presumably will follow the instruction (such as the one given here) and ensure that the total damages award includes no duplicative amounts. A special verdict on multiple counts, however, is different. If the jury finds the amount of damages separately for each count and does not calculate the total damages award, as here, the jury has no opportunity to eliminate any duplicative amounts in calculating the total award. Absent any instruction specifically informing the jury how to properly avoid awarding duplicative damages, it might have attempted to do so by finding no liability or no damages on certain counts, resulting in an inconsistent

verdict." (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 360 [112 Cal.Rptr.3d 455].)

- "A special verdict must present the jury's conclusions of facts, 'and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.' In our view, a special verdict on multiple counts should include factual findings identifying any duplicative amounts, or a finding as to the total amount of damages eliminating any duplicative amounts, so as to allow the trial court to avoid awarding duplicative damages in the judgment." (*Singh*, *supra,* 186 Cal.App.4th at p. 360, internal citation omitted.)
- " 'In California the phrase "cause of action" is often used indiscriminately . . . to mean counts which state [according to different legal theories] the same cause of action . . . .' But for purposes of applying the doctrine of res judicata, the phrase 'cause of action' has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. . . . '[T]he "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. 'Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal ground* for relief." [Citations.]' Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798 [108 Cal.Rptr.3d 806, 230 P.3d 342], original italics, internal citations omitted.)
- "Here the jury was properly instructed that it could not award damages under both contract and tort theories, but must select which theory, if either, was substantiated by the evidence, and that punitive damages could be assessed if defendant committed a tort with malice or intent to oppress plaintiffs, but that such damages could not be allowed in an action based on breach of contract, even though the breach was wilful." (*Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 336–337 [5 Cal.Rptr. 686, 353 P.2d 294].)
- "Ordinarily, a plaintiff asserting both a contract and tort theory arising from the same factual setting cannot recover damages under both theories, and the jury should be so instructed. Here, the court did not specifically instruct that damages could be awarded on only one theory, but did direct that punitive damages could be awarded only if the jury first determined that appellant had proved his tort action." (*Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 760, fn. 13 [250 Cal.Rptr. 195], internal citation omitted.)
- "The trial court would have been better advised to make an explicit instruction that duplicate damages could not be awarded. Indeed, it had a duty to do so." (*Dubarry International, Inc. v. Southwest Forest Industries, Inc.* (1991) 231

Cal.App.3d 552, 565, fn. 16 [282 Cal.Rptr. 181], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1717

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.23 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.50 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.150 (Matthew Bender)

3935. Prejudgment Interest (Civ. Code, § 3288)

If you decide that [*name of plaintiff*] is entitled to recover damages for past economic loss in one or more of the categories of damages that [he/she/*nonbinary pronoun*/it] claims, then you must decide whether [he/she/*nonbinary pronoun*/it] should also receive prejudgment interest on each item of loss in those categories. Prejudgment interest is the amount of interest the law provides to a plaintiff to compensate for the loss of the ability to use the funds. If prejudgment interest is awarded, it is computed from the date on which each loss was incurred until the date on which you sign your verdict.

Whether [*name of plaintiff*] should receive an award of prejudgment interest on all, some, or none of any past economic damages that you may award is within your discretion. If you award these damages to [*name of plaintiff*], you will be asked to address prejudgment interest in the special verdict form.

New December 2016

Directions for Use

Give this instruction if the court determines that the jury may award prejudgment interest. In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury. (Civ. Code, § 3288.) The statute allows the jury to award prejudgment interest on any claim within its scope. (*Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109].) The special verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

The role of the jury in awarding prejudgment interest is not clear from Civil Code section 3288. This instruction assumes that the court exercises a gatekeeper function of deciding whether the case is one to which the statute applies. The jury does not select the interest rate, which is seven percent as a matter of law. (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1585 [36 Cal.Rptr.2d 343].)

It is settled that prejudgment interest cannot be awarded on damages for the intangible, noneconomic aspects of mental and emotional injury because they are inherently nonpecuniary, unliquidated, and not readily subject to precise calculation. (*Greater Westchester Homeowners Assn v. L.A.* (1979) 26 Cal.3d 86, 102–103 [160 Cal.Rptr.733, 603 P.2d 1329].) This instruction assumes that implicit in the reasoning for denying prejudgment interest for noneconomic damages is authorization to award it on all past economic damages, as these amounts are pecuniary and subject to more precise calculation. This instruction should not be given unless damages of this nature are claimed.

Since the statute is permissive, the jury has the discretion to deny prejudgment interest, even if it might otherwise be authorized. (See *King v. Southern Pacific Co.* (1895) 109 Cal. 96, 99 [41 P. 786] [error to instruct jury that it must add prejudgment interest to award of damages].)

Whether interest may be compounded is also not resolved. (Compare *Douglas v. Westfall* (1952) 113 Cal.App.2d 107, 112 [248 P.2d 68] [trustee cannot be charged with compound interest unless s/he has been guilty of some positive misconduct or willful violation of duty; in cases of mere negligence, no more than simple interest can properly be added] and *State v. Day* (1946) 76 Cal.App.2d 536, 554 [173 P.2d 399] [general rule is that interest may not be computed on accrued interest unless by special statutory provision, or by stipulation of the parties] with *Michelson, supra,* 29 Cal.App.4th at p. 1588 [jury is vested with discretion to award prejudgment interest under section 3288, including compound interest] and *McNulty v. Copp* (1954) 125 Cal.App.2d 697, 712 [271 P.2d 90] [compound interest is properly allowed on a claim for wrongful and fraudulent detention of personalty].)

Sources and Authority

- Interest on Obligation Not Arising From Contract. Civil Code section 3288.
- "Under Civil Code section 3288, the trier of fact may award prejudgment interest '[in] an action for the breach of an obligation not arising from contract, *and* in every case of oppression, fraud, or malice . . . .' " (*Bullis, supra*, 21 Cal.3d at p. 814, original italics.)
- "[U]nlike Civil Code section 3287, which relates to liquidated and contractual claims, section 3288 permits discretionary prejudgment interest for unliquidated tort claims." (*Greater Westchester Homeowners Assn, supra,* 26 Cal.3d at p. 102.)
- "Conceptually, prejudgment interest is an element of damages, not a cost of litigation." (*Watson Bowman Acme Corp. v. RGW Construction, Inc.* (2016) 2 Cal.App.5th 279, 293 [206 Cal.Rptr.3d 281].)
- "In *Bullis*, we characterized prejudgment interest as 'awarded to compensate a party for the loss of his or her property.' The award of such interest represents the accretion of wealth which money or particular property could have produced during a period of loss. Using recognized and established techniques a fact finder can usually compute with fair accuracy the interest on a specific sum of money, or on property subject to specific valuation. Furthermore, the date of loss of the property is usually ascertainable, thus permitting an accurate interest computation." (*Greater Westchester Homeowners Assn, supra,* 26 Cal.3d at pp. 102–103, internal citations omitted.)
- "The award of [prejudgment] interest represents the accretion of wealth which money or particular property could have produced during a period of loss." (*Canavin v. Pac. Southwest Airlines* (1983)148 Cal.App.3d 512, 525 [196 Cal.Rptr. 82].)
- "However, damages for the intangible, noneconomic aspects of mental and

emotional injury are of a different nature. They are inherently nonpecuniary, unliquidated and not readily subject to precise calculation. The amount of such damages is necessarily left to the subjective discretion of the trier of fact. Retroactive interest on such damages adds uncertain conjecture to speculation. Moreover where, as here, the injury was of a continuing nature, it is particularly difficult to determine when any particular increment of intangible loss arose. Acknowledging the problem, the trial court arbitrarily resorted to an 'averaging' method applied to both the amount and duration of the loss. In our view this process was impermissibly speculative." (*Greater Westchester Homeowners Assn, supra,* 26 Cal.3d at p. 103.)

- "The amount of damages awarded in a wrongful death case designed to compensate these noneconomic losses are akin to those awarded for pain and suffering and emotional distress in *Greater Westchester* and do not support prejudgment interest. However, plaintiffs are entitled to prejudgment interest on those damages attributable to an ascertainable economic value, such as loss of household services or earning capacity, as well as funeral and related expenses. '[It] is important to underscore that [an] award is invalid only to the extent it represents interest on "the intangible noneconomic aspects of mental and emotional injury" claimed by plaintiffs. [Citation.] If plaintiffs allege specific damage that is supported by tangible evidence, prejudgment interest may properly be awarded under Civil Code section 3288.' " (*Canavin, supra*, 148 Cal.App.3d at p. 527, internal citations omitted.)
- "Whether the proper interest rate was applied is a question of law. There is no legislative act specifying the rate of prejudgment interest for a fraud claim, and therefore the constitutional rate of 7 percent applies . . . ." (*Michelson, supra*, 29 Cal.App.4th at p. 1585.)
- "Section 3288 . . . allows interest from date of monetary loss at the discretion of the trier of fact even if the damages are unliquidated." (*Stein v. Southern Cal. Edison Co.* (1992) 7 Cal.App.4th 565, 572 [8 Cal.Rptr.2d 907].)
- "[T]his action lies in tort and it is the generally accepted view that [prejudgment] interest cannot be awarded on damages for personal injury." (*Curtis v. State of California ex rel. Dept. of Transportation* (1982) 128 Cal.App.3d 668, 686 [180 Cal.Rptr. 843].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1818, 1821, 1822

4 Levy et al., California Torts, Ch. 50, *Damages*, §§ 50.51, 50.52 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.53 (Matthew Bender)

12 California Points and Authorities, Ch. 121, *Interest*, §§ 121.33, 121.54 (Matthew Bender)

3936–3939. Reserved for Future Use

3940. Punitive Damages—Individual Defendant—Trial Not Bifurcated

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If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages only if [*name of plaintiff*] proves by clear and convincing evidence that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when the person is aware of the probable dangerous consequences of the person's conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her/*nonbinary pronoun*] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant*]'s conduct? In deciding how reprehensible [*name of defendant*]'s conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether [*name of defendant*] disregarded the health or safety of others;

3. Whether [*name of plaintiff*] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/*nonbinary pronoun*/it];

4. Whether [*name of defendant*]'s conduct involved a pattern or practice; and

5. Whether [*name of defendant*] acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [his/her/*nonbinary pronoun*/its] conduct]?

(c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her/*nonbinary pronoun*/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/*nonbinary pronoun*/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008, May 2020

Directions for Use

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's

recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given where an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you

determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)
- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra*, 21 Cal.3d at p. 928, fn. 13.)
- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)
- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)
- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams*

v. Murakami (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)
- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)
- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)
- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- "While 'there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,' net worth is often described as 'the critical determinant of financial condition.' [¶] A plaintiff seeking punitive damages must provide a balanced overview of the defendant's financial condition; a selective presentation of financial condition evidence will not survive scrutiny." (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)
- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)
- "[T]he 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)
- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will

not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra*, 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)
- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)
- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . . .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)
- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. . . . '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " . . . By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10

[180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)
- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)
- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock, supra,* 198 Cal.App.4th at p. 562, internal citation omitted.)
- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. . . . While these ratios are not binding, they are instructive. They

demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . ." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 425, internal citation omitted.)
- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)
- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)
- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)
- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)
- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)
- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct

and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 725, internal citations omitted.)
- "We conclude that the rule . . . that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)
- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)
- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1727, 1729, 1731, 1743–1748, 1780–1796

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.01–54.06, 54.20–54.25 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3941. Punitive Damages—Individual Defendant—Bifurcated Trial (First Phase)

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. At this time, you must decide whether [*name of plaintiff*] has proved by clear and convincing evidence that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud. The amount of punitive damages, if any, will be decided later.

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when the person is aware of the probable dangerous consequences of the person's conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her/*nonbinary pronoun*] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

New September 2003; Revised April 2004, December 2005, May 2020

Directions for Use

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Evidence of Profits or Financial Condition. Civil Code section 3295(d).
- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil

Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)
- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)
- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)
- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1727, 1731, 1743–1748, 1780–1796

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, Punitive Damages, ¶¶ 3:1375, 3:1696 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1–14.8, 14.15–14.18, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.01–54.06, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51[17] (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.24 et seq. (Matthew Bender)

3942. Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff***] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. Whether the conduct caused physical harm;

2. Whether [*name of defendant***] disregarded the health or safety of others;**

3. Whether [*name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/***nonbinary pronoun***/it];**

4. Whether [*name of defendant***]'s conduct involved a pattern or practice; and**

5. Whether [*name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/***nonbinary pronoun***/its] conduct]?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/***nonbinary pronoun***/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant***] for the impact of [his/her/***nonbinary pronoun***/its] alleged misconduct on persons**

other than [*name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, October 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that "[p]unitive damages previously imposed for the same

conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Evidence of Profits or Financial Condition. Civil Code section 3295(d).
- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)
- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)
- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)
- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)
- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- "It follows that the wealthier the wrongdoing defendant, the larger the award of

exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)
- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)
- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)
- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)
- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)
- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- "While 'there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,' net worth is often described as 'the critical determinant of financial condition.' [¶] A plaintiff seeking punitive damages must provide a balanced overview of the defendant's

financial condition; a selective presentation of financial condition evidence will not survive scrutiny." (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)
- "[T]he 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)
- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)
- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)
- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)
- " 'Due process does not permit courts, in the calculation of punitive damages, to

adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . . .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. . . . '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " . . . By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)
- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)
- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious

conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock, supra*, 198 Cal.App.4th at p. 562, internal citation omitted.)
- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . ." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at pp. 424–425, internal citation omitted.)
- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)
- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)
- "The decision to award punitive damages is exclusively the function of the trier

of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)
- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)
- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)
- "We conclude that the rule . . . that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)
- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)
- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1727, 1729, 1731, 1743–1748, 1780–1796

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:1703–3:1708 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.37–14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.20–54.25 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3943. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated

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If you decide that [*name of employee/agent***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of defendant***] for [***name of employee/agent***]'s conduct. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages against [*name of defendant***] for [***name of employee/agent***]'s conduct only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of employee/agent***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that [*name of employee/agent***] acted with intent to cause injury or that [***name of employee/agent***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when the person is aware of the probable dangerous consequences of the person's conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of employee/agent***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her/***nonbinary pronoun***] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of employee/agent***] intentionally misrepresented or concealed a material fact and did so intending to harm [***name of plaintiff***].**

[*Name of plaintiff***] must also prove [one of] the following by clear and convincing evidence:**

1. **[That [***name of employee/agent***] was an officer, a director, or a managing agent of [***name of defendant***], who was acting on behalf of [***name of defendant***]; [or]]**
2. **[That an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of [***name of employee/agent***] and employed [him/her/***nonbinary pronoun***] with a knowing disregard of the rights or safety of others; [or]]**
3. **[That an officer, a director, or a managing agent of [***name of defendant***] authorized [***name of employee/agent***]'s conduct; [or]]**
4. **[That an officer, a director, or a managing agent of [***name of***

defendant] **knew of [***name of employee/agent***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if the employee exercises substantial independent authority and judgment in corporate decisionmaking such that the employee's decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. Whether the conduct caused physical harm;

2. Whether [*name of defendant***] disregarded the health or safety of others;**

3. Whether [*name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/***nonbinary pronoun***/it];**

4. Whether [*name of defendant***]'s conduct involved a pattern or practice; and**

5. Whether [*name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/***nonbinary pronoun***/its] conduct]?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/***nonbinary pronoun***/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant***] for the impact of [his/her/***nonbinary pronoun***/its] alleged misconduct on persons other than [***name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, December 2005, June

2006, April 2007, August 2007, October 2008, May 2020

Directions for Use

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated.* When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, or managing agents, use CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

"A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud

or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)
- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)
- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)
- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)
- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in

determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . ." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at pp. 424–425, internal citation omitted.)
- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 425, internal citation omitted.)
- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)
- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)
- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury

may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . . .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)
- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. . . . '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " . . . By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)
- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)
- "In light of our holding that evidence of a defendant's financial condition is

essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)
- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)
- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)
- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- "While 'there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,' net worth is often described as 'the critical determinant of financial condition.' [¶] A plaintiff seeking punitive damages must provide a balanced overview of the defendant's financial condition; a selective presentation of financial condition evidence will not survive scrutiny." (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)
- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)
- "[T]he 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)
- "The decision to award punitive damages is exclusively the function of the trier

of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)
- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)
- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- "Subdivision (b) . . . governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)
- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)
- The concept of "managing agent" "assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)
- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)
- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions . . . ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)
- "Although it is generally true, . . . that an employee's hierarchy in a corporation

is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)
- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)
- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)
- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)
- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168, internal citations omitted.)
- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)
- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)
- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to

plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:1703–3:1708 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.20–14.23, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3944. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase)

If you decide that [*name of employee/agent***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of defendant***] for [***name of employee/agent***]'s conduct. At this time, you must decide whether [***name of plaintiff***] has proved by clear and convincing evidence that [***name of employee/agent***] engaged in that conduct with malice, oppression, or fraud. The amount of punitive damages, if any, will be decided later.**

"Malice" means that [*name of employee/agent***] acted with intent to cause injury or that [***name of employee/agent***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when the person is aware of the probable dangerous consequences of the person's conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of employee/agent***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her/***nonbinary pronoun***] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of employee/agent***] intentionally misrepresented or concealed a material fact and did so intending to harm [***name of plaintiff***].**

[*Name of plaintiff***] must also prove [one of] the following by clear and convincing evidence:**

1. **[That [***name of employee/agent***] was an officer, a director, or a managing agent of [***name of defendant***] who was acting on behalf of [***name of defendant***]; [or]]**
2. **[That an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of [***name of employee/agent***] and employed [him/her/***nonbinary pronoun***] with a knowing disregard of the rights or safety of others; [or]]**
3. **[That an officer, a director, or a managing agent of [***name of defendant***] authorized [***name of employee/agent***]'s conduct; [or]]**
4. **[That an officer, a director, or a managing agent of [***name of defendant***] knew of [***name of employee/agent***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if the employee exercises substantial

independent authority and judgment in corporate decisionmaking such that the employee's decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005, May 2020

Directions for Use

CACI No. 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)* may be used for the second phase of a bifurcated trial.

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3948, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase)*. When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, and managing agents, use CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase).*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Deferral of Financial Condition Evidence to Second Stage. Civil Code section 3295(d).
- "[E]vidence of ratification of [agent's] actions by [defendant], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490].)
- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature

enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144].)
- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)
- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)
- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)
- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)
- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions . . . ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)
- "Although it is generally true . . . that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a

corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)
- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)
- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)
- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)
- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)
- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)
- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.24 et seq. (Matthew Bender)

3945. Punitive Damages—Entity Defendant—Trial Not Bifurcated

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against [*name of defendant*] only if [*name of plaintiff*] proves that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud. To do this, [*name of plaintiff*] must prove [one of] the following by clear and convincing evidence:

1. **[That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [*name of defendant*], who acted on behalf of [*name of defendant*]; [or]]**
2. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [*name of defendant*]; [or]]**
3. **[That one or more officers, directors, or managing agents of [*name of defendant*] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when the person is aware of the probable dangerous consequences of the person's conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her/*nonbinary pronoun*] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

An employee is a "managing agent" if the employee exercises substantial independent authority and judgment in corporate decisionmaking such that the employee's decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive

damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant*]'s conduct? In deciding how reprehensible [*name of defendant*]'s conduct was, you may consider, among other factors:

1. **Whether the conduct caused physical harm;**
2. **Whether [*name of defendant*] disregarded the health or safety of others;**
3. **Whether [*name of plaintiff*] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/*nonbinary pronoun*/it];**
4. **Whether [*name of defendant*]'s conduct involved a pattern or practice; and**
5. **Whether [*name of defendant*] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [his/her/*nonbinary pronoun*/its] conduct]?

(c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her/*nonbinary pronoun*/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/*nonbinary pronoun*/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2004; Revised April 2004, June 2004, December 2005, June 2006, April 2007, August 2007, October 2008, May 2020

Directions for Use

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, or managing agents. When the plaintiff seeks to hold an employer or principal liable for the conduct of a specific employee or agent, use CACI No. 3943, *Punitive*

Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated.*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

"A jury must be instructed . . . that it may not use evidence of out-of-state conduct

to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525].) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)
- " '[T]he most important indicium of the reasonableness of a punitive damages

award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)
- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . ." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at pp. 424–425, internal citation omitted.)
- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 425, internal citation omitted.)
- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the

trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)
- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)
- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . . .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)
- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. . . . '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " . . . By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 987 [180 Cal.Rptr.3d 382], internal citations omitted.)
- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot

consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)
- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)
- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)
- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)
- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- "While 'there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,' net worth is often described as 'the critical determinant of financial condition.' [¶] A plaintiff seeking punitive damages must provide a balanced overview of the defendant's financial condition; a selective presentation of financial condition evidence will not survive scrutiny." (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33

Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)
- "[T]he 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)
- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)
- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)
- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)
- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)
- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)
- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions . . . ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)
- "Although it is generally true . . . that an employee's hierarchy in a corporation

is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)
- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)
- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)
- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)
- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:1703–3:1708 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew

Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3946. Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase)

If you decide that [*name of defendant*]'s conduct caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The amount, if any, of punitive damages will be an issue decided later.

At this time, you must decide whether [*name of plaintiff*] has proved that [*name of defendant*] engaged in that conduct with malice, oppression, or fraud. To do this, [*name of plaintiff*] must prove [one of] the following by clear and convincing evidence:

1. **[That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [*name of defendant*] who acted on behalf of [*name of defendant*]; [or]]**
2. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [*name of defendant*]; [or]]**
3. **[That one or more officers, directors, or managing agents of [*name of defendant*] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that [*name of defendant*] acted with intent to cause injury or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of the defendant's conduct and deliberately fails to avoid those consequences.

"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her/*nonbinary pronoun*] rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff*].

An employee is a "managing agent" if the employee exercises substantial independent authority and judgment in corporate decisionmaking such that the employee's decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005, May 2020

Directions for Use

CACI No. 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)* may be used for the second phase of a bifurcated trial.

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, and managing agents. When the plaintiff is seeking to hold an employer or principal liable for the conduct of a specific employee or agent, use CACI No. 3944, *Punitive Damages Against Employer or Principal For Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase).* When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3948, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase).*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)
- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)
- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)
- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)
- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)
- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)
- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions . . . ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)
- "Although it is generally true . . . that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)
- "[W]e conclude the Legislature intended the term 'managing agent' to include

only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)
- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)
- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)
- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)
- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)
- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.13–14.14, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51[17] (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.24 et seq. (Matthew Bender)

3947. Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated

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If you decide that [*name of individual defendant***]'s or [***name of entity defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages against [*name of individual defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of individual defendant***] engaged in that conduct with malice, oppression, or fraud.**

You may award punitive damages against [*name of entity defendant***] only if [***name of plaintiff***] proves that [***name of entity defendant***] acted with malice, oppression, or fraud. To do this, [***name of plaintiff***] must prove [one of] the following by clear and convincing evidence:**

1. **[That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of [***name of entity defendant***], who acted on behalf of [***name of entity defendant***]; [or]]**
2. **[That an officer, a director, or a managing agent of [***name of entity defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her/***nonbinary pronoun***] with a knowing disregard of the rights or safety of others; [or]]**
3. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [***name of entity defendant***]; [or]]**
4. **[That one or more officers, directors, or managing agents of [***name of entity defendant***] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of the defendant's conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her/***nonbinary pronoun***] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible

that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff***].**

An employee is a "managing agent" if the employee exercises substantial independent authority and judgment in corporate decisionmaking such that the employee's decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether the defendant disregarded the health or safety of others;

3. Whether [*name of plaintiff***] was financially weak or vulnerable and the defendant knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/***nonbinary pronoun***];**

4. Whether the defendant's conduct involved a pattern or practice; and

5. Whether the defendant acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that the defendant knew was likely to occur because of [his/her/***nonbinary pronoun***/its] conduct]?**

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/*nonbinary pronoun***/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]**

[Punitive damages may not be used to punish a defendant for the impact of [his/her/*nonbinary pronoun***/its] alleged misconduct on persons other than [***name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008, May 2020

Directions for Use

This instruction is intended to apply if punitive damages are sought against both an individual person and a corporate defendant. When punitive damages are sought only against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When punitive damages are sought against an individual defendant, use CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile*

Insurance Co. v. Campbell (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

"A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the

unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)
- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)
- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)"[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)
- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages

award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . ." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 425, internal citation omitted.)
- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)
- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)
- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)
- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . . Punishment on these bases

creates the possibility of multiple punitive damages awards for the same conduct . . . .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. . . . '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " . . . By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)
- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)
- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's

financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)
- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)
- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)
- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- "While 'there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,' net worth is often described as 'the critical determinant of financial condition.' [¶] A plaintiff seeking punitive damages must provide a balanced overview of the defendant's financial condition; a selective presentation of financial condition evidence will not survive scrutiny." (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)
- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)
- "[T]he 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)
- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)
- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive

damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)
- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)
- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- "Subdivision (b) . . . governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)
- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)
- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)
- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)
- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions . . . ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor*

Corp., U.S.A. (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true . . . that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)
- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)
- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra*, 21 Cal.4th at p. 577.)
- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)
- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)
- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)
- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)
- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)
- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of*

North America, Inc. v. Gore (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3948. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase)

If you decide that [*name of individual defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of individual defendant***] and, if so, against [***name of corporate defendant***]. The amount, if any, of punitive damages will be an issue decided later.**

You may award punitive damages against [*name of individual defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of individual defendant***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of the defendant's conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her/***nonbinary pronoun***] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff***].**

You may also award punitive damages against [*name of corporate defendant***] based on [***name of individual***]'s conduct if [***name of plaintiff***] proves [one of] the following by clear and convincing evidence:**

1. **[That [***name of individual defendant***] was an officer, a director, or a managing agent of [***name of corporate defendant***] who was acting on behalf of [***name of corporate defendant***] at the time of the conduct constituting malice, oppression, or fraud; [or]]**
2. **[That an officer, a director, or a managing agent of [***name of corporate defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her/***nonbinary pronoun***] with a knowing disregard of the rights or safety of others; [or]]**
3. **[That [***name of individual defendant***]'s conduct constituting malice,**

oppression, or fraud was authorized by an officer, a director, or a managing agent of [*name of corporate defendant***]; [or]]**

4. **[That an officer, a director, or a managing agent of [***name of corporate defendant***] knew of [***name of individual defendant***]'s conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

An employee is a "managing agent" if the employee exercises substantial independent authority and judgment in corporate decisionmaking such that the employee's decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005, May 2020

Directions for Use

Use CACI No. 3949, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase),* for the second phase of a bifurcated trial.

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When damages are sought only against a corporate defendant, use CACI No. 3944, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase),* or CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase).* When damages are sought against individual defendants, use CACI No. 3941, *Punitive Damages—Individual Defendant—Bifurcated Trial (First Phase).*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated,* for additional sources and authority.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Deferral of Financial Condition Evidence to Second Stage. Civil Code section 3295(d).
- "[E]vidence of ratification of [agent's] actions by [defendant] and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)
- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)
- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)
- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)
- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- "[T]o support an award of punitive damages, the evidence must allow a reasonable person to conclude it is highly probable that an officer, director, or managing agent of defendant was ' " 'aware of the probable dangerous consequences' " ' of his conduct in connection with the company's distribution of its [product] to [plaintiff], and ' " 'willfully fail[ed] to avoid' " ' those consequences." (*McNeal v. Whittaker, Clark & Daniels, Inc.* (2022) 80 Cal.App.5th 853, 873 [296 Cal.Rptr.3d 394].)
- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- "[I]n performing, ratifying, or approving the malicious conduct, the agent must

be acting *as the organization's representative*, not in some other capacity." (*College Hospital, supra,* 8 Cal.4th at p. 723, original italics.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, supra,* 8 Cal.4th at p. 723.)
- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, supra*, 8 Cal.4th at pp. 723–724.)
- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions . . . ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)
- "Although it is generally true . . . that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)
- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decision making so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)
- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)
- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)
- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v.*

Superior Court (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)
- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, supra,* 8 Cal.4th at p. 726.)
- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, supra,* 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.13–14.14, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51[17] (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.24 et seq. (Matthew Bender)

3949. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff*] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether the defendant disregarded the health or safety of others;

3. Whether [*name of plaintiff*] was financially weak or vulnerable and the defendant knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/*nonbinary pronoun*/it];

4. Whether the defendant's conduct involved a pattern or practice; and

5. Whether the defendant acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that the defendant knew was likely to occur because of [his/her/*nonbinary pronoun*/its] conduct]?

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/*nonbinary pronoun*/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

[Punitive damages may not be used to punish a defendant for the impact

of [his/her/*nonbinary pronoun*/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, October 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Evidence of Profits or Financial Condition. Civil Code section 3295(d).
- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)
- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)
- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)
- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)
- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)
- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citations omitted.)
- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)
- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)
- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)
- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)
- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- "While 'there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,' net worth is often described as 'the critical determinant of financial condition.' [¶] A plaintiff

seeking punitive damages must provide a balanced overview of the defendant's financial condition; a selective presentation of financial condition evidence will not survive scrutiny." (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)
- "[T]he 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)
- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)
- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)
- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)
- " 'Due process does not permit courts, in the calculation of punitive damages, to

adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . . .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. . . . '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " . . . By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)
- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)
- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious

conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock, supra*, 198 Cal.App.4th at p. 562, internal citation omitted.)
- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)
- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 425, internal citation omitted.)
- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)
- "The decision to award punitive damages is exclusively the function of the trier

of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)
- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)
- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)
- "We conclude that the rule . . . that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)
- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)
- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:1703–3:1708 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.21, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d]

(Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3950–3959. Reserved for Future Use

3960. Comparative Fault of Plaintiff—General Verdict

If you decide that [*name of plaintiff*]'s negligence combined with [*name of defendant*]'s [negligence/conduct/product] in causing [*name of plaintiff*]'s harm, then you must decide the percentage of responsibility for the harm that you attribute to each of them.

First, decide the total amount of [*name of plaintiff*]'s damages. Then decide the percentage of responsibility that [*name of plaintiff*] and [*name of defendant*] have for the damages. Then reduce the total damages by the percentage of responsibility that you attribute to [*name of plaintiff*].

After you make these calculations, state the reduced damage award in your verdict.

New September 2003; Revised December 2009

Sources and Authority

- "In determining to what degree the injury was due to the fault of the plaintiff, it is logically essential that the plaintiff's negligence be weighed against the combined total of all other causative negligence; moreover, inasmuch as a plaintiff's actual damages do not vary by virtue of the particular defendants who happen to be before the court, we do not think that the damages which a plaintiff may recover against defendants who are joint and severally liable should fluctuate in such a manner." (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 590, fn. 2 [146 Cal.Rptr. 182, 578 P.2d 899].)
- "Proposition 51 . . . retains the joint liability of all tortfeasors, regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses. On the other hand, the more intangible and subjective categories of damage were limited by Proposition 51 to a rule of strict proportionate liability. With respect to these noneconomic damages, the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained from each person responsible for the injury." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600 [7 Cal.Rptr.2d 238, 828 P.2d 140].)

Secondary Sources

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.45 (Matthew Bender)

33 California Points and Authorities, Ch. 380, *Negligence*, § 380.170 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.380 (Matthew Bender)

3961. Duty to Mitigate Damages for Past Lost Earnings

[*Name of plaintiff*] is not entitled to recover damages for economic losses that [*name of defendant*] proves [*name of plaintiff*] could have avoided by returning to gainful employment as soon as it was reasonable for [him/her/*nonbinary pronoun*] to do so.

To calculate the amount of damages you must:

1. **Determine the amount [*name of plaintiff*] would have earned from the job [he/she/*nonbinary pronoun*] held at the time [he/she/*nonbinary pronoun*] was injured; and**
2. **Subtract the amount [*name of plaintiff*] earned or could have earned by returning to gainful employment.**

The resulting amount is [*name of plaintiff*]'s damages for past lost earnings.

New September 2003; Revised December 2015

Directions for Use

For an instruction on mitigation of damages involving personal injury, see CACI No. 3930, *Mitigation of Damages (Personal Injury).*

Sources and Authority

- "A plaintiff has a duty to mitigate damages and cannot recover losses it could have avoided through reasonable efforts." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568 [54 Cal.Rptr.2d 468].)
- "The doctrine of mitigation of damages holds that '[a] plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided.' A plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion. The duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable. 'The rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights.' " (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691 [32 Cal.Rptr.2d 329], internal citations omitted.)
- "Whether a plaintiff acted reasonably to mitigate damages, however, is a factual matter to be determined by the trier of fact, and is reviewed under the substantial evidence test. The burden of proving a plaintiff failed to mitigate damages, however, is on the defendant, not the other way around." (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 884 [164 Cal.Rptr.3d 811].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 945

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1798

4 Levy et al., California Torts, Ch. 53, *Mitigation of Damages (Avoidable Consequences) and the Collateral Source Rule*, § 53.02 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.48 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.170 et seq. (Matthew Bender)

3962. Duty to Mitigate Damages for Future Lost Earnings

[*Name of plaintiff*] is not entitled to recover damages for future economic losses that [*name of defendant*] proves [*name of plaintiff*] will be able to avoid by returning to gainful employment as soon as it is reasonable for [him/her/*nonbinary pronoun*] to do so.

If you decide that [*name of plaintiff*] will be able to return to work, then you must not award [him/her/*nonbinary pronoun*] any damages for the amount [he/she/*nonbinary pronoun*] will be able to earn from future gainful employment. To calculate the amount of damages you must:

1. **Determine the amount [*name of plaintiff*] would have earned from the job [he/she/*nonbinary pronoun*] held at the time [he/she/*nonbinary pronoun*] was injured; and**
2. **Subtract the amount [*name of plaintiff*] is reasonably able to earn from alternate employment.**

The resulting amount is [*name of plaintiff*]'s damages for future lost earnings.

New September 2003

Directions for Use

For an instruction on mitigation of damages involving personal injury, see CACI No. 3930, *Mitigation of Damages (Personal Injury).*

Sources and Authority

- "A plaintiff has a duty to mitigate damages and cannot recover losses it could have avoided through reasonable efforts." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568 [54 Cal.Rptr.2d 468].)
- "It is the employer's burden 'to affirmatively prove failure to mitigate as an affirmative defense.' " (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 871 [136 Cal.Rptr.3d 259].)
- "Whether a plaintiff acted reasonably to mitigate damages, however, is a factual matter to be determined by the trier of fact, and is reviewed under the substantial evidence test." (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 884 [164 Cal.Rptr.3d 811].)
- "The doctrine of mitigation of damages holds that '[a] plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided.' A plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion. The duty to mitigate damages does not require an injured party to do what is unreasonable or

impracticable. 'The rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights.' " (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691 [32 Cal.Rptr.2d 329], internal citations omitted.)

- "Had plaintiff actually retired and taken her retirement pension, we are convinced the trial court would have been required to exclude evidence of plaintiff's retirement benefits as a collateral source. . . . [¶] It seems to us to make little sense to allow introduction into evidence of retirement benefits that plaintiff never received on the issue of mitigation where such evidence would have been precluded under the collateral source rule had she actually received the benefits. It appears the court viewed the issue as one of fact, akin to the question whether plaintiff made reasonable efforts to mitigate her damages by seeking comparable or substantially similar employment." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 877.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1798–1801

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-F, *Mitigation Of Damages (Avoidable Consequences Doctrine)*, ¶¶ 17:490–17:557 (The Rutter Group)

4 Levy et al., California Torts, Ch. 52, *Recovery for Medical Expenses and Economic Loss*, § 52.10 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.46, 177.48 (Matthew Bender)

3963. Affirmative Defense—Employee's Duty to Mitigate Damages

[*Name of defendant***] claims that if [***name of plaintiff***] is entitled to any damages, they should be reduced by the amount that [***name of plaintiff***] could have earned from other employment. To succeed, [***name of defendant***] must prove all of the following:**

1. **That employment substantially similar to [***name of plaintiff***]'s former job was available to [him/her/***nonbinary pronoun***];**
2. **That [***name of plaintiff***] failed to make reasonable efforts to seek [and retain] this employment; and**
3. **The amount that [***name of plaintiff***] could have earned from this employment.**

In deciding whether the employment was substantially similar, you should consider, among other factors, whether:

(a) The nature of the work was different from [*name of plaintiff***]'s employment with [***name of defendant***];**

(b) The new position was substantially inferior to [*name of plaintiff***]'s former position;**

(c) The salary, benefits, and hours of the job were similar to [*name of plaintiff***]'s former job;**

(d) The new position required similar skills, background, and experience;

(e) The job responsibilities were similar; [and]

(f) The job was in the same locality; [and]

(g) [*insert other relevant factor(s)***].**

[In deciding whether [*name of plaintiff***] failed to make reasonable efforts to retain comparable employment, you should consider whether [***name of plaintiff***] quit or was discharged from that employment for a reason within [his/her/***nonbinary pronoun***] control.]**

New September 2003; Revised February 2007, December 2014; Revised and Renumbered from CACI No. 2407 November 2018

Directions for Use

This instruction may be given for any claim in which the plaintiff seeks to recover damages for past and future lost earnings from an employer for a wrongful termination of employment, for example in violation of public policy (see CACI No. 2400 et seq.) or under the Fair Employment and Housing Act (see CACI No. 2500

et seq.), when there is evidence that the employee's damages could have been mitigated. The bracketed language at the end of the instruction regarding plaintiff's failure to retain a new job is based on the holding in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502–1503 [44 Cal.Rptr.2d 565].

In deciding whether the plaintiff could have obtained a substantially similar job, the trier of fact may consider several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system. (See *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250–255 [106 Cal.Rptr. 283].) Read only those factors that have been shown by the evidence.

Sources and Authority

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181–182 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 98 [127 Cal.Rptr. 222] ["Plaintiff concedes that the trial court was entitled to deduct her actual earnings"]; but see *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432 [165 Cal.Rptr.3d 441] [wages actually earned from an inferior job may not be used to mitigate damages].)
- "We respectfully disagree with *Villacorta*[*, supra,* 221 Cal.App.4th 1425]. Neither *Parker* nor *Rabago-Alvarez* supports *Villacorta*'s holding that earned wages from an inferior job do not mitigate economic damages for wrongful termination." (*Martinez v. Rite Aid Corp.* (2021) 63 Cal.App.5th 958, 974–975 [278 Cal.Rptr.3d 310].)
- "[B]efore projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived . . . ." (*Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 454 [177 Cal.Rptr.3d 145].)
- "The burden is on the employer to prove that substantially similar employment was available which the wrongfully discharged employee could have obtained with reasonable effort." (*Chyten v. Lawrence & Howell Investments* (1993) 23 Cal.App.4th 607, 616 [46 Cal.Rptr.2d 459].)
- "[W]e conclude that the trial court should not have deducted from plaintiff's recovery against defendant the amount that the court found she might have

earned in employment which was substantially inferior to her position with defendant." (*Rabago-Alvarez*, *supra,* 55 Cal.App.3d at p. 99.)

- "[I]n those instances where the jury determines the employee was fired from a substantially similar position for cause, any amount the employee with reasonable effort could have earned by retaining that employment should be deducted from the amount of damages which otherwise would have been awarded to the employee under the terms of the original employment agreement." (*Stanchfield, supra,* 37 Cal.App.4th at pp. 1502–1503.)
- "The location of the new job is one of the factors to consider in determining whether the new job is inferior." (*Villacorta*, *supra,* 221 Cal.App.4th at p. 1432.)
- "There is some authority for the proposition that whether or not the other employment is comparable or substantially similar or equivalent to the prior position is a question of fact. On the other hand the issue of substantial similarity or inferiority of employment is one that has often been decided as a matter of law in California." (*California School Employees Assn.*, *supra,* 30 Cal.App.3d at pp. 253–254, internal citations omitted.)
- "The court could reasonably admit the evidence of other available jobs and leave the question of their substantial similarity to the jury." (*Kao, supra,* 229 Cal.App.4th at p. 454.)
- "[S]elf-employment is not unreasonable mitigation as long as the discharged employee applies sufficient effort trying to make the business successful, even if those efforts fail." (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1284–1285 [134 Cal.Rptr.3d 883].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-F, *Mitigation Of Damages (Avoidable Consequences Doctrine)*, ¶¶ 17:490, 17:492, 17:495, 17:497, 17:499–17:501 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.40–8.41

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[4] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.65 (Matthew Bender)

3964. Jurors Not to Consider Attorney Fees and Court Costs

You must not consider, or include as part of any award, attorney fees or expenses that the parties incurred in bringing or defending this lawsuit.

New June 2006

Directions for Use

This instruction is intended to prevent jurors from improperly factoring attorney fees into their damage awards. Do not use this instruction in cases in which attorney fees are a jury issue.

Secondary Sources

15 California Forms of Pleading and Practice, Ch. 174, *Costs and Attorney's Fees* (Matthew Bender)

3965. No Deduction for Workers' Compensation Benefits Paid

Do not consider whether or not [*name of plaintiff*] received workers' compensation benefits for [his/her/*nonbinary pronoun*] injuries. If you decide in favor of [*name of plaintiff*], you should determine the amount of your verdict according to my instructions concerning damages.

New September 2003; Revised December 2009; Renumbered from CACI No. 3963 November 2018

Directions for Use

This instruction is intended for use in conjunction with a special verdict form if the judge may need to make deductions from the verdict to avoid a double recovery. It may also be read if there are no allegations regarding the employer's comparative fault.

Sources and Authority

- "Since the employer was not negligent, the death benefits paid did not constitute an impermissible double recovery but rather a payment for plaintiff's loss from a source wholly independent of the wrongdoer." (*Curtis v. State of California ex rel. Department of Transportation* (1982) 128 Cal.App.3d 668, 682 [180 Cal.Rptr. 843].)
- "Here the collateral source was workers' compensation benefits paid by the [defendant]'s policy. Under the general principles just described, this would not be an independent source; defendant is the policyholder, so the collateral source rule would not apply. Yet the California Supreme Court held that the rule did apply in a case in which an employee received benefits from the employer's workers' compensation policy and then sued a third party tortfeasor, the compensation insurer having waived its right of subrogation against the third party." (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 637 [210 Cal.Rptr.3d 362] [action by employee against employer on claim alleged to not be within scope of employment].)
- " 'The average reasonably well-informed person who may be called to serve upon a jury knows that a workman injured in his employment receives compensation. It is a delusion to think that this aspect of the case can be kept from the minds of the jurors simply by not alluding to it in the course of the trial.' " (*Berryman v. Bayshore Construction Co.* (1962) 207 Cal.App.2d 331, 336 [24 Cal.Rptr. 380], internal citations omitted.)
- "To prevent a double recovery, the court may instruct the jury to segregate types of damage as between the employee and employer, awarding to the employee only those tort damages not recoverable by the employer." (*Demkowski v. Lee* (1991) 233 Cal.App.3d 1251, 1259 [284 Cal.Rptr. 919], footnote omitted.)
- "Alternatively, the jury may generally be instructed on the types of tort damages

to which the employee may be entitled and then given a special verdict form that requires the jury to find whether the defendant was negligent, whether the negligence was the proximate cause of the employee's injuries, what the employee's total tort damages are, without taking into account his or her receipt of workers' compensation benefits, and what the reasonable amount of benefits paid by the employer were. Thereafter, the court enters individual judgments on the special verdict for the amounts to which the employee and employer are entitled." (*Demkowski, supra,* 233 Cal.App.3d at p. 1259, footnote omitted.)

- "Prior to Proposition 51, a negligent third party was allowed an offset for the workers' compensation benefits paid to the plaintiff. This prevented double recovery under the then-existing joint and several liability rule. Proposition 51, however, limited joint and several liability to plaintiff's economic damages." (*Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App.4th 187, 197 [78 Cal.Rptr.2d 861].)
- "The *Espinoza* approach has provided an effective solution for preverdict settlements, and we believe that it is also the most suitable means of dealing with workers' compensation benefits." (*Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 37 [56 Cal.Rptr.2d 455].)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Workers' Compensation, §§ 23, 28–30, 35

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.10 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.319 (Matthew Bender)

3966–3999. Reserved for Future Use

VF-3900. Punitive Damages

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] engage in the conduct with malice, oppression, or fraud?**

   _____ Yes _____ No

   [If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **What amount of punitive damages, if any, do you award [*name of plaintiff*]? $_____]**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised October 2008, December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 2 if the trial is not bifurcated.

This form is based on CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, and CACI No. 3941, *Punitive Damages—Individual Defendant—Bifurcated Trial (First Phase).*

VF-3901. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee

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We answer the questions submitted to us as follows:

1. **Did [***name of agent/employee***] engage in the conduct with malice, oppression, or fraud?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of employee/agent***] an officer, director, or managing agent of [***name of defendant***] acting on behalf of [***name of defendant***]?**

   _____ Yes _____ No

   [If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **What amount of punitive damages, if any, do you award [***name of plaintiff***]? $_____]**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised October 2008, December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Normally, this verdict form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 3 if the trial is not bifurcated.

This form is based on CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, and CACI No. 3944, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase)*.

Depending on the facts of the case, alternative grounds for liability may be

substituted in question 2, as in CACI No. 3943.

VF-3902. Punitive Damages—Entity Defendant

We answer the questions submitted to us as follows:

1. **Was the conduct constituting malice, oppression, or fraud committed by one or more officers, directors, or managing agents of [***name of defendant***] acting on behalf of [***name of defendant***]?**

   _____ Yes _____ No

   [If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **What amount of punitive damages, if any, do you award [***name of plaintiff***]? $_____]**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised October 2008, December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Normally, this verdict form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 2 if the trial is not bifurcated.

This form is based on CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*, and CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase)*. This form is intended to address the first bracketed option in CACI Nos. 3945 and 3946.

VF-3903. Punitive Damages—Entity Defendant—Ratification

We answer the questions submitted to us as follows:

1. **Did an agent or employee of [*name of defendant*] engage in the conduct with malice, oppression, or fraud?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did one or more officers, directors, or managing agents of [*name of defendant*] know of this conduct and adopt or approve it after it occurred?**

   _____ Yes _____ No

   [If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **What amount of punitive damages, if any, do you award [*name of plaintiff*]? $_____]**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised October 2008, December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Normally, this verdict form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 3 if the trial is not bifurcated.

This form is based on CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*, and CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase)*. This form is intended to address the third bracketed option in CACI Nos. 3945 and 3946.

VF-3904. Punitive Damages—Entity Defendant—Authorization

We answer the questions submitted to us as follows:

1. **Did an agent or employee of [*name of defendant*] engage in the conduct with malice, oppression, or fraud?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did one or more officers, directors, or managing agents of [*name of defendant*] authorize this conduct?**

   _____ Yes _____ No

   [If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **What amount of punitive damages, if any, do you award [*name of plaintiff*]? $_____]**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised October 2008, December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 3 if the trial is not bifurcated.

This form is based on CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*, and CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase)*. This form is intended to address the second bracketed option in CACI Nos. 3945 and 3946.

Users may wish to combine this verdict form with the verdict form(s) on the underlying cause(s) of action.

VF-3905. Damages for Wrongful Death (Death of an Adult)

We answer the questions submitted to us as follows:

1. What are [*name of plaintiff*]'s economic damages?

[a. Past financial support that [*name of decedent*] would have contributed to the family: $_____]

[b. Future financial support that [*name of decedent*] would have contributed to the family: $_____]

[c. Past losses of gifts or benefits that [*name of plaintiff*] would have expected to receive from [*name of decedent*]: $_____]

[d. Future losses of gifts or benefits that [*name of plaintiff*] would have expected to receive from [*name of decedent*]: $_____]

[e. [*Name of decedent*]'s funeral and burial expenses: $_____]

[f. Past household services that [*name of decedent*] would have provided: $_____]

[g. Future household services that [*name of decedent*] would have provided: $_____]

2. What are [*name of plaintiff*]'s noneconomic damages?

[a. The loss of [*name of decedent*]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support, [and] [the enjoyment of sexual relations/[*name of decedent*]'s training and guidance] from [*insert date of death*] to the present: $_____]

[b. The loss of [*name of decedent*]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support, [and] [the enjoyment of sexual relations/[*name of decedent*]'s training

and guidance] from today forward: $_____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New April 2004; Revised December 2010, December 2016, May 2024

Directions for Use

This form is based on CACI No. 3921, *Wrongful Death (Death of an Adult)*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Delete any questions that do not apply to the facts of the case. Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3906. Damages for Wrongful Death (Parents' Recovery for Death of a Minor Child)

We answer the questions submitted to us as follows:

1. What are [*name of plaintiff*]'s economic damages?

[a. Past financial support that [*name of decedent*] would have contributed to the family: **$_____]**

[b. Future financial support that [*name of decedent*] would have contributed to the family: **$_____]**

[c. Past losses of gifts or benefits that [*name of plaintiff*] would have expected to receive from [*name of decedent*]: **$_____]**

[d. Future losses of gifts or benefits that [*name of plaintiff*] would have expected to receive from [*name of decedent*]: **$_____]**

[e. [*Name of decedent*]'s funeral and burial expenses: **$_____]**

[f. Past household services that [*name of decedent*] would have provided: **$_____]**

[g. Future household services that [*name of decedent*] would have provided: **$_____]**

2. What are [*name of plaintiff*]'s noneconomic damages?

[a. The loss of [*name of decedent*]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support from [*insert date of death*] to the present: **$_____]**

[b. The loss of [*name of decedent*]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support from today forward: **$_____]**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New April 2004; Revised December 2010, December 2016, May 2024

Directions for Use

This form is based on CACI No. 3922, *Wrongful Death (Parents' Recovery for Death of a Minor Child).*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Delete any questions that do not apply to the facts of the case. Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest.* This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-3907. Damages for Loss of Consortium (Noneconomic Damage)

We answer the question submitted to us as follows:

1. **What are [*name of plaintiff*]'s damages for loss of [his/her/*nonbinary pronoun*] [husband/wife]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support, and enjoyment of sexual relations [or the ability to have children]? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New April 2004; Revised December 2010, May 2024

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action. Insert the name of the spouse of the injured party as "name of plaintiff."

This form is based on CACI No. 3920, *Loss of Consortium (Noneconomic Damage)*.

VF-3908–VF-3919. Reserved for Future Use

VF-3920. Damages on Multiple Legal Theories

What are [*name of plaintiff***]'s damages? [***List each item of damages listed in CACI No. 3934.***]**

1. **[***e.g., economic damages: lost past earnings***]. [Enter the amount below if you find that [***name of defendant***] is liable to [***name of plaintiff***] under [***specify all of the legal theories supporting this element of damages; use "or" if more than one***].]**

$_____

2. **[***e.g., economic damages: past medical expenses***]. [Enter the amount below if you find that [***name of defendant***] is liable to [***name of plaintiff***] under [***specify the legal theories supporting this element of damages; use "or" if more than one***].]**

$_____

3. **[***e.g., economic damages: lost future earnings***]. [Enter the amount below if you find that [***name of defendant***] is liable to [***name of plaintiff***] under [***specify the legal theories supporting this element of damages; use "or" if more than one***].]**

$_____

4. **[***e.g., economic damages: future medical expenses***]. [Enter the amount below if you find that [***name of defendant***] is liable to [***name of plaintiff***] under [***specify the legal theories supporting this element of damages; use "or" if more than one***].]**

$_____

5. **[***e.g., past noneconomic loss including [physical pain/mental suffering***].] [Enter the amount below if you find that [***name of defendant***] is liable to [***name of plaintiff***] under [***specify the legal theories supporting this element of damages; use "or" if more than one***].]**

$_____

6. **[***e.g., future noneconomic loss including [physical pain/mental suffering***].] [Enter the amount below if you find that [***name of defendant***] is liable to [***name of plaintiff***] under [***specify the legal theories supporting this element of damages; use "or" if more than one***].]**

$_____

TOTAL **$**_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2010; Revised May 2024

Directions for Use

This verdict form is for use with CACI No. 3934, *Damages on Multiple Legal Theories*. Together they are designed to avoid the jury's awarding the same damages twice under different causes of action, counts, or legal theories, or failing to distinguish sufficiently what damages are being awarded under what cause of action, count, or legal theory.

If multiple causes of action are at issue, use this verdict form instead of the damages tables in each separate verdict form. If multiple verdict forms will be combined, delete all damages tables and incorporate this verdict form instead.

List each item of damages identified in CACI No. 3934. Include each item only once regardless of the number of claims under which the item may be recovered. The sentence after the item of damages must be included if the item is not recoverable under all causes of action, counts, or legal theories asserted against the defendant. The jury must be advised to find damages only if it has found liability on at least one theory under which the item is recoverable. For example, lost past earnings might be recoverable under all claims, in which case the additional sentence should be omitted. But noneconomic damages for metal suffering might be recoverable only under "the claim for bad-faith breach of insurance contract," in which case the additional sentence must be included.

Often it will be necessary to identify items of damages with considerable specificity. For example, instead of just "emotional distress," it may be necessary to specify "emotional distress from harassment before termination of employment" and "additional emotional distress because of termination of employment." (See, e.g., *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 701–705 [101 Cal.Rptr.3d 773, 219 P.3d 749].)

VF-3921–VF-3999. Reserved for Future Use

Life Expectancy Table—Male

National Vital Statistics Reports, Vol. 72, No. 12, November 7, 2023

Table 2. Life table for males: United States, 2021

Spreadsheet version available from: https://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/NVSR/72-12/Table02.xlsx.

Age (years)	Probability of dying between ages x and $x+1$ q_x	Number surviving to age x l_x	Number dying between ages x and $x+1$ d_x	Person-years lived between ages x and $x+1$ L_x	Total number of person-years lived above age x T_x	Expectation of life at age x e_x
0–1	0.005833	100,000	583	99,489	7,354,986	73.5
1–2	0.000416	99,417	41	99,396	7,255,497	73.0
2–3	0.000274	99,375	27	99,362	7,156,101	72.0
3–4	0.000224	99,348	22	99,337	7,056,739	71.0
4–5	0.000175	99,326	17	99,317	6,957,402	70.0
5–6	0.000161	99,308	16	99,300	6,858,085	69.1
6–7	0.000149	99,292	15	99,285	6,758,785	68.1
7–8	0.000137	99,278	14	99,271	6,659,500	67.1
8–9	0.000119	99,264	12	99,258	6,560,229	66.1
9–10	0.000098	99,252	10	99,247	6,460,971	65.1
10–11	0.000084	99,242	8	99,238	6,361,724	64.1
11–12	0.000093	99,234	9	99,230	6,262,485	63.1
12–13	0.000144	99,225	14	99,218	6,163,256	62.1
13–14	0.000248	99,211	25	99,198	6,064,038	61.1
14–15	0.000392	99,186	39	99,167	5,964,840	60.1
15–16	0.000556	99,147	55	99,120	5,865,673	59.2
16–17	0.000719	99,092	71	99,056	5,766,553	58.2
17–18	0.000885	99,021	88	98,977	5,667,497	57.2
18–19	0.001044	98,933	103	98,882	5,568,520	56.3
19–20	0.001199	98,830	118	98,771	5,469,638	55.3
20–21	0.001361	98,711	134	98,644	5,370,868	54.4
21–22	0.001527	98,577	151	98,502	5,272,223	53.5
22–23	0.001678	98,427	165	98,344	5,173,722	52.6
23–24	0.001805	98,261	177	98,173	5,075,378	51.7
24–25	0.001915	98,084	188	97,990	4,977,205	50.7
25–26	0.002015	97,896	197	97,798	4,879,215	49.8
26–27	0.002116	97,699	207	97,596	4,781,417	48.9
27–28	0.002221	97,492	217	97,384	4,683,821	48.0
28–29	0.002334	97,276	227	97,162	4,586,438	47.1
29–30	0.002451	97,049	238	96,930	4,489,275	46.3
30–31	0.002569	96,811	249	96,686	4,392,346	45.4
31–32	0.002682	96,562	259	96,433	4,295,659	44.5
32–33	0.002789	96,303	269	96,169	4,199,227	43.6
33–34	0.002887	96,035	277	95,896	4,103,058	42.7
34–35	0.002982	95,757	286	95,615	4,007,162	41.8
35–36	0.003081	95,472	294	95,325	3,911,547	41.0
36–37	0.003190	95,178	304	95,026	3,816,222	40.1
37–38	0.003310	94,874	314	94,717	3,721,196	39.2
38–39	0.003446	94,560	326	94,397	3,626,479	38.4
39–40	0.003597	94,234	339	94,065	3,532,082	37.5
40–41	0.003772	93,895	354	93,718	3,438,018	36.6
41–42	0.003964	93,541	371	93,356	3,344,299	35.8
42–43	0.004158	93,170	387	92,977	3,250,944	34.9
43–44	0.004353	92,783	404	92,581	3,157,967	34.0
44–45	0.004560	92,379	421	92,168	3,065,386	33.2
45–46	0.004799	91,958	441	91,737	2,973,218	32.3
46–47	0.005090	91,516	466	91,283	2,881,481	31.5
47–48	0.005431	91,051	494	90,803	2,790,198	30.6
48–49	0.005818	90,556	527	90,293	2,699,394	29.8
49–50	0.006241	90,029	562	89,748	2,609,102	29.0
50–51	0.006679	89,467	598	89,169	2,519,353	28.2
51–52	0.007151	88,870	636	88,552	2,430,185	27.3
52–53	0.007690	88,234	678	87,895	2,341,633	26.5
53–54	0.008316	87,556	728	87,192	2,253,738	25.7
54–55	0.009023	86,828	783	86,436	2,166,546	25.0
55–56	0.009754	86,044	839	85,624	2,080,111	24.2
56–57	0.010510	85,205	895	84,757	1,994,486	23.4
57–58	0.011350	84,309	957	83,831	1,909,729	22.7
58–59	0.012285	83,352	1,024	82,840	1,825,898	21.9
59–60	0.013286	82,328	1,094	81,782	1,743,058	21.2

Table 2. Life table for males: United States, 2021—Con.

Spreadsheet version available from: https://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/NVSR/72-12/Table02.xlsx.

Age (years)	Probability of dying between ages x and $x+1$ q_x	Number surviving to age x l_x	Number dying between ages x and $x+1$ d_x	Person-years lived between ages x and $x+1$ L_x	Total number of person-years lived above age x T_x	Expectation of life at age x e_x
60–61	0.014341	81,235	1,165	80,652	1,661,276	20.5
61–62	0.015402	80,070	1,233	79,453	1,580,624	19.7
62–63	0.016437	78,836	1,296	78,189	1,501,171	19.0
63–64	0.017445	77,541	1,353	76,864	1,422,982	18.4
64–65	0.018475	76,188	1,408	75,484	1,346,118	17.7
65–66	0.019576	74,780	1,464	74,048	1,270,634	17.0
66–67	0.020927	73,316	1,534	72,549	1,196,586	16.3
67–68	0.022303	71,782	1,601	70,982	1,124,036	15.7
68–69	0.023804	70,181	1,671	69,346	1,053,055	15.0
69–70	0.025383	68,511	1,739	67,641	983,709	14.4
70–71	0.026908	66,772	1,797	65,873	916,068	13.7
71–72	0.028704	64,975	1,865	64,042	850,195	13.1
72–73	0.030788	63,110	1,943	62,138	786,152	12.5
73–74	0.033361	61,167	2,041	60,147	724,014	11.8
74–75	0.035944	59,126	2,125	58,064	663,867	11.2
75–76	0.040497	57,001	2,308	55,847	605,804	10.6
76–77	0.044053	54,693	2,409	53,488	549,957	10.1
77–78	0.048810	52,283	2,552	51,007	496,469	9.5
78–79	0.053173	49,731	2,644	48,409	445,461	9.0
79–80	0.058908	47,087	2,774	45,700	397,052	8.4
80–81	0.063954	44,313	2,834	42,896	351,352	7.9
81–82	0.070311	41,479	2,916	40,021	308,456	7.4
82–83	0.076958	38,563	2,968	37,079	268,435	7.0
83–84	0.084813	35,595	3,019	34,086	231,356	6.5
84–85	0.094500	32,576	3,078	31,037	197,271	6.1
85–86	0.104319	29,498	3,077	27,959	166,234	5.6
86–87	0.116428	26,421	3,076	24,882	138,275	5.2
87–88	0.129619	23,344	3,026	21,831	113,392	4.9
88–89	0.143914	20,319	2,924	18,856	91,561	4.5
89–90	0.159317	17,394	2,771	16,009	72,704	4.2
90–91	0.175814	14,623	2,571	13,338	56,695	3.9
91–92	0.193369	12,052	2,331	10,887	43,358	3.6
92–93	0.211919	9,722	2,060	8,692	32,471	3.3
93–94	0.231379	7,661	1,773	6,775	23,779	3.1
94–95	0.251638	5,889	1,482	5,148	17,004	2.9
95–96	0.272559	4,407	1,201	3,806	11,856	2.7
96–97	0.293988	3,206	942	2,735	8,050	2.5
97–98	0.315751	2,263	715	1,906	5,315	2.3
98–99	0.337666	1,549	523	1,287	3,409	2.2
99–100	0.359544	1,026	369	841	2,122	2.1
100 and older	1.000000	657	657	1,281	1,281	1.9

SOURCE: National Center for Health Statistics, National Vital Statistics System, mortality data file.

Life Expectancy Table—Female

National Vital Statistics Reports, Vol. 72, No. 12, November 7, 2023

Table 3. Life table for females: United States, 2021

Spreadsheet version available from: https://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/NVSR/72-12/Table03.xlsx.

Age (years)	Probability of dying between ages x and $x+1$ q_x	Number surviving to age x l_x	Number dying between ages x and $x+1$ d_x	Person-years lived between ages x and $x+1$ L_x	Total number of person-years lived above age x T_x	Expectation of life at age x e_x
0–1	0.005040	100,000	504	99,557	7,932,807	79.3
1–2	0.000389	99,496	39	99,477	7,833,250	78.7
2–3	0.000234	99,457	23	99,446	7,733,774	77.8
3–4	0.000158	99,434	16	99,426	7,634,328	76.8
4–5	0.000147	99,418	15	99,411	7,534,902	75.8
5–6	0.000124	99,404	12	99,398	7,435,491	74.8
6–7	0.000109	99,391	11	99,386	7,336,093	73.8
7–8	0.000100	99,381	10	99,376	7,236,707	72.8
8–9	0.000094	99,371	9	99,366	7,137,332	71.8
9–10	0.000093	99,361	9	99,357	7,037,966	70.8
10–11	0.000096	99,352	10	99,347	6,938,609	69.8
11–12	0.000107	99,342	11	99,337	6,839,262	68.8
12–13	0.000128	99,332	13	99,325	6,739,925	67.9
13–14	0.000160	99,319	16	99,311	6,640,600	66.9
14–15	0.000201	99,303	20	99,293	6,541,289	65.9
15–16	0.000247	99,283	25	99,271	6,441,995	64.9
16–17	0.000297	99,259	29	99,244	6,342,724	63.9
17–18	0.000349	99,229	35	99,212	6,243,481	62.9
18–19	0.000403	99,195	40	99,175	6,144,269	61.9
19–20	0.000459	99,155	46	99,132	6,045,094	61.0
20–21	0.000520	99,109	52	99,083	5,945,962	60.0
21–22	0.000584	99,057	58	99,029	5,846,879	59.0
22–23	0.000641	99,000	64	98,968	5,747,851	58.1
23–24	0.000690	98,936	68	98,902	5,648,883	57.1
24–25	0.000733	98,868	72	98,832	5,549,981	56.1
25–26	0.000774	98,795	76	98,757	5,451,149	55.2
26–27	0.000820	98,719	81	98,678	5,352,392	54.2
27–28	0.000876	98,638	86	98,595	5,253,714	53.3
28–29	0.000946	98,552	93	98,505	5,155,119	52.3
29–30	0.001026	98,458	101	98,408	5,056,614	51.4
30–31	0.001111	98,357	109	98,303	4,958,206	50.4
31–32	0.001194	98,248	117	98,189	4,859,903	49.5
32–33	0.001275	98,131	125	98,068	4,761,714	48.5
33–34	0.001354	98,006	133	97,939	4,663,646	47.6
34–35	0.001433	97,873	140	97,803	4,565,707	46.6
35–36	0.001518	97,733	148	97,658	4,467,904	45.7
36–37	0.001611	97,584	157	97,506	4,370,245	44.8
37–38	0.001709	97,427	167	97,344	4,272,740	43.9
38–39	0.001814	97,261	176	97,172	4,175,396	42.9
39–40	0.001925	97,084	187	96,991	4,078,223	42.0
40–41	0.002048	96,897	198	96,798	3,981,232	41.1
41–42	0.002183	96,699	211	96,593	3,884,434	40.2
42–43	0.002321	96,488	224	96,376	3,787,841	39.3
43–44	0.002461	96,264	237	96,145	3,691,465	38.3
44–45	0.002611	96,027	251	95,902	3,595,320	37.4
45–46	0.002784	95,776	267	95,643	3,499,418	36.5
46–47	0.002984	95,510	285	95,367	3,403,775	35.6
47–48	0.003203	95,225	305	95,072	3,308,408	34.7
48–49	0.003436	94,919	326	94,756	3,213,336	33.9
49–50	0.003680	94,593	348	94,419	3,118,580	33.0
50–51	0.003935	94,245	371	94,060	3,024,160	32.1
51–52	0.004217	93,874	396	93,677	2,930,101	31.2
52–53	0.004544	93,479	425	93,266	2,836,424	30.3
53–54	0.004928	93,054	459	92,824	2,743,158	29.5
54–55	0.005361	92,595	496	92,347	2,650,333	28.6
55–56	0.005809	92,099	535	91,831	2,557,986	27.8
56–57	0.006274	91,564	574	91,277	2,466,155	26.9
57–58	0.006795	90,989	618	90,680	2,374,879	26.1
58–59	0.007383	90,371	667	90,037	2,284,199	25.3
59–60	0.008020	89,704	719	89,344	2,194,161	24.5

Table 3. Life table for females: United States, 2021—Con.

Spreadsheet version available from: https://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/NVSR/72-12/Table03.xlsx.

Age (years)	Probability of dying between ages x and $x+1$ q_x	Number surviving to age x l_x	Number dying between ages x and $x+1$ d_x	Person-years lived between ages x and $x+1$ L_x	Total number of person-years lived above age x T_x	Expectation of life at age x e_x
60–61	0.008703	88,984	774	88,597	2,104,817	23.7
61–62	0.009396	88,210	829	87,796	2,016,220	22.9
62–63	0.010066	87,381	880	86,941	1,928,424	22.1
63–64	0.010706	86,502	926	86,039	1,841,482	21.3
64–65	0.011354	85,576	972	85,090	1,755,444	20.5
65–66	0.012041	84,604	1,019	84,095	1,670,354	19.7
66–67	0.012880	83,585	1,077	83,047	1,586,259	19.0
67–68	0.013821	82,509	1,140	81,938	1,503,212	18.2
68–69	0.014915	81,368	1,214	80,762	1,421,274	17.5
69–70	0.016188	80,155	1,298	79,506	1,340,512	16.7
70–71	0.017475	78,857	1,378	78,168	1,261,007	16.0
71–72	0.018964	77,479	1,469	76,744	1,182,838	15.3
72–73	0.020616	76,010	1,567	75,226	1,106,094	14.6
73–74	0.022603	74,443	1,683	73,602	1,030,868	13.8
74–75	0.024647	72,760	1,793	71,864	957,266	13.2
75–76	0.027933	70,967	1,982	69,976	885,402	12.5
76–77	0.030922	68,985	2,133	67,918	815,427	11.8
77–78	0.034536	66,851	2,309	65,697	747,509	11.2
78–79	0.037857	64,543	2,443	63,321	681,812	10.6
79–80	0.041967	62,099	2,606	60,796	618,491	10.0
80–81	0.046336	59,493	2,757	58,115	557,695	9.4
81–82	0.051084	56,736	2,898	55,287	499,580	8.8
82–83	0.056608	53,838	3,048	52,314	444,293	8.3
83–84	0.062881	50,790	3,194	49,194	391,978	7.7
84–85	0.070582	47,597	3,359	45,917	342,785	7.2
85–86	0.079149	44,237	3,501	42,487	296,868	6.7
86–87	0.087870	40,736	3,579	38,946	254,381	6.2
87–88	0.098712	37,156	3,668	35,323	215,435	5.8
88–89	0.110635	33,489	3,705	31,636	180,113	5.4
89–90	0.123686	29,784	3,684	27,942	148,477	5.0
90–91	0.137893	26,100	3,599	24,300	120,535	4.6
91–92	0.153272	22,501	3,449	20,776	96,235	4.3
92–93	0.169816	19,052	3,235	17,434	75,458	4.0
93–94	0.187493	15,817	2,966	14,334	58,024	3.7
94–95	0.206246	12,851	2,651	11,526	43,690	3.4
95–96	0.225991	10,201	2,305	9,048	32,164	3.2
96–97	0.246613	7,895	1,947	6,922	23,116	2.9
97–98	0.267972	5,948	1,594	5,151	16,194	2.7
98–99	0.289905	4,354	1,262	3,723	11,043	2.5
99–100	0.312227	3,092	965	2,609	7,319	2.4
100 and older	1.000000	2,127	2,127	4,710	4,710	2.2

SOURCE: National Center for Health Statistics, National Vital Statistics System, mortality data file.

LANTERMAN-PETRIS-SHORT ACT

4000. Conservatorship—Essential Factual Elements

[*Name of petitioner*] claims that [*name of respondent*] is gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and a severe substance use disorder/ impairment by chronic alcoholism] and therefore [should be placed in a conservatorship/the conservatorship should be renewed]. In a conservatorship, a conservator is appointed to oversee, under the direction of the court, the care of persons who are gravely disabled. To succeed on this claim, [*name of petitioner*] must prove beyond a reasonable doubt both of the following:

1. **That [*name of respondent*] [has a [mental health disorder/severe substance use disorder/co-occurring mental health disorder and severe substance use disorder]/is impaired by chronic alcoholism]; and**
2. **That [*name of respondent*] is gravely disabled as a result of the [mental health disorder/severe substance use disorder/co-occurring mental health disorder and severe substance use disorder/chronic alcoholism].**

New June 2005; Revised June 2016, May 2022, May 2024

Directions for Use

Give CACI No. 4002, *"Gravely Disabled" Explained*, with this instruction.

Select the appropriate option in the first sentence depending on whether the case involves an initial petition to establish a conservatorship or a successive petition for reappointment. (Welf. & Inst. Code, §§ 5350, 5361(b).)

If a county's relevant governing body has adopted a resolution postponing the changes made to Welfare and Institutions Code section 5008 until January 1, 2026 (or an earlier date), do not include "severe substance use disorder" or "a co-occurring mental health disorder and severe substance use disorder." (Welf. & Inst. Code, § 5008(h)(4) [authorizing a county's deferral of changes made in Senate Bill 43 (Stats. 2023, ch. 637)].)

A different instruction will be required if the standard for mental incompetence under Penal Code section 1370 is alleged. (Welf. & Inst. Code, § 5008(h)(1)(B).)

Sources and Authority

- Right to Jury Trial. Welfare and Institutions Code section 5350(d).
- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "The Lanterman-Petris-Short Act (the act) governs the involuntary treatment of the mentally ill in California. Enacted by the Legislature in 1967, the act

includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program." (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008–1009 [36 Cal.Rptr.2d 40, 884 P.2d 988].)

- "LPS Act commitment proceedings are subject to the due process clause because significant liberty interests are at stake. But an LPS Act proceeding is civil. '[T]he stated purposes of the LPS Act foreclose any argument that an LPS commitment is equivalent to criminal punishment in its design or purpose.' Thus, not all safeguards required in criminal proceedings are required in LPS Act proceedings." (*Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163, 1167 [231 Cal.Rptr.3d 79], internal citations omitted.)
- "The clear import of the LPS Act is to use the involuntary commitment power of the state sparingly and only for those truly necessary cases where a 'gravely disabled' person is incapable of providing for his basic needs either alone or with help from others." (*Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1280 [221 Cal.Rptr.3d 622].)
- "The right to a jury trial upon the establishment of conservatorship is fundamental to the protections afforded by the LPS. As related, that right is expressly extended to the reestablishment of an LPS conservatorship." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1037 [226 Cal.Rptr. 33], internal citations omitted.)
- "[T]he trial court erred in accepting counsel's waiver of [conservatee]'s right to a jury trial . . . . (*Estate of Kevin A.* (2015) 240 Cal.App.4th 1241, 1253 [193 Cal.Rptr.3d 237].)
- " 'The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act.' An LPS commitment order involves a loss of liberty by the conservatee. Consequently, it follows that a trial court must obtain a waiver of the right to a jury trial from the person who is subject to an LPS commitment." (*Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378, 382–383 [199 Cal.Rptr.3d 689].)
- "We . . . hold that capacity or willingness to accept treatment is a relevant factor to be considered on the issue of grave disability but is not a separate element that must be proven to establish a conservatorship." (*Conservatorship of K.P.* (2021) 11 Cal.5th 695, 703 [280 Cal.Rptr.3d 298, 489 P.3d 296].)
- "We . . . hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or

shelter unaided by willing, responsible relatives, friends or appropriate third persons." (*Conservatorship of Davis*, *supra*, 124 Cal.App.3d at p. 328, disapproved on other grounds in *Conservatorship of K.P., supra,* 11 Cal.5th at p. 717.)

- "The jury should determine if the person voluntarily accepts meaningful treatment, in which case no conservatorship is necessary. If the jury finds the person will not accept treatment, then it must determine if the person can meet his basic needs on his own or with help, in which case a conservatorship is not justified." (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1092–1093 [242 Cal.Rptr. 289].)
- "Our research has failed to reveal any authority for the proposition [that] without a finding that the proposed conservatee is unable or unwilling to voluntarily accept treatment, the court must reject a conservatorship in the face of grave disability. . . . Some persons with grave disabilities are beyond treatment. Taken to its logical conclusion, they would be beyond the LPS Act's reach, according to the argument presented in this appeal." (*Conservatorship of Symington, supra,* 209 Cal.App.3d at p. 1469.)
- "The party seeking imposition of the conservatorship must prove the proposed conservatee's grave disability beyond a reasonable doubt and the verdict must be issued by a unanimous jury." (*Conservatorship of Susan T., supra,* 8 Cal.4th at p. 1009, internal citation omitted.)
- "Although there is no private right of action for a violation of section 5152, 'aggrieved individuals can enforce the [LPS] Act's provisions through other common law and statutory causes of action, such as negligence, medical malpractice, false imprisonment, assault, battery, declaratory relief, United States Code section 1983 for constitutional violations, and Civil Code section 52.1. [Citations.]' " (*Swanson v. County of Riverside* (2019) 36 Cal.App.5th 361, 368 [248 Cal.Rptr.3d 476].)

Secondary Sources

15 Witkin, Summary of California Law (11th ed. 2017) Wills and Probate, § 994

3 Witkin, California Procedure (6th ed.2021) Actions, § 103 et seq.

2 California Conservatorship Practice (Cont.Ed.Bar) Ch. 23

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.42 et seq. (Matthew Bender)

4001. "Mental Disorder" Explained

Revoked May 2024. Reserved for Future Use.

4002. "Gravely Disabled" Explained

The term "gravely disabled" means that a person is presently unable to provide for the person's basic needs for food, clothing, shelter, personal safety, or necessary medical care because of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and a severe substance use disorder/impairment by chronic alcoholism]. [The term "gravely disabled" does not include persons with intellectual disabilities by reason of the disability alone.]

[[*Insert one or more of the following***:] [psychosis/bizarre or eccentric behavior/delusions/hallucinations/[***insert other***]] [is/are] not enough, by [itself/themselves], to find that [***name of respondent***] is gravely disabled. [He/She/***Nonbinary pronoun***] must be unable to provide for the basic needs of food, clothing, shelter, personal safety, or necessary medical care because of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and a severe substance use disorder/impairment by chronic alcoholism].]**

["Personal safety" means the ability of a person to survive safely in the community without involuntary detention or treatment.]

["Necessary medical care" means care that a licensed health care practitioner, while operating within the scope of their practice, determines to be necessary to prevent serious deterioration of an existing physical medical condition, which, if left untreated, is likely to result in serious bodily injury. "Serious bodily injury" means an injury involving extreme physical pain, substantial risk of death, or protracted loss or impairment of function of a bodily member, organ, or of mental faculty, or requiring medical intervention, including but not limited to hospitalization, surgery, or physical rehabilitation.]

[If you find [*name of respondent***] will not take [his/her/***nonbinary pronoun***] prescribed medication without supervision and that a mental health disorder makes [him/her/***nonbinary pronoun***] unable to provide for [his/her/***nonbinary pronoun***] basic needs for food, clothing, shelter, personal safety, or necessary medical care without such medication, then you may conclude [***name of respondent***] is gravely disabled.**

In determining whether [*name of respondent***] is gravely disabled, you may consider evidence that [he/she/***nonbinary pronoun***] did not take prescribed medication in the past. You may also consider evidence of [his/her/***nonbinary pronoun***] lack of insight into [his/her/***nonbinary pronoun***] mental health condition.]**

In considering whether [*name of respondent***] is gravely disabled, you may not consider the likelihood of future deterioration or relapse of a condition.**

In determining whether [*name of respondent*] is gravely disabled, you may consider whether [he/she/*nonbinary pronoun*] is unable or unwilling to voluntarily accept meaningful treatment.

New June 2005; Revised January 2018, May 2019, May 2020, May 2022, May 2024

Directions for Use

This instruction provides the definition of "gravely disabled" from Welfare and Institutions Code section 5008(h)(1)(A) and (h)(2), which will be the applicable standard in most cases. The instruction applies to both adults and minors. (*Conservatorship of M.B.* (2018) 27 Cal.App.5th 98, 107 [237 Cal.Rptr.3d 775].)

If a county's relevant governing body has adopted a resolution postponing the changes made to Welfare and Institutions Code section 5008, omit from the definition of "gravely disabled" the terms "personal safety" and "necessary medical care," as well as "severe substance use disorder" and "a co-occurring mental health disorder and a severe substance use disorder." (Welf. & Inst. Code, § 5008(h)(4) [authorizing a county's deferral of changes made in Senate Bill 43 (Stats. 2023, ch. 637)].) These four terms should not be given in those counties until January 1, 2026, or an earlier date specified in the county's resolution.

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case. There is another standard in Welfare and Institutions Code section 5008(h)(1)(B) involving a finding of mental incompetence under Penal Code section 1370. A different instruction will be required if this standard is alleged.

The Welfare and Institutions Code defines "severe substance use disorder." (Welf. & Inst. Code, § 5008(o).) Give additional information about this term if appropriate. For example, severe substance use disorder requires a diagnosis, so it may be preferable to identify the individual's diagnosed severe substance use disorder.

The next to last paragraph regarding the likelihood of future deterioration may not apply if the respondent has no insight into the respondent's mental health condition. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576–1577 [254 Cal.Rptr. 552].)

If there is evidence concerning the availability of third parties that are willing to provide assistance to the proposed conservatee, see CACI No. 4007, *Third Party Assistance*.

Sources and Authority

- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "Severe Substance Use Disorder" Defined. Welfare and Institutions Code section 5008(o).
- "Personal Safety" Defined. Welfare and Institutions Code section 5008(p).
- "Necessary Medical Care" Defined. Welfare and Institutions Code section 5008(q).

- "Serious Bodily Injury" Defined. Welfare and Institutions Code section 15610.67.
- "The enactment of the LPS and with it the substitution of 'gravely disabled' for 'in need of treatment' as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative determination to meet the constitutional requirements of precision. The term 'gravely disabled' is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284 [139 Cal.Rptr. 357], footnotes omitted.)
- "[T]he public guardian must prove beyond a reasonable doubt that the proposed conservatee is gravely disabled." (*Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453, 461 [203 Cal.Rptr.3d 667].)
- "The stricter criminal standard is used because the threat to the conservatee's individual liberty and personal reputation is no different than the burdens associated with criminal prosecutions." (*Conservatorship of Smith* (1986) 187 Cal.App.3d 903, 909 [232 Cal.Rptr. 277] internal citations omitted.)
- "Bizarre or eccentric behavior, even if it interferes with a person's normal intercourse with society, does not rise to a level warranting conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival." (*Conservatorship of Smith, supra*, 187 Cal.App.3d at p. 909.)
- "Under [Welfare and Institutions Code] section 5350, subdivision (e)(1), 'a person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter.' " (*Conservatorship of Jesse G., supra*, 248 Cal.App.4th at p. 460.)
- "While [third person] may not have shown that he could manage appellant's mental health symptoms as adeptly as would a person professionally trained to care for someone with a mental disorder, that is not the standard. As appellant states, '[t]he question in a LPS conservatorship case where the proposed conservatee asserts a third party assistance claim is not whether the third party will be able to manage the person's mental health symptoms completely. Rather, the dispositive question is whether the person is able to provide the proposed conservatee with food, clothing, and shelter on a regular basis." (*Conservatorship of Jesse G., supra*, 248 Cal.App.4th at p. 463, fn. 4.)
- "We . . . hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third

persons." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369].)

- "[A]n individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled." (*Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1468 [257 Cal.Rptr. 860].)
- "[T]he pivotal issue is whether [respondent] was 'presently' gravely disabled and the evidence demonstrates that he was not. Accordingly, the order granting the petition must be overturned." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d. 1030, 1034 [226 Cal.Rptr. 33], fn. omitted, citing to *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18 [184 Cal.Rptr. 363].)
- "[A] conservatorship cannot be established because of a perceived likelihood of future relapse. To do so could deprive the liberty of persons who will not suffer such a relapse solely because of the pessimistic statistical odds. Because of the promptness with which a conservatorship proceeding can be invoked the cost in economic and liberty terms is unwarranted." (*Conservatorship of Neal* (1987) 190 Cal.App.3d 685, 689 [235 Cal.Rptr. 577].)
- "A perceived likelihood of future relapse, without more, is not enough to justify establishing a conservatorship. Neither can such a likelihood justify keeping a conservatorship in place if its subject is not presently gravely disabled, in light of the statutory provisions allowing rehearings to evaluate a conservatee's current status." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 302 [256 Cal.Rptr. 415], internal citation omitted.)
- "[T]he definition of ' "[g]ravely disabled minor" ' from section 5585.25 is not part of the LPS Act, but is found in the Children's Civil Commitment and Mental Health Treatment Act of 1988. (§ 5585.) This definition applies 'only to the initial 72 hours of mental health evaluation and treatment provided to a minor. . . . Evaluation and treatment of a minor beyond the initial 72 hours shall be pursuant to the . . . [LPS Act].' (§ 5585.20.) Accordingly, we must apply the definition found in the LPS Act, and determine whether there was substantial evidence Minor suffered from a mental disorder as a result of which she 'would be unable to provide for [her] basic personal needs' if she had to so provide." (*Conservatorship of M.B., supra*, 27 Cal.App.5th at p. 107.)
- "Theoretically, someone who is willing and able to accept voluntary treatment may not be gravely disabled if that treatment will allow the person to meet the needs for food, clothing, and shelter. Under the statutory scheme, however, this is an evidentiary conclusion to be drawn by the trier of fact. If credible evidence shows that a proposed conservatee is willing and able to accept treatment that would allow them to meet basic survival needs, the fact finder may conclude a reasonable doubt has been raised on the issue of grave disability, and the effort to impose a conservatorship may fail. It may be necessary in some cases for the fact finder to determine whether the treatment a proposed conservatee is prepared to accept will sufficiently empower them to meet basic survival needs. In some cases of severe dementia or mental illness, there may simply be no

treatment that would enable the person to 'survive safely in freedom.' " (*Conservatorship of K.P.* (2021) 11 Cal.5th 695, 711 [280 Cal.Rptr.3d 298, 489 P.3d 296].)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, § 103 et seq.

2 California Conservatorship Practice (Cont.Ed.Bar) §§ 23.3, 23.5

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, §§ 361A.33, 361A.42 (Matthew Bender)

4003. "Gravely Disabled" Minor Explained

Revoked May 2019. See *Conservatorship of M.B.* (2018) 27 Cal.App.5th 98, 107 [237 Cal.Rptr.3d 775].

4004. Issues Not to Be Considered—Type of Treatment, Care, or Supervision

In determining whether [*name of respondent*] is gravely disabled, you must not consider or discuss the type of treatment, care, or supervision that may be ordered if a conservatorship is [established/renewed].

New June 2005; Revised May 2024

Sources and Authority

- "Petitioner's proposed jury instruction reads as follows: 'You are instructed that the matter of what kind or type of treatment, care or supervision shall be rendered is not a part of your deliberation, and shall not be considered in determining whether or not [proposed conservatee] is or is not gravely disabled. The problem of treatment, care and supervision of a gravely disabled person and whether or not he shall be detained in a sanitarium, private hospital, or state institution, is not within the province of the jury, but is a matter to be considered by the conservator in the event that the jury finds that [proposed conservatee] is gravely disabled.' [¶] [T]he instruction should be given." (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 553 & fn. 7 [200 Cal.Rptr. 262].)
- "[I]nformation about the consequences of conservatorship for [proposed conservatee] was irrelevant to the only question before [the] jury: whether, as a result of a mental disorder, he is unable to provide for his basic personal needs for food, clothing, or shelter." (*Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163, 1168 [231 Cal.Rptr.3d 79].)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, § 104

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.89

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.33 (Matthew Bender)

4005. Obligation to Prove—Reasonable Doubt

[*Name of respondent*] is presumed not to be gravely disabled. [*Name of petitioner*] has the burden of proving beyond a reasonable doubt that [*name of respondent*] is gravely disabled. The fact that a petition has been filed claiming [*name of respondent*] is gravely disabled is not evidence that this claim is true.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that [*name of respondent*] is gravely disabled as a result of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism]. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether [*name of respondent*] is gravely disabled, you must impartially compare and consider all the evidence that was received throughout the entire trial.

Unless the evidence proves that [*name of respondent*] is gravely disabled because of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism] beyond a reasonable doubt, you must find that [he/she/*nonbinary pronoun*] is not gravely disabled.

Although a conservatorship is a civil proceeding, the burden of proof is the same as in criminal trials.

New June 2005; Revised June 2016, May 2024

Directions for Use

The presumption in the first sentence of the instruction is perhaps open to question. Two older cases have held that there is such a presumption. (See *Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1340 [249 Cal.Rptr. 415]; *Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1099 [242 Cal.Rptr. 289].) However, these holdings may have been based on the assumption that the California Supreme Court had incorporated all protections for criminal defendants into LPS proceedings. (See *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [proof beyond reasonable doubt and unanimous jury verdict required].) Subsequent cases have made it clear that an LPS respondent is not entitled to all of the same protections as a criminal defendant. (See *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 538 [53 Cal.Rptr.3d 856, 150 P.3d 738] [exclusionary rule and *Wende* review do not apply in LPS].)

Sources and Authority

- "A proposed conservatee has a constitutional right to a finding based on proof beyond a reasonable doubt. Without deciding whether the court has a sua sponte duty to so instruct, we are satisfied that, on request, a court is required to instruct in language emphasizing a proposed conservatee is presumed to not be gravely disabled until the state carries its burden of proof." (*Conservatorship of Walker*, *supra*, 196 Cal.App.3d at p. 1099, internal citation omitted.)
- "[I]f requested, a court is required to instruct that a proposed conservatee is presumed not to be gravely disabled until the state carries its burden of proof." (*Conservatorship of Law*, *supra*, 202 Cal.App.3d at p. 1340.)
- "Even if we view the presumption in a more general sense as a warning against the consideration of extraneous factors, we cannot conclude that the federal and state Constitutions require a presumption-of-innocence-like instruction outside the context of a criminal case. Particularly, we conclude that, based on the civil and nonpunitive nature of involuntary commitment proceedings, a mentally ill or disordered person would not be deprived of a fair trial without such an instruction." (*People v. Beeson* (2002) 99 Cal.App.4th 1393, 1409 [122 Cal.Rptr.2d 384].)
- "Neither mental disorder nor grave disability is a crime." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 330 [177 Cal.Rptr. 369].)
- "More recently this court has recognized, however, that the analogy between criminal proceedings and proceedings under the LPS Act is imperfect at best and that not all of the safeguards required in the former are appropriate to the latter." (*Conservatorship of Ben C., supra,* 40 Cal.4th at p. 538.)
- "In [*Conservatorship of*] *Roulet*, the California Supreme Court held that due process requires proof beyond a reasonable doubt and jury unanimity in conservatorship proceedings. However, subsequent appellate court decisions have not extended the application of criminal law concepts in this area." (*Conservatorship of Maldonado* (1985) 173 Cal.App.3d 144, 147 [218 Cal.Rptr. 796].)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, §§ 116, 117

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.81

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.42 (Matthew Bender)

4006. Sufficiency of Indirect Circumstantial Evidence

You may not decide that [*name of respondent*] is gravely disabled based substantially on indirect evidence unless this evidence:

1. **Is consistent with the conclusion that [*name of respondent*] is gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism]; and**
2. **Cannot be explained by any other reasonable conclusion.**

If the indirect evidence suggests two reasonable interpretations, one of which suggests the existence of a grave disability and the other its nonexistence, then you must accept the interpretation that suggests [*name of respondent*] is not gravely disabled.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable one.

If you base your verdict on indirect evidence, [*name of petitioner*] must prove beyond a reasonable doubt each fact essential to your conclusion that [*name of respondent*] is gravely disabled.

New June 2005; Revised May 2024

Directions for Use

Read this instruction immediately after CACI No. 202, *Direct and Indirect Evidence*.

Sources and Authority

- "[W]here proof to establish a conservatorship for a person alleged to be gravely disabled is based upon substantially circumstantial evidence, the proposed conservatee is entitled, on request in an appropriate case, to have the jurors instructed as to the principles relevant when applying circumstantial evidence to the beyond a reasonable doubt burden of proof." (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1088 [242 Cal.Rptr. 289].)
- "A proposed conservatee is entitled to procedural due process protections similar to a criminal defendant since fundamental liberty rights are at stake. The trial court had a sua sponte duty to correctly instruct on the general principles of law necessary for the jury's understanding of the case." (*Conservatorship of Walker, supra,* 196 Cal.App.3d at p. 1092, fn. 5, internal citations omitted.)
- "The court has no duty to give the [circumstantial evidence jury instructions

applicable to criminal cases] in a case where the circumstantial evidence necessary to prove a certain mental state is not subject to any inference except that pointing to the existence of that mental state." (*Conservatorship of Walker, supra,* 196 Cal.App.3d at p. 1098; *Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1342 [249 Cal.Rptr. 415].)

- "Where a noncriminal case is to be evaluated by a reasonable doubt standard, it follows that a party on a proper state of the evidence is entitled on request to have jurors informed of the manner in which that standard must be established when the evidence consists substantially of circumstantial evidence." (*Conservatorship of Walker, supra,* 196 Cal.App.3d at p. 1098.)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, §§ 104, 108

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.90

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.33 (Matthew Bender)

4007. Third Party Assistance

A person is not "gravely disabled" if [he/she/*nonbinary pronoun*] can survive safely with the help of third party assistance. Third party assistance is the aid of family, friends, or others who are responsible, willing, and able to help provide for the person's basic needs for food, clothing, shelter, personal safety, or necessary medical care.

You must not consider offers by family, friends, or others unless they [have testified to/stated specifically in writing] their willingness and ability to help provide [*name of respondent*] with food, clothing, shelter, personal safety, or necessary medical care. Well-intended offers of assistance are not sufficient unless they will ensure the person can survive safely.

[Assistance provided by a correctional facility does not constitute third party assistance.]

New June 2005; Revised May 2024

Sources and Authority

- Help of Family or Friends. Welfare and Institutions Code section 5350(e).
- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "[A] person is not 'gravely disabled' within the meaning of section 5008, subdivision (h)(1) if he or she is capable of surviving safely in freedom with the help of willing and responsible family members, friends or third parties." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 321 [177 Cal.Rptr. 369].)
- "As we view the broad purpose of the LPS Act, imposition of a conservatorship should be made only in situations where it is truly necessary. To accomplish this purpose evidence of the availability of third party assistance must be considered." (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [197 Cal.Rptr. 539, 673 P.2d 209].)
- "The California Supreme Court in *Conservatorship of Early* . . . concluded although a person might be gravely disabled if left to his or her own devices, he or she may be able to function successfully in freedom with the support and assistance of family and friends. The court recognized almost everyone depends to a greater or lesser extent upon others in order to survive in our complex society." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 299 [256 Cal.Rptr. 415].)
- "In *Conservatorship of Early* . . . the Supreme Court held that it was error for the trial court to refuse to admit evidence of and to fail to instruct on the 'availability of assistance of others to meet the basic needs of a person afflicted with a mental disorder.' " (*Conservatorship of Baber* (1984) 153 Cal.App.3d

542, 552–553 [200 Cal.Rptr. 262], citation omitted.)

- "Corrections custody does not qualify as third party assistance under the LPS Act as interpreted by case law." (*Conservatorship of Jones, supra,* 208 Cal.App.3d at p. 303.)
- "Under section 5350, subdivision (e)(1), a person is not gravely disabled only if he or she can *survive safely* with the assistance of a third party. There is substantial evidence that the assistance offered by [respondent's mother], while well-intended, would not meet this requirement." (*Conservatorship of Johnson* (1991) 235 Cal.App.3d 693, 699 [1 Cal.Rptr. 2d 46], original italics, footnote omitted.)
- "The parties have raised the issue of whether section 5350, subdivision (e)(2), precluded the trial court from considering [petitioner's mother's] testimony on the issue of third party assistance. This section provides that third parties shall not be considered willing or able to provide assistance unless they so indicate in writing. This section has no application in this case. The purpose of section 5350, subdivision (e), 'is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.' This was not the case here; [petitioner's mother] took the stand at trial and testified as to her willingness to provide assistance to her daughter. No purpose of section 5350, subdivision (e), would be served by requiring her to also execute a writing to this effect." (*Conservatorship of Johnson, supra,* 235 Cal.App.3d at p. 699, fn. 5.)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, §§ 106, 111

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.4

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.42 (Matthew Bender)

4008. Third Party Assistance to Minor

A minor is not "gravely disabled" if [he/she/*nonbinary pronoun*] can survive safely with the help of third party assistance. Third party assistance is the aid of family, friends, or others who are responsible, willing, and able to help provide for the minor's health, safety, and development, including food, clothing, shelter, personal safety, and necessary medical care.

You must not consider offers by family, friends, or others unless they [have testified to/stated specifically in writing] their willingness and ability to help provide for [*name of respondent*]'s health, safety, and development. Well-intended offers of assistance are not sufficient unless they will ensure the person can survive safely.

[Assistance provided by a correctional facility does not constitute third party assistance.]

New June 2005; Revised May 2024

Sources and Authority

- Help of Family and Friends. Welfare and Institutions Code section 5350(e).
- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "[A] person is not 'gravely disabled' within the meaning of section 5008, subdivision (h)(1) if he or she is capable of surviving safely in freedom with the help of willing and responsible family members, friends or third parties." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 321 [177 Cal.Rptr. 369].)
- "Although a minor may not be legally responsible to provide for his basic personal needs, or may suffer disabilities other than a mental disorder which preclude him from so providing, the [statutory] definition is nevertheless applicable. A minor is 'gravely disabled' within the meaning of section 5008, subdivision (h)(1), when the trier of fact, on expert and other testimony, finds that disregarding other disabilities, if any, the minor, because of the further disability of a mental disorder, would be unable to provide for his basic personal needs. Immaturity, either physical or mental when not brought about by a mental disorder, is not a disability which would render a minor 'gravely disabled' within the meaning of section 5008." (*In re Michael E.* (1975) 15 Cal.3d 183, 192, fn. 12 [123 Cal.Rptr. 103, 538 P.2d 231].)
- "As we view the broad purpose of the LPS Act, imposition of a conservatorship should be made only in situations where it is truly necessary. To accomplish this purpose evidence of the availability of third party assistance must be considered." (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [197 Cal.Rptr. 539, 673 P.2d 209].)

- "The California Supreme Court in *Conservatorship of Early* . . . concluded although a person might be gravely disabled if left to his or her own devices, he or she may be able to function successfully in freedom with the support and assistance of family and friends. The court recognized almost everyone depends to a greater or lesser extent upon others in order to survive in our complex society." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 299 [256 Cal.Rptr. 415].)
- "Corrections custody does not qualify as third party assistance under the LPS Act as interpreted by case law." (*Conservatorship of Jones, supra,* 208 Cal.App.3d at p. 303.)
- "Under section 5350, subdivision (e)(1), a person is not gravely disabled only if he or she can *survive safely* with the assistance of a third party. There is substantial evidence that the assistance offered by [respondent's mother], while well-intended, would not meet this requirement." (*Conservatorship of Johnson* (1991) 235 Cal.App.3d 693, 699 [1 Cal.Rptr. 2d 46], original italics, footnote omitted.)
- "The parties have raised the issue of whether section 5350, subdivision (e)(2), precluded the trial court from considering [petitioner's mother's] testimony on the issue of third party assistance. This section provides that third parties shall not be considered willing or able to provide assistance unless they so indicate in writing. This section has no application in this case. The purpose of section 5350, subdivision (e), 'is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.' This was not the case here; [petitioner's mother] took the stand at trial and testified as to her willingness to provide assistance to her daughter. No purpose of section 5350, subdivision (e), would be served by requiring her to also execute a writing to this effect." (*Conservatorship of Johnson, supra,* 235 Cal.App.3d at p. 699, fn. 5.)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, §§ 106, 111

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.4

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, §§ 361A.42, 361A.45 (Matthew Bender)

4009. Physical Restraint

The fact that respondent has been brought before the court in physical restraints is not evidence of grave disability. You must not speculate on the reasons for such restraints.

New June 2005

Directions for Use

When the restraints are concealed from the jury's view, this instruction should not be given unless requested by the conservatee since it might invite initial attention to the restraints and, thus, create prejudice, which would otherwise be avoided. (*People v. Duran* (1976) 16 Cal.3d 282, 292 [127 Cal.Rptr. 618, 545 P.2d 1322].)

In *Conservatorship of Warrack* (1992) 11 Cal.App.4th 641, 647 [14 Cal.Rptr. 2d 99], the court held that a proposed conservatee in a jury trial under the LPS Act may not be physically restrained unless the trial court follows the procedures outlined in *People v. Duran, supra,* 16 Cal.3d at pp. 288–290.

Sources and Authority

- "The court in *People v. Duran,* held that where physical restraints are visible to the jury the trial court must give a cautionary instruction advising the jurors such restraints are not evidence of the defendant's guilt (disability) and that the jury should not speculate as to the reasons for such restraints. The court erred in failing to so instruct in this case." (*Conservatorship of Warrack, supra,* 11 Cal.App.4th at p. 648, internal citation omitted.)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, § 115

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.88

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.42 (Matthew Bender)

4010. Limiting Instruction—Expert Testimony

Revoked May 2018. See *People v. Sanchez* (2016) 63 Cal.4th 665, 684 [204 Cal.Rptr.3d 102, 374 P.3d 320] and *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1281 [221 Cal.Rptr.3d 622].

4011. History of Disorder Relevant to the Determination of Grave Disability

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You must consider information about the history of [*name of respondent***]'s alleged mental disorder if you believe this information has a direct bearing on whether [he/she/***nonbinary pronoun***] is presently gravely disabled as a result of a mental disorder. Such information may include testimony from persons who have provided, or are providing, mental health or related support services to [***name of respondent***], [his/her/***nonbinary pronoun***] medical records, including psychiatric records, or testimony from family members, [***name of respondent***], or any other person designated by [***name of respondent***].**

You must not consider any evidence that you believe is irrelevant because it occurred either too long ago or under circumstances that are not similar to those involved in this case.

New June 2005

Sources and Authority

- Historical Course of Mental Disorder. Welfare and Institutions Code section 5008.2(a).

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.84

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.33 (Matthew Bender)

4012. Concluding Instruction

To find that [*name of respondent*] is gravely disabled, all 12 jurors must agree on the verdict. To find that [*name of respondent*] is not gravely disabled, only 9 jurors must agree on the verdict.

As soon as you have agreed on a verdict, the presiding juror must date and sign the form and notify the [clerk/bailiff].

New June 2005; Revised May 2017

Directions for Use

Read this instruction immediately after CACI No. 5009, *Predeliberation Instructions*.

There are many votes that are possible other than a unanimous 12-0 vote for gravely disabled or a 9-3 or better vote for not gravely disabled. A vote other than one of these will result in a mistrial and the option to retry the proceeding.

Sources and Authority

- "The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1].)
- "The LPS Act is silent as to whether the jury must unanimously agree on the issue of grave disability. '[H]owever, the Act incorporates by reference Probate Code procedures for conservatorships. The Probate Code provides for factual determinations by a three-fourths majority . . . . Thus, the Legislature has provided for less than unanimous jury verdicts in grave disability cases.' " (*Conservatorship of Rodney M.* (1996) 50 Cal.App.4th 1266, 1269 [58 Cal.Rptr.2d 513].)
- "The Legislature's determination that a three-fourths majority vote applies in LPS conservatorship proceedings is eminently sound in the context of finding a proposed conservatee is not gravely disabled." (*Conservatorship of Rodney M., supra*, 50 Cal.App.4th at pp. 1271–1272.)
- "Permitting a finding of no grave disability to be based on a three-fourths majority coincides with *Roulet's* goal of minimizing the risk of unjustified and needless conservatorships. It also avoids unnecessary confinement of the proposed conservatee while renewal proceedings are completed." (*Conservatorship of Rodney M., supra*, 50 Cal.App.4th at p. 1270.)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, § 103 et seq.

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.89

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.42 (Matthew Bender)

4013. Disqualification From Voting

If you find that [*name of respondent*], as a result of [a mental disorder/ impairment by chronic alcoholism], is gravely disabled, then you must also decide whether [he/she/*nonbinary pronoun*] should also be disqualified from voting. To disqualify [*name of respondent*] from voting, all 12 jurors must find, by clear and convincing evidence, that [he/she/ *nonbinary pronoun*] cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process.

New June 2005; Revised June 2016

Directions for Use

This instruction should be given if the petition prays for this relief.

In addition to the required jury finding, one of the following must apply (See Elec. Code, § 2208(a)):

(1) A conservator for the person or the person and estate is appointed under Division 4 (commencing with Section 1400) of the Probate Code.

(2) A conservator for the person or the person and estate is appointed under Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code.

(3) A conservator is appointed for the person under proceedings initiated under Section 5352.5 of the Welfare and Institutions Code, the person has been found not competent to stand trial, and the person's trial or judgment has been suspended pursuant to Section 1370 of the Penal Code.

(4) A person has pleaded not guilty by reason of insanity, has been found to be not guilty under Section 1026 of the Penal Code, and is deemed to be gravely disabled at the time of judgment as defined in paragraph (2) of subdivision (h) of Section 5008 of the Welfare and Institutions Code.

The court should determine if one of the above requirements has been met.

Sources and Authority

- Disqualification from Voting. Elections Code section 2208.
- Affidavit of Voter Registration. Elections Code section 2150.

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 11.34

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.42 (Matthew Bender)

4014–4099. Reserved for Future Use

VF-4000. Conservatorship—Verdict Form

Select one of the following two options:

_____ **12 jurors find that [***name of respondent***] is presently gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism].**

_____ **9 or more jurors find that [***name of respondent***] is not presently gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism].**

[If you have concluded that [*name of respondent***] is gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism], then answer the following:**

Do all 12 jurors find that [*name of respondent***] is disqualified from voting because [he/she/***nonbinary pronoun***] cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process?**

_____ **Yes** _____ **No]**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New June 2005; Revised December 2010, May 2017, May 2024

Directions for Use

The question regarding voter disqualification is bracketed. The judge must decide whether this question is appropriate in a given case. (See CACI No. 4013, *Disqualification From Voting.*)

VF-4001–VF-4099. Reserved for Future Use

BREACH OF FIDUCIARY DUTY

4100. "Fiduciary Duty" Explained

[A/An] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship***]] owes what is known as a fiduciary duty to [his/her/***nonbinary pronoun***/its] [principal/client/corporation/partner/[***insert other fiduciary relationship***]]. A fiduciary duty imposes on [a/an] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]] a duty to act with the utmost good faith in the best interests of [his/her/** ***nonbinary pronoun***/**its] [principal/client/corporation/ partner/[***insert other fiduciary relationship***]].**

New June 2006; Revised December 2010, December 2016

Directions for Use

This instruction explains the nature of a fiduciary duty. It may be modified if other concepts involving fiduciary duty are relevant to the jury's understanding of the case. For instructions on damages resulting from misrepresentation by a fiduciary, see CACI No. 1923, *Damages—"Out of Pocket" Rule*, and CACI No. 1924, *Damages—"Benefit of the Bargain" Rule*.

The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432–433 [140 Cal.Rptr.3d 569].) No fraudulent intent is required. (See Civ. Code, § 1573 (defining "constructive fraud").)

Sources and Authority

- "A fiduciary relationship is ' " 'any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. . . .' " ' " (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 [130 Cal.Rptr.2d 860], internal citations omitted.)
- "Whether a fiduciary duty exists is generally a question of law. Whether the defendant breached that duty towards the plaintiff is a question of fact." (*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 915 [187 Cal.Rptr.3d 452], internal citation omitted.)
- " ' "[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law."

[Citation.]' " (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1338 [147 Cal.Rptr.3d 772].)

- "[E]xamples of relationships that impose a fiduciary obligation to act on behalf of and for the benefit of another are 'a joint venture, a partnership, or an agency.' But, '[t]hose categories are merely illustrative of fiduciary relationships in which fiduciary duties are imposed by law.' " (*Cleveland*, *supra*, 209 Cal.App.4th at p. 1339, internal citation omitted.)
- "The investment adviser/client relationship is one such relationship, giving rise to a fiduciary duty as a matter of law." (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 140 [173 Cal.Rptr.3d 356].)
- "There is a 'strong public interest in assuring that corporate officers, directors, majority shareholders and others are faithful to their fiduciary obligations to minority shareholders.' " (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 395 [178 Cal.Rptr.3d 604].)
- "Any persons who subscribe for stock have a right to do so upon the assumption that the promoters are using their knowledge, skill, and ability for the benefit of the company. It is, therefore, clear on principle that promoters, under the circumstances just stated, do occupy a position of trust and confidence, and it devolves upon them to make full disclosure." (*Cleveland*, *supra*, 209 Cal.App.4th at p. 1339.)
- "[I]t is unclear whether a fiduciary relationship exists between an insurance broker and an insured." (*Mark Tanner Constr. v. Hub Internat. Ins. Servs.* (2014) 224 Cal.App.4th 574, 585 [169 Cal.Rptr.3d 39].)
- "It is a question of fact whether one is either an investment adviser or a party to a confidential relationship that gives rise to a fiduciary duty under common law." (*Hasso*, *supra*, 227 Cal.App.4th at p. 140, internal citations omitted.)
- "[A] third party who knowingly assists a trustee in breaching his or her fiduciary duty may, dependent upon the circumstances, be held liable along with that trustee for participating in the breach of trust." (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 325 [166 Cal.Rptr.3d 116].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 63, 64

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶ 2:158 et seq. (The Rutter Group)

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶ 6:425 et seq. (The Rutter Group)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31[1] (Matthew Bender)

14 California Forms of Pleading and Practice, Ch. 167, *Corporations: Directors and Management*, § 167.53 et seq. (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, §§ 427.12, 427.23 (Matthew Bender)

5 California Points and Authorities, Ch. 52, *Corporations*, § 52.112 et seq. (Matthew Bender)

6 California Legal Forms, Ch. 12C, *Limited Liability Companies*, § 12C.24[6] (Matthew Bender)

4101. Failure to Use Reasonable Care—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/it] was harmed by [***name of defendant***]'s breach of the fiduciary duty to use reasonable care. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]];**
2. **That [***name of defendant***] acted on [***name of plaintiff***]'s behalf for purposes of [***insert description of transaction, e.g., "purchasing a residential property"***];**
3. **That [***name of defendant***] failed to act as a reasonably careful [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]] would have acted under the same or similar circumstances;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2006

Directions for Use

The instructions in this series are intended for lawsuits brought by or on behalf of the principal. They also assume that the plaintiff is bringing a legal cause of action, not an action in equity. (See *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819 [251 Cal.Rptr. 530].) This instruction is not intended for cases involving insurance brokers or agents.

In appropriate cases, element 3 may be tailored to reflect the particular fiduciary duty at issue.

For a breach of fiduciary duty instruction in cases involving attorney defendants, see CACI No. 4106, *Breach of Fiduciary Duty by Attorney—Essential Factual Elements*.

While the advisory committee has not included "employee" as an option for identifying the defendant agent in element 1, there may be cases in which certain employees qualify as "agents," thereby subjecting them to liability for breach of fiduciary duty.

Sources and Authority

- "A fiduciary relationship is ' " 'any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. . . .' " ' " (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 [130 Cal.Rptr.2d 860], internal citations omitted.)
- "An act such as breach of fiduciary duty may be both a breach of contract and a tort." (*Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1178 [27 Cal.Rptr.3d 754], internal citation omitted.)
- "Breach of a real estate agent's fiduciary duty to his or her client may constitute negligence or fraud, depending on the circumstances of the case." (*Salahutdin v. Valley of California, Inc*. (1994) 24 Cal.App.4th 555, 563 [29 Cal.Rptr.2d 463].)
- "Breach of fiduciary duty is a tort that by definition may be committed by only a limited class of persons." (*1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 592 [132 Cal.Rptr.2d 789].)
- "Traditional examples of fiduciary relationships in the commercial context include trustee/beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, and agent/principal." (*Wolf, supra,* 107 Cal.App.4th at p. 30, internal citations omitted.)
- " 'The relationship between a broker and principal is fiduciary in nature and imposes on the broker the duty of acting in the highest good faith toward the principal.' " (*Twomey v. Mitchum, Jones & Templeton, Inc.* (1968) 262 Cal.App.2d 690, 709 [69 Cal.Rptr. 222], internal citations omitted.)
- "A stockbroker's fiduciary duty requires more than merely carrying out the stated objectives of the customer; at least where there is evidence, as there certainly was here, that the stockbroker's recommendations were invariably followed, the stockbroker must 'determine the customer's actual financial situation and needs.' If it would be improper and unsuitable to carry out the speculative objectives expressed by the customer, there is a further obligation on the part of the stockbroker 'to make this known to [the customer], and [to] refrain from acting except upon [the customer's] express orders.' Under such circumstances, although the stockbroker can advise the customer about the speculative options available, he or she should not solicit the customer's purchase of any such speculative securities that would be beyond the customer's 'risk threshold.' " (*Duffy v. Cavalier* (1989) 215 Cal.App.3d 1517, 1538 [264 Cal.Rptr. 740], internal citations omitted.)
- "Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency. . . . 'The

existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made, except to the extent that fraud, duress, illegality, or the incapacity of one or both of the parties to the agreement modifies it or deprives it of legal effect.' " (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 755 [17 Cal. Rptr. 2d 734], internal citations omitted.)

- "In order to plead a cause of action for breach of fiduciary duty against a trustee, the plaintiff must show the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach; the absence of any one of these elements is fatal to the cause of action. The beneficiary of the trust has the initial burden of proving the existence of a fiduciary duty and the trustee's failure to perform it; the burden then shifts to the trustee to justify its actions." (*LaMonte v. Sanwa Bank California* (1996) 45 Cal.App.4th 509, 517 [52 Cal.Rptr.2d 861], internal citations omitted.)
- "Recovery for damages based upon breach of fiduciary duty is controlled by Civil Code section 3333, the traditional tort recovery. This is actually broader in some instances than damages which may be recovered for fraud. Also, punitive damages are appropriate for a breach of fiduciary duty." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1582 [36 Cal.Rptr.2d 343], internal citations omitted.)
- "While breach of fiduciary duty is a question of fact, the existence of legal duty in the first instance and its scope are questions of law." (*Kirschner Brothers Oil, Inc. v. Natomas Co.* (1986) 185 Cal.App.3d 784, 790 [229 Cal.Rptr. 899], internal citation omitted.)
- "[I]n actions against fiduciaries, a plaintiff may have the option of pursuing either legal or equitable remedies." (*Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 863 [251 Cal.Rptr. 530].)
- "A minority shareholder's action for damages for the breach of fiduciary duties of the majority shareholder is one in equity, with no right to a jury trial." (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 122 [84 Cal.Rptr.2d 753], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 70

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31[2] (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

Miller & Starr, California Real Estate 4th, § 3:26 (Thomson Reuters)

4102. Duty of Undivided Loyalty—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/it] was harmed by [***name of defendant***]'s breach of the fiduciary duty of loyalty. [A/An] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]] owes [his/her/***nonbinary pronoun***/its] [principal/client/corporation/partner/[***insert other fiduciary relationship***]] undivided loyalty. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]];**
2. **That [***name of defendant***] [***insert one of the following:***]**

   [knowingly acted against [*name of plaintiff***]'s interests in connection with [***insert description of transaction, e.g., "purchasing a residential property"***];]**

   [acted on behalf of a party whose interests were adverse to [*name of plaintiff***] in connection with [***insert description of transaction, e.g., "purchasing a residential property"***];]**
3. **That [***name of plaintiff***] did not give informed consent to [***name of defendant***]'s conduct;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2006; Revised June 2010

Directions for Use

The instructions in this series are intended for lawsuits brought by or on behalf of the principal. They also assume that the plaintiff is bringing a legal cause of action, not an action in equity. (See *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819 [251 Cal.Rptr. 530].)

For a breach of fiduciary duty instruction in cases involving attorney defendants, see CACI No. 4106, *Breach of Fiduciary Duty by Attorney—Essential Factual Elements*.

While the advisory committee has not included "employee" as an option for identifying the defendant agent in element 1, there may be cases in which certain employees qualify as "agents," thereby subjecting them to liability for breach of fiduciary duty.

If the parties dispute whether the plaintiff gave informed consent (element 3), the court may wish to add explanatory language or a separate instruction on what constitutes informed consent. (See, e.g., Rest. 3d Agency, § 8.06(1).)

Sources and Authority

- Restatement Third of Agency, section 8.01, states: "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."
- Restatement Third of Agency, section 8.02, states: "An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position."
- Restatement Third of Agency, section 8.03, states: "An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship."
- Restatement Third of Agency, section 8.04, states: "Throughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors. During that time, an agent may take action, not otherwise wrongful, to prepare for competition following termination of the agency relationship."
- Restatement Third of Agency, section 8.05, states:

  An agent has a duty

  (1) not to use property of the principal for the agent's own purposes or those of a third party; and

  (2) not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party.

- Restatement Third of Agency, section 8.06, states:

  (1) Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 does not constitute a breach of duty if the principal consents to the conduct, provided that

  (a) in obtaining the principal's consent, the agent

  (i) acts in good faith,

  (ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

  (iii) otherwise deals fairly with the principal; and

  (b) the principal's consent concerns either a specific act or transaction,

or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.

(2) An agent who acts for more than one principal in a transaction between or among them has a duty

(a) to deal in good faith with each principal,

(b) to disclose to each principal

(i) the fact that the agent acts for the other principal or principals, and

(ii) all other facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

(c) otherwise to deal fairly with each principal.

- "Every agent owes his principal the duty of undivided loyalty. During the course of his agency, he may not undertake or participate in activities adverse to the interests of his principal. In the absence of an agreement to the contrary, an agent is free to engage in competition with his principal after termination of his employment but he may plan and develop his competitive enterprise during the course of his agency only where the particular activity engaged in is not against the best interests of his principal." (*Sequoia Vacuum Systems v. Stransky* (1964) 229 Cal.App.2d 281, 287 [40 Cal.Rptr. 203].)
- "The determination of the particular factual circumstances and the application of the ethical standards of fairness and good faith required of a fiduciary in a given situation are for the trier of facts." (*Sequoia Vacuum Systems, supra*, 229 Cal.App.2d at p. 288, internal citation omitted.)
- "[T]he protection of the principal's interest requires a full disclosure of acts undertaken in preparation of entering into competition." (*Sequoia Vacuum Systems, supra*, 229 Cal.App.2d at p. 287, internal citation omitted.)
- "It is settled that a director or officer of a corporation may not enter into a competing enterprise which cripples or injures the business of the corporation of which he is an officer or director. An officer or director may not seize for himself, to the detriment of his company, business opportunities in the company's line of activities which his company has an interest and prior claim to obtain. In the event that he does seize such opportunities in violation of his fiduciary duty, the corporation may claim for itself all benefits so obtained." (*Xum Speegle, Inc. v. Fields* (1963) 216 Cal.App.2d 546, 554 [31 Cal.Rptr. 104], internal citations omitted.)
- "A fiduciary relationship is ' "any relation existing between parties to a transaction wherein one of the parties is . . . duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises

where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent." ' " (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 [130 Cal.Rptr.2d 860].)

- "Inherent in each of these relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the fiduciary obligations far more stringent than those required of ordinary contractors. As Justice Cardozo observed, 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior.' " (*Wolf, supra,* 107 Cal.App.4th at p. 30, internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 72–93

35 California Forms of Pleading and Practice, Ch. 401, *Partnerships: Actions Between General Partners and Partnership*, § 401.20 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.23 (Matthew Bender)

4103. Duty of Confidentiality—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/it] was harmed by [***name of defendant***]'s breach of the fiduciary duty of confidentiality. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]];**
2. **That [***name of defendant***] had information relating to [***name of plaintiff***] that [he/she/***nonbinary pronoun***/it] knew or should have known was confidential;**
3. **That [***name of defendant***] [***insert one of the following:***]**

   [used [*name of plaintiff***]'s confidential information for [his/her/***nonbinary pronoun***/its] own benefit;]**

   [communicated [*name of plaintiff***]'s confidential information to third parties;]**
4. **That [***name of plaintiff***] did not give informed consent to [***name of defendant***]'s conduct;**
5. **That the confidential information was not a matter of general knowledge;**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2006

Directions for Use

The instructions in this series are intended for lawsuits brought by or on behalf of the principal. They also assume that the plaintiff is bringing a legal cause of action, not an action in equity. (See *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819 [251 Cal.Rptr. 530].)

For a breach of fiduciary duty instruction in cases involving attorney defendants, see CACI No. 4106, *Breach of Fiduciary Duty by Attorney—Essential Factual Elements*.

While the advisory committee has not included "employee" as an option for identifying the defendant agent in element 1, there may be cases in which certain employees qualify as "agents," thereby subjecting them to liability for breach of fiduciary duty.

A cause of action relating to the misuse of confidential information may also be brought, in certain circumstances, against non-fiduciaries. This instruction may be modified to apply to such cases.

Sources and Authority

- Restatement Second of Agency, section 395, states: "Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge."
- " 'The law of confidential relationships governs duties of trust that one is not obligated to assume. Once a person commits himself to a confidential relationship, the law requires him to fulfill the duties attendant to the relationship. Confidential relations protect the *trust* that is implicit in relationships between employers and employees, between masters and servants, and between principals and agents, rather than the *information* that may pass between these parties.' " (*Balboa Ins. Co. v. Trans Global Equities* (1990) 218 Cal.App.3d 1327, 1350–1351 [267 Cal.Rptr. 787], original italics, internal citation omitted.)

Secondary Sources

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.12[3] (Matthew Bender)

4104. Duties of Escrow Holder

Escrow holders have a fiduciary duty to the parties in escrow:

1. **To comply strictly with the parties' written instructions; [and]**
2. **To exercise reasonable skill and diligence in carrying out the escrow instructions; [and]**
3. **[To obtain reliable evidence that a real estate broker was regularly licensed before paying [his/her/***nonbinary pronoun***/its] commission;] [and]**
4. **[***Insert other applicable duty***].**

New June 2006

Directions for Use

Element 3 is intended only for cases involving real estate escrow.

Sources and Authority

- "The duty of an escrow holder to obtain evidence that a real estate broker was regularly licensed before delivering compensation arises from Business and Professions Code section 10138. Respondent assumed this duty only by entering the contract to execute the escrow for appellant and the seller. Accordingly, the duty arose out of and is not outside the contract." (*Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1179 [27 Cal.Rptr.3d 754].)
- "The duty to communicate any facts learned about the broker's licenses arises only because of the duty to obtain such evidence. Since the duty to obtain such evidence is not outside the contract, the duty to communicate those findings also is not outside the contract." (*Kangarlou, supra,* 128 Cal.App.4th at p. 1179.)
- "An escrow holder has a fiduciary duty to the escrow parties to comply strictly with the parties' instructions. The holder only assumes this duty by agreeing to execute the escrow. The obligation to exercise reasonable skill and diligence in carrying out the escrow instructions, and to comply strictly with the depositor's written instructions are within the duties undertaken in the contract." (*Kangarlou, supra,* 128 Cal.App.4th at p. 1179, internal citation omitted.)

Secondary Sources

21 California Forms of Pleading and Practice, Ch. 253, *Escrows*, § 253.17[4] (Matthew Bender)

4105. Duties of Stockbroker—Speculative Securities

Stockbrokers who trade in speculative securities and advise clients have a fiduciary duty to those clients:

1. **To make sure that the client understands the investment risks in light of the client's financial situation;**
2. **To inform the client that speculative investments are not suitable if the stockbroker believes that the client is unable to bear the financial risks involved; and**
3. **Not to solicit the client's purchase of speculative securities that the stockbroker considers to be beyond the client's risk threshold.**

If these duties are met and the client still insists on purchasing speculative securities, the stockbroker may advise the client about various speculative securities and purchase speculative securities that the client selects.

New June 2006; Revised May 2020

Directions for Use

This instruction should be read after CACI No. 4101, *Failure to Use Reasonable Care—Essential Factual Elements*.

Sources and Authority

- "[T]he stockbroker has a fiduciary duty (1) to ascertain that the investor understands the investment risks in the light of his or her actual financial situation; (2) to inform the customer that no speculative investments are suitable if the customer persists in wanting to engage in such speculative transactions without the stockbroker's being persuaded that the customer is able to bear the financial risks involved; and (3) to refrain completely from soliciting the customer's purchase of any speculative securities which the stockbroker considers to be beyond the customer's risk threshold. As long as these duties are met, if the customer nevertheless insists on purchasing speculative securities, the stockbroker is not barred from advising the customer about various speculative securities and purchasing for the customer those securities which the customer selects." (*Duffy v. Cavalier* (1989) 215 Cal.App.3d 1517, 1532 [264 Cal.Rptr. 740], internal citations and footnote omitted.)
- "[T]he relationship between any stockbroker and his or her customer is fiduciary in nature, imposing on the former the duty to act in the highest good faith toward the customer." (*Duffy, supra,* 215 Cal.App.3d at p. 1534, internal citations omitted.)
- "A stockbroker's fiduciary duty requires more than merely carrying out the stated

objectives of the customer; at least where there is evidence, as there certainly was here, that the stockbroker's recommendations were invariably followed, the stockbroker must 'determine the customer's actual financial situation and needs.' If it would be improper and unsuitable to carry out the speculative objectives expressed by the customer, there is a further obligation on the part of the stockbroker 'to make this known to [the customer], and [to] refrain from acting except upon [the customer's] express orders.' Under such circumstances, although the stockbroker can advise the customer about the speculative options available, he or she should not solicit the customer's purchase of any such speculative securities that would be beyond the customer's 'risk threshold.' " (*Duffy, supra,* 215 Cal.App.3d at p. 1538, internal citations omitted.)

Secondary Sources

45 California Forms of Pleading and Practice, Ch. 515, *Securities and Franchise Regulation*, § 515.15[3] (Matthew Bender)

4106. Breach of Fiduciary Duty by Attorney—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/it] was harmed because [***name of defendant***] breached an attorney's duty [***describe duty, e.g., "not to represent clients with conflicting interests"***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] breached the duty of an attorney [***describe duty***];**
2. **That [***name of plaintiff***] was harmed; and**
3. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised April 2004; Renumbered from CACI No. 605 December 2007; Revised May 2019, May 2020

Directions for Use

The existence of a fiduciary relationship is a question of law. Whether an attorney has breached that fiduciary duty is a question of fact. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890 [250 Cal.Rptr. 339], disapproved on other grounds in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

Give CACI No. 430, *Causation: Substantial Factor*, with this instruction.

The causation standard for an attorney's intentional breach of fiduciary duty differs from that for a negligent breach. If the plaintiff alleges an attorney's intentional breach of duty, do not include the optional last sentence of CACI No. 430, *Causation: Substantial Factor*, on "but for" causation. The "but for" causation standard does not apply to an intentional breach of fiduciary duty. If the plaintiff alleges an attorney's negligent breach of duty, the "but for" ("would have happened anyway") causation standard applies. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473]; see *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046].) If the plaintiff alleges a negligent breach of duty, give the optional last sentence of CACI No. 430: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."

If the plaintiff alleges both negligent breach and intentional or fraudulent breach, the jury must be instructed on both causation standards and it should be made clear which causation standard applies to which claim.

If the harm allegedly caused by the defendant's conduct involves the outcome of a legal claim, the jury should be instructed with CACI No. 601, *Legal Malpractice—Causation*, for the "but for" standard. (See *Gutierrez v. Girardi* (2011)

194 Cal.App.4th 925, 928, 933–937 [125 Cal.Rptr.3d 210] [discussing circumstances when a client need not show that they objectively would have obtained a better result in the underlying case in the absence of the attorney's breach (the trial-within-a-trial method)].)

Sources and Authority

- " 'The relation between attorney and client is a fiduciary relation of the very highest character.' " (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189 [98 Cal.Rptr. 837, 491 P.2d 421].)
- " 'The breach of fiduciary duty can be based upon either negligence or fraud depending on the circumstances. It has been referred to as a species of tort distinct from causes of action for professional negligence [citation] and from fraud [citation].' 'The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages.' " (*Knutson, supra*, 25 Cal.App.5th at pp. 1093–1094, internal citation omitted.)
- "Substantial factor causation is the correct causation standard for an intentional breach of fiduciary duty." (*Knutson, supra*, 25 Cal.App.5th at p. 1094.)
- "The trial court applied the legal malpractice standard of causation to [plaintiff]'s intentional breach of fiduciary duty cause of action. The court cited The Rutter Group's treatise on professional responsibility to equate causation for legal malpractice with causation for all breaches of fiduciary duty: ' "The rules concerning causation, damages, and defenses that apply to lawyer negligence actions . . . also govern actions for breach of fiduciary duty." ' This statement of the law is correct, however, only as to claims of breach of fiduciary duty arising from negligent conduct." (*Knutson, supra*, 25 Cal.App.5th at p. 1094, internal citations omitted.)
- "Expert testimony is not required, but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge." (*Stanley, supra,* 35 Cal.App.4th at p. 1087, internal citations omitted.)
- "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' " (*Stanley, supra,* 35 Cal.App.4th at p. 1087.)

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, § 87 et al.

Vapnek et al., California Practice Guide: Professional Responsibility ¶ 6:425 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.02[4] (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*,

§ 76.150 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, §§ 24A.43, 24A.56B (Matthew Bender)

4107. Duty of Disclosure by Real Estate Broker to Client

As a fiduciary, a real estate broker must disclose to the broker's client all material information that the broker knows or could reasonably obtain regarding the property or relating to the transaction.

The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of the transaction, the knowledge and experience of the client, the questions asked by the client, the nature of the property, and the terms of sale. Brokers must place themselves in the position of their clients and consider the type of information required for the client to make a well-informed decision.

[A real estate broker cannot accept information received from another person, such as the seller, as being true, and transmit it to the broker's client without either verifying the information or disclosing to the client that the information has not been verified.]

New April 2008; Revised December 2012, June 2013, May 2020

Directions for Use

This instruction may be read after CACI No. 4101, *Failure to Use Reasonable Care—Essential Factual Elements,* if a real estate broker's duty of disclosure to the broker's own client is at issue. Give the second paragraph if relevant to the facts of the case. For an instruction based on a broker's breach of duty to the buyer with regard to the property inspection required by Civil Code section 2079, see CACI No. 4108, *Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements*.

While a broker's fiduciary duty to the client arises from the relationship and not from contract (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312 [139 Cal.Rptr.3d 670]), the scope of the duty may be limited by contract. (See *Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 750–751 [17 Cal.Rptr.2d 734] [broker-client agreement may relieve broker of any duty to provide tax advice].) Any contractual limitations may be added to the second paragraph regarding what facts a broker must learn.

Sources and Authority

- "Under the common law, . . . a broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. 'The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The

agent's duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information. [¶] . . . [¶] The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of each transaction, the knowledge and the experience of the principal, the questions asked by the principal, and the nature of the property and the terms of sale. The broker must place himself in the position of the principal and ask himself the type of information required for the principal to make a well-informed decision. This obligation requires investigation of facts not known to the agent and disclosure of all material facts that might reasonably be discovered.' " (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25–26 [73 Cal.Rptr.2d 784], internal citations omitted.)

- "A fiduciary must tell its principal of all information it possesses that is material to the principal's interests. A fiduciary's failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent. (*Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 762 [67 Cal.Rptr.3d 797], internal citations omitted.)
- " '[W]here the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. . . .' When the seller's real estate agent or broker is also aware of such facts, 'he [or she] is under the same duty of disclosure.' " (*Holmes v. Summer* (2010) 188 Cal.App.4th 1510, 1518–1519 [116 Cal.Rptr.3d 419], internal citations omitted.)
- " 'A broker who is merely an innocent conduit of the seller's fraud may be innocent of actual fraud [citations], but in this situation the broker may be liable for negligence on a constructive fraud theory if he or she passes on the misstatements as true without personally investigating them.' " (*Salahutdin v. Valley of Cal.* (1994) 24 Cal.App.4th 555, 562 [29 Cal.Rptr.2d 463].)
- "[T]he broker has a fiduciary duty to investigate the material facts of the transaction, and he cannot accept information received from others as being true, and transmit it to the principal, without either verifying the information or disclosing to the principal that the information has not been verified. Because of the fiduciary obligations of the broker, the principal has a right to rely on the statements of the broker, and if the information is transmitted by the broker without verification and without qualification, the broker is liable to the principal for negligent misrepresentation." (*Salahutdin, supra,* 24 Cal.App.4th at pp. 562–563.)
- "[T]he fiduciary duty owed by brokers to their own clients is substantially more extensive than the *nonfiduciary* duty codified in [Civil Code] section 2079 [duty to visually inspect and disclose material facts]." (*Michel, supra,* 156 Cal.App.4th at p. 763, original italics.)
- "The statutory duties owed by sellers' brokers under section 2079 are separate

and independent of the duties owed by brokers to their own clients who are buyers." (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1305 [139 Cal.Rptr.3d 670].)

- "[W]e are not persuaded by Defendants' reliance on Civil Code section 2079. Although we agree that that statute sets forth some of the duties of a real estate broker, it is not the only source of a broker's duties. 'Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency.' Here, the [plaintiffs]' claims are not contingent on an expansion of the statutorily defined duties of a real estate broker. Instead, their claim is more elementary. If a real estate broker has information that will adversely affect the value of a property he or she is selling, does that broker have a duty to share that information with his or her client? The clear and uncontroversial answer to that question is yes." (*Ryan v. Real Estate of the Pacific, Inc.* (2019) 32 Cal.App.5th 637, 646 [244 Cal.Rptr.3d 129], internal citation omitted.)
- "[Fiduciary] duties require full and complete disclosure of all material facts respecting the property or relating to the transaction in question." (*Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1286 [63 Cal.Rptr.2d 373].)
- "Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 164 [11 Cal.Rptr.3d 564].)
- "[R]eal estate brokers representing buyers of residential property are licensed professionals who owe fiduciary duties to their own clients. As such, this fiduciary duty is not a creature of contract and, therefore, did not arise under the buyer-broker agreement." (*William L. Lyon & Associates, Inc., supra*, 204 Cal.App.4th at p. 1312, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 914

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶ 2:164 (The Rutter Group)

California Real Property Sales Transactions (Cont.Ed.Bar 4th ed.) §§ 2.132–2.136

3 California Real Estate Law and Practice, Ch. 61, *Employment and Authority of Brokers*, § 61.05, Ch. 63, *Duties and Liabilities of Brokers*, §§ 63.20–63.22 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

4108. Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements (Civ. Code, § 2079)

[*Name of defendant***], as the real estate [broker/salesperson] for [***name of seller***], must conduct a reasonably competent and diligent visual inspection of the property offered for sale. Before the sale, [***name of defendant***] must then disclose to [***name of plaintiff***], the buyer, all facts that materially affect the value or desirability of the property that the investigation revealed or should have revealed.**

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/it] was harmed by [***name of defendant***]'s breach of this duty. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of seller***]'s real estate [broker/salesperson];**
2. **That [***name of defendant***] acted on [***name of seller***]'s behalf for purposes of [***insert description of transaction, e.g., "selling a residential property"***];**
3. **That [***name of defendant***] failed to conduct a reasonably competent and diligent visual inspectionof the property;**
4. **That before the sale, [***name of defendant***] failed to disclose to [***name of plaintiff***] all facts that materially affected the value or desirability of the property that such an inspection would have revealed;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2013; Revised May 2020

Directions for Use

Give this instruction if the seller's real estate broker or salesperson did not conduct a visual inspection of the property and make disclosures to the buyer as required by Civil Code section 2079(a). For an instruction on the fiduciary duty of a real estate broker to the broker's own client, see CACI No. 4107, *Duty of Disclosure of Real Estate Broker to Client*.

The duty created by Civil Code section 2079 is not a fiduciary duty; it is strictly a limited duty created by statute. (See *Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 762 [67 Cal.Rptr.3d 797].)

Sources and Authority

- Statutory Duties of Seller's Real Estate Broker. Civil Code section 2079(a).
- Scope of Required Inspection. Civil Code section 2079.3.
- "Section 2079 requires sellers' real estate brokers, and their cooperating brokers, to conduct a 'reasonably competent and diligent visual inspection of the property,' and to disclose all material facts such an investigation would reveal to a prospective buyer." (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 23 [73 Cal.Rptr.2d 784], footnote omitted.)
- "Section 2079 was enacted to codify and focus the holding in *Easton v. Strassburger, supra*, 152 Cal. App. 3d 90. In *Easton*, the court recognized that case law imposed a duty on *sellers*' brokers to disclose material facts *actually known* to the broker. *Easton* expanded the holdings of former decisions to include a requirement that sellers' brokers must diligently inspect residential property and disclose material facts they obtain from that investigation. Further, the case held sellers' brokers are chargeable with knowledge they *should have known* had they conducted an adequate investigation." (*Field, supra*, 63 Cal.App.4th at p. 24, original italics.)
- "Section 2079 statutorily limits the duty of inspection recognized in *Easton* to one requiring only a *visual* inspection. Further, the statutory scheme expressly states a selling broker has no obligation to purchasers to investigate public records or permits pertaining to title or use of the property." (*Field, supra*, 63 Cal.App.4th at p. 24, original italics; see Civ. Code, § 2079.3.)
- "The statutory duties owed by sellers' brokers under section 2079 are separate and independent of the duties owed by brokers to their own clients who are buyers." (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1305 [139 Cal.Rptr.3d 670].)
- "In accordance with the clear and unambiguous language of section 2079, the inspection and disclosure duties of residential real estate brokers and their agents apply exclusively to prospective buyers, and not to other persons who are not parties to the real estate transaction. Only a transferee, that is, the ultimate purchaser, can recover from a broker or agent for breach of these duties." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 165 [11 Cal.Rptr.3d 564].)
- "[W]e are not persuaded by Defendants' reliance on Civil Code section 2079. Although we agree that that statute sets forth some of the duties of a real estate broker, it is not the only source of a broker's duties. 'Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency.' " (*Ryan v. Real Estate of the Pacific, Inc.* (2019) 32 Cal.App.5th 637, 646 [244 Cal.Rptr.3d 129].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 174

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶ 2:173 et seq. (The Rutter Group)

3 California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers*, § 63.20 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 et seq. (Matthew Bender)

2A California Points and Authorities, Ch. 31, *Brokers and Salespersons*, § 31.142 et seq. (Matthew Bender)

9 California Legal Forms, Ch. 23, *Real Property Sales Agreements*, § 23.20 (Matthew Bender)

Miller & Starr, California Real Estate 4th, § 1:41 (Thomson Reuters)

4109. Duty of Disclosure by Seller's Real Estate Broker to Buyer

A real estate broker for the seller of property must disclose to the buyer all facts known to the broker regarding the property or relating to the transaction that materially affect the value or desirability of the property. A broker must disclose these facts if the broker knows or should know that the buyer is not aware of them and cannot reasonably be expected to discover them through diligent attention and observation. The broker does not, however, have to disclose facts that the buyer already knows or could have learned with diligent attention and observation.

New December 2013; Revised May 2020

Directions for Use

This instruction should be read after CACI No. 400, *Negligence—Essential Factual Elements*, if a seller's real estate broker's breach of duty of disclosure to the buyer is at issue. A broker's failure to disclose known material facts to the buyer may constitute a breach of duty for purposes of a claim for negligence. Causation and damages must still be proved. This instruction may also be used with instructions in the Fraud and Deceit series (CACI No. 1900 et seq.) for a cause of action for misrepresentation or concealment. (See *Holmes v. Summer* (2010) 188 Cal.App.4th 1510, 1528 [116 Cal.Rptr.3d 419].)

For an instruction on the fiduciary duty of a real estate broker to the broker's own client, see CACI No. 4107, *Duty of Disclosure of Real Estate Broker to Client*. For an instruction on the duty of the seller's real estate broker under Civil Code section 2079 to conduct a visual inspection of the property and disclose to the buyer all facts materially affecting the value or desirability of the property that an investigation would reveal, see CACI No. 4108, *Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements*.

Sources and Authority

- " '[W]here the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]' When the seller's real estate agent or broker is also aware of such facts, 'he [or she] is under the same duty of disclosure.' A real estate agent or broker may be liable 'for mere nondisclosure since his [or her] conduct in the transaction *amounts to a representation of the nonexistence of the facts which he has failed to disclose* [citation].' " (*Holmes, supra*, 188 Cal.App.4th at pp. 1518–1519, original italics, internal citations omitted.)
- "Even in the absence of a fiduciary duty to the buyer, listing agents are required

to disclose to prospective purchasers all facts materially affecting the value or desirability of a property that a reasonable visual inspection would reveal. And regardless of whether a listing agent also represents the buyer, it is required to disclose to the buyer all known facts materially affecting the value or desirability of a property that are not known to or reasonably discoverable by the buyer." (*Horiike v. Coldwell Banker Residential Brokerage Co.* (2016) 1 Cal.5th 1024, 1040 [210 Cal.Rptr.3d 1, 383 P.3d 1094].)

- "The real estate agent or broker representing the seller is a party to the business transaction. In most instances he has a personal interest in it and derives a profit from it. Where such agent or broker possesses, along with the seller, the requisite knowledge . . . , whether he acquires it from, or independently of, his principal, he is under the same duty of disclosure. He is a party connected with the fraud and if no disclosure is made at all to the buyer by the other parties to the transaction, such agent or broker becomes jointly and severally liable with the seller for the full amount of the damages." (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 736 [29 Cal.Rptr. 201], footnote omitted.)
- "A breach of the duty to disclose gives rise to a cause of action for rescission or damages." (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1383 [89 Cal.Rptr.3d 659].)
- "The 'elements of a simple negligence action [are] whether [the defendant] owed a legal duty to [the plaintiff] to use due care, whether this legal duty was breached, and finally whether the breach was a proximate cause of [the plaintiff's] injury. [Citations.]' We have already stated that the buyers alleged facts sufficient to impose a legal duty on the brokers. Furthermore, they have alleged facts sufficient to show a breach of that duty. Finally, the buyers alleged that the breach caused them harm. In short, the buyers stated facts sufficient to constitute a cause of action on a negligence theory. Our cursory analysis of this one theory is enough to demonstrate that the trial court erred in sustaining the brokers' demurrer without leave to amend, but is not meant to preclude the buyers' pursuit of their other [fraud] theories." (*Holmes, supra*, 188 Cal.App.4th at p. 1528, internal citation omitted.)
- "Despite the absence of privity of contract, a real estate agent is clearly under a duty to exercise reasonable care to protect those persons whom the agent is attempting to induce into entering a real estate transaction for the purpose of earning a commission." (*Holmes, supra*, 188 Cal.App.4th at p. 1519.)
- "[A] seller's agent has no affirmative duty to disclose latent defects unless the agent '*also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer*.' " (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 445 [173 Cal.Rptr.3d 624], original italics.)
- "[W]hen a real estate agent or broker is aware that the amount of existing monetary liens and encumbrances exceeds the sales price of a residential property, so as to require either the cooperation of the lender in a short sale or the ability of the seller to put a substantial amount of cash into the escrow in

order to obtain the release of the monetary liens and encumbrances affecting title, the agent or broker has a duty to disclose this state of affairs to the buyer, so that the buyer can inquire further and evaluate whether to risk entering into a transaction with a substantial risk of failure." (*Holmes, supra*, 188 Cal.App.4th at pp. 1522–1523.)

- "[W]e do not convert the seller's fiduciary into the buyer's fiduciary. The seller's agent under a listing agreement owes the seller '[a] fiduciary duty of utmost care, integrity, honesty, and loyalty . . . .' Although the seller's agent does not generally owe a fiduciary duty to the buyer, he or she nonetheless owes the buyer the affirmative duties of care, honesty, good faith, fair dealing and disclosure, as reflected in Civil Code section 2079.16, as well as such other nonfiduciary duties as are otherwise imposed by law." (*Holmes, supra*, 188 Cal.App.4th at p. 1528, internal citation omitted.)
- "Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 164 [11 Cal.Rptr.3d 564].)
- "In enacting section 2079 [see CACI No. 4108], the Legislature did not intend to preclude a real estate agent's liability for fraud. However, because a seller's agent has no fiduciary relationship with a buyer, the courts have strictly limited the scope of an agent's disclosure duties under a fraudulent concealment theory." (*Peake, supra*, 227 Cal.App.4th at p. 444, internal citation omitted.)
- "The primary difference between the disclosure obligations of an exclusive representative of a seller and a dual agent representing the seller and the buyer is the dual agent's duty to learn and disclose facts material to the property's price or desirability, including those facts that might reasonably be discovered by the buyer." (*Horiike, supra*, 1 Cal.5th at pp. 1040–1041.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 914

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 487, 489

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶¶ 2:164, 2:172 (The Rutter Group)

California Real Property Sales Transactions (Cont.Ed.Bar 4th ed.) §§ 2.132–2.136

3 California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers*, §§ 63.20–63.22 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

4110. Breach of Duty by Real Estate Seller's Agent—Inaccurate Information in Multiple Listing Service—Essential Factual Elements (Civ. Code, § 1088)

[*Name of defendant***], as the real estate [broker/salesperson/appraiser] for [***name of seller***], listed the property for sale in a multiple listing service (MLS). [***Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed because information in the MLS was false or inaccurate. [***Name of defendant***] is responsible for this harm if [***name of plaintiff***] proves all of the following:**

1. **That [***name of defendant***] listed the property for sale in a MLS;**
2. **That information posted on the MLS was false or inaccurate;**
3. **That [***name of defendant***] knew, or reasonably should have known, that the information was false or inaccurate;**
4. **That [***name of plaintiff***] reasonably relied on the false or inaccurate information in the MLS;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2015

Directions for Use

A real estate agent or appraiser has a duty to a buyer of real estate to post only accurate information on a multiple listing service (MLS). The buyer has a right of action against an agent or appraiser for harm caused by inaccurate information on an MLS if the agent or broker knew or should have known that the information was false or inaccurate. (Civ. Code, § 1088; see *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1077 [76 Cal.Rptr.2d 911].)

The statute provides a remedy for anyone "injured by" the false or inaccurate information. (Civ. Code, § 1088.) As a statutory remedy for a species of misrepresentation, the plaintiff must show causation in the form of both actual and justifiable reliance on the inaccurate information on the MLS (element 4). (See *Furla*, *supra*, 65 Cal.App.4th at p. 1078; CACI No. 1907, *Reliance*, CACI No. 1908, *Reasonable Reliance*.)

Sources and Authority

- False or Inaccurate Information in Multiple Listing Service. Civil Code section 1088.
- A real estate agent also has a statutory liability for negligence: '[i]f an agent

. . . places a listing or other information in the multiple listing service, that agent . . . shall be responsible for the truth of all representations . . . of which that agent . . . had knowledge or reasonably should have had knowledge to anyone injured by their falseness or inaccuracy.' " (*Furla*, *supra*, 65 Cal.App.4th at p. 1077.)

- "A broker's duties with respect to any listing or other information posted to an MLS are specified in section 1088. Section 1088 states in relevant part that the broker 'shall be responsible for the truth of all representations and statements made by the agent [in an MLS] . . . of which that agent . . . had knowledge or reasonably should have had knowledge,' and provides a statutory negligence claim for 'anyone injured' by the 'falseness or inaccuracy' of such representations and statements." (*Saffie v. Schmeling* (2014) 224 Cal.App.4th 563, 568 [168 Cal.Rptr.3d 766].)
- "There is nothing in section 1088, or any other source of law, imposing responsibility on a seller's broker to ensure that true statements in an MLS are not misconstrued, or to make certain that the buyer and the buyer's broker perform the appropriate due diligence to evaluate the significance of such true statements for the buyer's particular purposes." (*Saffie*, *supra*, 224 Cal.App.4th at p. 570.)
- "Defendants contend there is no triable issue of fact and as a matter of law plaintiff did not reasonably rely upon the misrepresentations, and plaintiff unreasonably failed to exercise due care for his own interest as buyer. They contend plaintiff was repeatedly warned by language in the Multiple Listing Service and the sales agreement that statements concerning square footage were approximations only, and that plaintiff could obtain accurate determinations of square footage by a professional pursuant to the buyer's right to inspect the property. But whether a plaintiff reasonably relied on a defendant's misrepresentations or failed to exercise reasonable diligence is also ordinarily a question of fact for the trier of fact." (*Furla*, *supra*, 65 Cal.App.4th at p. 1078.)
- "To be sure, an omission of information may sometimes render an otherwise true statement false or inaccurate, in the meaning of section 1088." (*Saffie*, *supra*, 224 Cal.App.4th at p. 570.)
- "Absent anything untrue or inaccurate about the statement seller's broker actually made in the MLS, and absent damage to buyer from such falsity or inaccuracy, seller's broker is not liable under section 1088." (*Saffie*, *supra*, 224 Cal.App.4th at pp. 571–572.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 487, 489

3 California Real Estate Law and Practice, Ch. 61, *Employment and Authority of Brokers*, § 61.76 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

2A California Points and Authorities, Ch. 31, *Brokers and Salespersons*, § 31.147 (Matthew Bender)

4111. Constructive Fraud (Civ. Code, § 1573)

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed because [*name of defendant*] misled [him/her/*nonbinary pronoun*] by failing to provide [*name of plaintiff*] with complete and accurate information. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was [*name of plaintiff*]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship*]];**
2. **That [*name of defendant*] acted on [*name of plaintiff*]'s behalf for purposes of [*insert description of transaction, e.g., purchasing a residential property*];**
3. **That [*name of defendant*] knew, or should have known, that [*specify information at issue*];**
4. **That [*name of defendant*] misled [*name of plaintiff*] by [failing to disclose this information/providing [*name of plaintiff*] with information that was inaccurate or incomplete];**
5. **That [*name of plaintiff*] was harmed; and**
6. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New November 2017; Revised May 2020

Directions for Use

Give this instruction for a claim of constructive fraud under Civil Code section 1573. Under the statute, constructive fraud is a particular kind of breach of fiduciary duty in which the defendant has misled the plaintiff to the plaintiff's prejudice or detriment. Constructive fraud differs from actual fraud (see CACI Nos. 1900–1903 on different claims involving actual fraud) in that no fraudulent intent is required. (Civ. Code, § 1573(1).) Thus, if one who is under a fiduciary duty to provide complete and accurate information to the plaintiff fails to do so and the plaintiff is misled to the plaintiff's prejudice, there is a claim for constructive fraud despite the lack of any intent to mislead or deceive.

In element 4, choose the first option if it was the defendant's failure to disclose information that misled the plaintiff. Choose the second option if the defendant provided information to the plaintiff, but the plaintiff was misled because the information was inaccurate or incomplete.

In a fiduciary relationship, there is a rebuttable presumption of reasonable reliance. The defendant bears the burden of rebutting the presumption by proving by substantial evidence that the plaintiff could not have reasonably relied on the

misleading information or omission. (*Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th 1290, 1301–1302 [20 Cal.Rptr.2d 701].)

There are cases that set forth the elements of constructive fraud as "(1) a fiduciary or confidential relationship; (2) nondisclosure (breach of fiduciary duty); (3) intent to deceive, and (4) reliance and resulting injury (causation)." (See, e.g., *Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 516 fn. 14 [169 Cal.Rptr. 478]; see also *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1131 [167 Cal.Rptr.3d 832].) However, these elements conflict with the statute in at least two ways. First, the statute clearly states that no fraudulent intent (or intent to deceive) is required. Second, the statute is not limited to nondisclosure; it extends to information that is disclosed, but misleading.

For discussion of the statute of limitations for constructive fraud, see CACI No. 4120, *Affirmative Defense—Statute of Limitations*.

Sources and Authority

- Constructive Fraud. Civil Code section 1573.
- "A fiduciary must tell its principal of all information it possesses that is material to the principal's interests. A fiduciary's failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent." (*Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 762 [67 Cal.Rptr.3d 797], internal citations omitted.)
- "In its generic sense, constructive fraud comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence, and resulting in damages to another. [Citations.] Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated—that is, in which such conduct is a constructive or quasi fraud, having all the actual consequences and all the legal effects of actual fraud." (*Prakashpalan, supra,* 223 Cal.App.4th at p. 1131.)
- "The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud even though there is no fraudulent intent." (*Assilzadeh v. Cal. Fed. Bank* (2000) 82 Cal.App.4th 399, 415 [98 Cal.Rptr.2d 176].)
- "[A] representation in the context of a trust or fiduciary relationship creates a rebuttable presumption of reasonable reliance subject to being overcome by substantial evidence to the contrary." (*Edmunds, supra,* 16 Cal.App.4th at p. 1302.)
- "This rebuttable presumption implements the long recognized public policy of imposing fiduciary duties upon partners in their relationship to one another. Indeed, this policy is lodged in the statutory and case law of this state. It is more than the simple shifting of the burden of proof to facilitate the determination of a particular action. Consequently, [defendant] had the burden of proving by

substantial evidence that [plaintiff] did not rely on the alleged false statement." (*Edmunds, supra,* 16 Cal.App.4th at p. 1302.)

- "Confidential and fiduciary relations are in law, synonymous and may be said to exist whenever trust and confidence is reposed by one person in another." (*Barrett v. Bank of Am.* (1986) 183 Cal.App.3d 1362, 1369 [229 Cal.Rptr. 16].)

Secondary Sources

5 Witkin, California Procedure (6th ed. 2021) Pleading § 714

1 Witkin, Summary of California Law (11th ed. 2017) Contracts § 295 et seq.

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.01 (Matthew Bender)

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Fraud, Menace, Undue Influence, and Mistake*, §§ 215.70, 215.130 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.22 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Fraud, Menace, Undue Influence, and Mistake*, §§ 92.44, 92.56 (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, *Attacking or Defending Existence of Contract—Fraud, Duress, Menace, and Undue Influence*, 17.14 et seq.

4112–4119. Reserved for Future Use

4120. Affirmative Defense—Statute of Limitations

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s claimed harm occurred before [***insert date four years before complaint was filed***] unless [***name of plaintiff***] proves that before [***insert date four years before complaint was filed***], [he/she/***nonbinary pronoun***/it] did not discover, and did not know of facts that would have caused a reasonable person to suspect, [***name of defendant***]'s wrongful act or omission.**

New April 2007; Renumbered from CACI No. 4106 December 2007; Revised December 2012

Directions for Use

Read this instruction only for a cause of action for breach of fiduciary duty. For a statute-of-limitations defense to a cause of action for personal injury or wrongful death due to wrongful or negligent conduct, see CACI No. 454, *Affirmative Defense—Statute of Limitations,* and CACI No. 455, *Statute of Limitations—Delayed Discovery*.

This instruction assumes that the four-year "catch-all" statute of limitations of Code of Civil Procedure section 343 applies to claims for breach of fiduciary duty. (See *Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230 [282 Cal.Rptr. 43].) There is, however, language in several cases supporting the proposition that if the breach can be characterized as constructive fraud, the three-year limitation period of Code of Civil Procedure section 338(d) applies. (See *Austin v. Medicis* (2018) 21 Cal.App.5th 577, 587–588 [230 Cal.Rptr.3d 528]; *William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312 [139 Cal.Rptr.3d 670].) If the court determines that the claim is actually for constructive fraud, a date three years before the complaint was filed may be used instead of a four-year date. It is not clear, however, when a breach of fiduciary duty might constitute constructive fraud for purposes of the applicable statute of limitations. (Compare *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607 [129 Cal.Rptr.3d 525] [suggesting that breach of fiduciary duty founded on concealment of facts would be subject to three-year statute] with *Stalberg, supra*, 230 Cal.App.3d at p. 1230 [applying four-year statute to breach of fiduciary duty based on concealment of facts].)

Do not use this instruction in an action against an attorney. For a statute-of-limitations defense to a cause of action, other than actual fraud, against an attorney acting in the capacity of an attorney, see CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit,* and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-*

Year Limit. One cannot avoid a shorter limitation period for attorney malpractice (see Code Civ. Proc., § 340.6) by pleading the facts as a breach of fiduciary duty or constructive fraud. (See *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 67–68 [72 Cal.Rptr.2d 359]; see also *Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 322 [166 Cal.Rptr.3d 116] [constructive fraud].)

Sources and Authority

- Four-Year Statute of Limitations. Code of Civil Procedure section 343.
- "The statute of limitations for breach of fiduciary duty is four years. (§ 343.)" (*Stalberg, supra*, 230 Cal.App.3d at p. 1230, internal citation omitted.)
- " '[W]here the gravamen of the complaint is that defendant's acts constituted actual or constructive fraud, the applicable statute of limitations is the [Code of Civil Procedure section 338, subdivision (d) three-year] limitations period,' governing fraud even though the cause of action is designated by the plaintiff as a claim for breach of fiduciary duty." (*Thomson, supra*, 198 Cal.App.4th at p. 607.)
- "Defendants argue on appeal that the gravamen of plaintiff's complaint is that defendants' acts constituted actual or constructive fraud, and thus should be governed by the fraud statute of limitations. We disagree. Plaintiff's claim is not founded upon the concealment of facts but upon defendants' alleged failure to draft documents necessary to the real estate transaction in which they represented plaintiff. The allegation is an allegation of breach of fiduciary duty, not fraud." (*Thomson, supra*, 198 Cal.App.4th at p. 607.)
- "To be sure, section 340.6, subdivision (a), exempts claims of 'actual fraud' from its limitations period—but the exemption does not extend to claims of constructive fraud." (*Austin, supra,* 21 Cal.App.5th at p. 587.)
- "Breach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year 'catch-all statute' of Code of Civil Procedure section 343 . . . . Fraud is subject to the three-year statute of limitations under Code of Civil Procedure section 338. . . . [¶][¶] However, a breach of a fiduciary duty usually constitutes constructive fraud." (*William L. Lyon & Associates, Inc., supra,* 204 Cal.App.4th at pp. 1312, 1313.)
- "The statute of limitations for breach of fiduciary duty is three years or four years, depending on whether the breach is fraudulent or nonfraudulent." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1479 [171 Cal.Rptr.3d 548].)
- "A breach of fiduciary duty claim is based on concealment of facts, and the statute begins to run when plaintiffs discovered, or in the exercise of reasonable diligence could have discovered, that facts had been concealed." (*Stalberg, supra,* 230 Cal.App.3d at p. 1230, internal citation omitted.)
- "We also are not persuaded by [defendant]'s contention breach of fiduciary duty can only be characterized as constructive fraud (which does not include fraudulent intent as an element). This simply is not true: 'A misrepresentation

that constitutes a breach of a fiduciary or confidential a [*sic*] relationship may, depending on whether an intent to deceive is present, constitute either actual or constructive fraud. However, the issue is usually discussed in terms of whether the misrepresentation constitutes constructive fraud, because actual fraud can exist independently of a fiduciary or confidential relationship, while the existence of such a relationship is usually crucial to a finding of constructive fraud.' " (*Worthington v. Davi* (2012) 208 Cal.App.4th 263, 283 [145 Cal.Rptr.3d 389].)

- " 'Where a fiduciary obligation is present, the courts have recognized a postponement of the accrual of the cause of action until the beneficiary has knowledge or notice of the act constituting a breach of fidelity. [Citations.] The existence of a trust relationship limits the duty of inquiry. "Thus, when a potential plaintiff is in a fiduciary relationship with another individual, that plaintiff's burden of discovery is reduced and he is entitled to rely on the statements and advice provided by the fiduciary." ' " (*WA Southwest 2, LLC v. First American Title Ins. Co.* (2015) 240 Cal.App.4th 148, 157 [192 Cal.Rptr.3d 423].)
- "Delayed accrual due to the fiduciary relationship does not extend beyond the bounds of the discovery rule, which operates to protect the plaintiff who ' "despite diligent investigation . . . is blamelessly ignorant of the cause of his injuries" ' and should not be barred from asserting a cause of action for wrongful conduct ' "before he could reasonably be expected to discover its existence." ' " (*Choi v. Sagemark Consulting* (2017) 18 Cal.App.5th 308, 334 [226 Cal.Rptr.3d 267].)
- "The distinction between the rules excusing a late discovery of fraud and those allowing late discovery in cases in the confidential relationship category is that in the latter situation, the duty to investigate may arise later because the plaintiff is entitled to rely upon the assumption that his fiduciary is acting on his behalf. However, once a plaintiff becomes *aware* of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with knowledge of the facts which would have been discovered by such an investigation." (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 202 [210 Cal.Rptr. 387], original italics, internal citations omitted.)
- " '[R]esolution of the statute of limitations issue is normally a question of fact . . . .' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)
- "[T]he statute of limitations for aiding and abetting a breach of fiduciary duty is the same as the statute of limitations for breach of fiduciary duty." (*American Master Lease LLC*, *supra*, 225 Cal.App.4th at p. 1479].)
- " 'Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.' [Citation.] [¶] '[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even

though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. . . .' " (*Mark Tanner Constr. v. Hub Internat. Ins. Servs.* (2014) 224 Cal.App.4th 574, 588 [169 Cal.Rptr.3d 39].)

Secondary Sources

4 Witkin, California Procedure (6th ed. 2021) Actions, § 735

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, § 30.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.19[4] (Matthew Bender)

4121–4199. Reserved for Future Use

UNIFORM VOIDABLE TRANSACTIONS ACT

4200. Actual Intent to Hinder, Delay, or Defraud a Creditor—Essential Factual Elements (Civ. Code, § 3439.04(a)(1))

[*Name of plaintiff***] claims [he/she/***nonbinary pronoun***/it] was harmed because [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***] in order to avoid paying a debt to [***name of plaintiff***]. [This is called "actual fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**
2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**
3. **That [***name of debtor***] [transferred the property/incurred the obligation] with the intent to hinder, delay, or defraud one or more of [his/her/***nonbinary pronoun***/its] creditors;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of debtor***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

To prove intent to hinder, delay, or defraud creditors, it is not necessary to show that [*name of debtor***] had a desire to harm [his/her/***nonbinary pronoun***/its] creditors. [***Name of plaintiff***] need only show that [***name of debtor***] intended to remove or conceal assets to make it more difficult for [his/her/***nonbinary pronoun***/its] creditors to collect payment.**

[It does not matter whether [*name of plaintiff***]'s right to payment arose before or after [***name of debtor***] [transferred property/incurred an obligation].]**

New June 2006; Revised June 2013, June 2016

Directions for Use

Under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), a transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud a creditor. (Civ. Code, § 3439.04(a)(1).)

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence if the plaintiff is asserting claims for both actual and constructive fraud. Read the last bracketed sentence if the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

Note that in element 3, only the debtor-transferor's intent is required. (See Civ. Code, § 3439.04(a)(1).) The intent of the transferee is irrelevant. However, a transferee who receives the property both in good faith and for a reasonably equivalent value has an affirmative defense. (See Civ. Code, § 3439.08(a); CACI No. 4207, *Affirmative Defense—Good Faith*.)

If the case concerns an incurred obligation, users may wish to insert a brief description of the obligation in this instruction, e.g., "a lien on the property."

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523].) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even if a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made") (Civ. Code, § 3439.08(b)(1)(A)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Note that there may be a split of authority regarding the appropriate standard of proof of intent. The Sixth District Court of Appeal has stated: "Actual intent to defraud must be shown by clear and convincing evidence. (*Hansford v. Lassar* (1975) 53 Cal.App.3d 364, 377 [125 Cal.Rptr. 804].)" (*Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123 [10 Cal.Rptr.2d 58].) Note that the case relied on by the *Hansford* court (*Aggregates Assoc., Inc. v. Packwood* (1962) 58 Cal.2d 580 [25 Cal.Rptr. 545, 375 P.2d 425]) was disapproved by the Supreme Court in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291–292 [137 Cal.Rptr. 635, 562 P.2d 316]. The Fourth District Court of Appeal, Division Two, disagreed with *Reddy*: "In determining whether transfers occurred with fraudulent intent, we apply the preponderance of the evidence test, even though we recognize that some courts believe that the test requires clear and convincing evidence." (*Gagan v. Gouyd* (1999) 73 Cal.App.4th 835, 839 [86 Cal.Rptr.2d 733], internal citations omitted, disapproved on other grounds in *Mejia v. Reed* (2003) 31 Cal.4th 657, 669, fn. 2 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

Sources and Authority

- Uniform Voidable Transactions Act. Civil Code section 3439 et seq.
- "Claim" Defined for UVTA. Civil Code section 3439.01(b).
- Creditor Remedies Under UVTA. Civil Code section 3439.07.
- "The UFTA permits defrauded creditors to reach property in the hands of a transferee." (*Mejia*, *supra*, 31 Cal.4th at p. 663.)
- "The UVTA, formerly known as the Uniform Fraudulent Transfer Act, 'permits defrauded creditors to reach property in the hands of a transferee.' 'A fraudulent conveyance is a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.' . . . The purpose of the voidable transactions statute is ' "to prevent

debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach . . . .' " (*Lo v. Lee* (2018) 24 Cal.App.5th 1065, 1071 [234 Cal.Rptr.3d 824], internal citations omitted.)

- "Under the UFTA, 'a transfer of assets made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer, if the debtor made the transfer (1) with an actual intent to hinder, delay or defraud any creditor, or (2) without receiving reasonably equivalent value in return, and either (a) was engaged in or about to engage in a business or transaction for which the debtor's assets were unreasonably small, or (b) intended to, or reasonably believed, or reasonably should have believed, that he or she would incur debts beyond his or her ability to pay as they became due.' " (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 121–122 [173 Cal.Rptr.3d 356], internal citations omitted.)
- "[A] conveyance will not be considered fraudulent if the debtor merely transfers property which is otherwise exempt from liability for debts. That is, because the theory of the law is that it is fraudulent for a judgment debtor to divest himself of assets against which the creditor could execute, if execution by the creditor would be barred while the property is in the possession of the debtor, then the debtor's conveyance of that exempt property to a third person is not fraudulent." (*Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13 [33 Cal.Rptr.2d 283].)
- "A transfer is not voidable against a person 'who took in good faith and for a reasonably equivalent value or against any subsequent transferee.' " (*Filip, supra,* 129 Cal.App.4th at p. 830, internal citations omitted.)
- "We hold that under the UVTA, physically relocating personal property and transmitting or transporting sale proceeds out of state, then transmuting them into a different legal form, may constitute a direct or indirect mode of parting with assets or one's interest in those assets. As such, [plaintiff] adequately alleged a 'transfer' under the UVTA. In this posture the trier of fact must now determine if grantor's title is but, 'a mere cloak under which is hidden the hideous skeleton of deceit . . . .' " (*Nagel v. Westen* (2021) 59 Cal.App.5th 740, 749 [274 Cal.Rptr.3d 21].)
- " '[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked'; they 'may also be attacked by, as it were, a common law action.' " (*Wisden, supra,* 124 Cal.App.4th at p. 758, internal citation omitted.)
- "Case law has established the remedies specified in the UVTA are cumulative and not the exclusive remedy for fraudulent conveyances. 'They may also be attached by, as it were, a common law action.' By its terms the UVTA was intended to supplement, not replace, common law principles relating to fraud." (*Berger v. Varum* (2019) 35 Cal.App.5th 1013, 1019 [248 Cal.Rptr.3d 51].)
- "[E]ven if the Legislature intended that all fraudulent conveyance claims be

brought under the UFTA, the Legislature could not thereby dispense with a right to jury trial that existed at common law when the California Constitution was adopted." (*Wisden, supra,* 124 Cal.App.4th at p. 758, internal citation omitted.)

- "Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer." (*Filip, supra,* 129 Cal.App.4th at p. 834, internal citations omitted.)
- "In order to constitute intent to defraud, it is not necessary that the transferor act maliciously with the desire of causing harm to one or more creditors." (*Economy Refining & Service Co. v. Royal Nat'l Bank* (1971) 20 Cal.App.3d 434, 441 [97 Cal.Rptr. 706].)
- "There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other." (*Filip, supra,* 129 Cal.App.4th at p. 834.)
- " 'A well-established principle of the law of fraudulent transfers is, "A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential." ' " (*Berger, supra*, 35 Cal.App.5th at p. 1020.)
- "It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt." (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)
- "[G]ranting [plaintiff judgment creditor] an additional judgment against [defendant judgment debtor] under the UFTA for . . . 'the amount transferred here to avoid paying part of his underlying judgment, *would in effect allow [him] to recover more than the underlying judgment,* which the [UFTA] does not allow.' (Italics added.) We thus conclude that because [plaintiff] obtained a judgment in the prior action for the damages [defendant] caused him, the principle against double recovery for the same harm bars him from obtaining a second judgment against her under the UFTA for a portion of those same damages." (*Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, 1238 [167 Cal.Rptr.3d 874], original italics.)
- "Certain cases, while not awarding consequential damages, have recognized the availability of such damages." (*Berger, supra*, 35 Cal.App.5th at p. 1021.)

Secondary Sources

8 Witkin, California Procedure (6th ed. 2021) Enforcement of Judgment, § 542 et seq.

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prelawsuit Considerations*, ¶ 3:291 et seq. (The Rutter Group)

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 5(III)-B, *Elements of Claim*, ¶ 5:528 (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.40 (Matthew Bender)

1 Goldsmith et al., Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 4, *Fraudulent Transfers*, 4.05

4201. Factors to Consider in Determining Actual Intent to Hinder, Delay, or Defraud (Civ. Code, § 3439.04(b))

In determining whether [*name of debtor***] intended to hinder, delay, or defraud any creditors by [transferring property/incurring an obligation] to [***name of defendant***], you may consider, among other factors, the following:**

[(a) Whether the [transfer/obligation] was to [a/an] [*insert relevant description of insider, e.g., "relative," "business partner," etc.***];]**

[(b) Whether [*name of debtor***] retained possession or control of the property after it was transferred;]**

[(c) Whether the [transfer/obligation] was disclosed or concealed;]

[(d) Whether before the [transfer was made/obligation was incurred] [*name of debtor***] had been sued or threatened with suit;]**

[(e) Whether the transfer was of substantially all of [*name of debtor***]'s assets;]**

[(f) Whether [*name of debtor***] fled;]**

[(g) Whether [*name of debtor***] removed or concealed assets;]**

[(h) Whether the value received by [*name of debtor***] was not reasonably equivalent to the value of the [asset transferred/amount of the obligation incurred];]**

[(i) Whether [*name of debtor***] was insolvent or became insolvent shortly after the [transfer was made/obligation was incurred];]**

[(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;]

[(k) Whether [*name of debtor***] transferred the essential assets of the business to a lienholder who transferred the assets to an insider of [***name of defendant***];] [and]**

[(*l*) [*insert other appropriate factor***].]**

Evidence of one or more factors does not automatically require a finding that [*name of defendant***] acted with the intent to hinder, delay, or defraud creditors. The presence of one or more of these factors is evidence that may suggest the intent to delay, hinder, or defraud.**

New June 2006; Revised June 2016

Directions for Use

Some or all of the stated factors may not be necessary in every case. Other factors may be added as appropriate depending on the facts of the case.

Sources and Authority

- Determination of Actual Intent. Civil Code section 3439.04(b).
- "Over the years, courts have considered a number of factors, the 'badges of fraud' described in a Legislative Committee comment to section 3439.04, in determining actual intent. Effective January 1, 2005, those factors are now codified as section 3439.04, subdivision (b) and include considerations such as whether the transfer was made to an insider, whether the transferee retained possession or control after the property was transferred, whether the transfer was disclosed, whether the debtor had been sued or threatened with suit before the transfer was made, whether the value received by the debtor was reasonably equivalent to the value of the transferred asset, and similar concerns. According to section 3439.04, subdivision (c), this amendment 'does not constitute a change in, but is declaratory of, existing law.' " (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 834 [28 Cal.Rptr.3d 884], internal citations omitted.)
- "[The factors in Civil Code section 3439.04(b)] do not create a mathematical formula to establish actual intent. There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other." (*Filip, supra,* 129 Cal.App.4th at p. 834.)
- "Even the existence of several 'badges of fraud' may be insufficient to raise a triable issue of material fact." (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924], internal citation omitted.)
- "Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer." (*Filip, supra,* 129 Cal.App.4th at p. 834, internal citation omitted.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prelawsuit Considerations*, ¶ 3:291 et seq. (The Rutter Group)

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 5(III)-B, *Elements of Claim*, ¶ 5:528 (The Rutter Group)

9 California Forms of Pleading and Practice, Ch. 94, *Bankruptcy*, § 94.55[4][b] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.40 (Matthew Bender)

4202. Constructive Fraudulent Transfer—No Reasonably Equivalent Value Received—Essential Factual Elements (Civ. Code, § 3439.04(a)(2))

[*Name of plaintiff***] claims [he/she/***nonbinary pronoun***/it] was harmed because [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***] and, as a result, was unable to pay [***name of plaintiff***] money that was owed. [This is called "constructive fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**
2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**
3. **That [***name of debtor***] did not receive a reasonably equivalent value in exchange for the [transfer/obligation];**
4. **[That [***name of debtor***] was in business or about to start a business or enter a transaction when [his/her/***nonbinary pronoun***/its] remaining assets were unreasonably small for the business or transaction;] [or]**

   [That [*name of debtor***] intended to incur debts beyond [his/her/***nonbinary pronoun***/its] ability to pay as they became due;] [or]**

   [That [*name of debtor***] believed or reasonably should have believed that [he/she/***nonbinary pronoun***/it] would incur debts beyond [his/her/***nonbinary pronoun***/its] ability to pay as they became due;]**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of debtor***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

If you decide that [*name of plaintiff***] has proved all of the above, [he/she/***nonbinary pronoun***/it] does not have to prove that [***name of debtor***] intended to defraud any creditors.**

[It does not matter whether [*name of plaintiff***]'s right to payment arose before or after [***name of debtor***] [transferred property/incurred an obligation].]**

New June 2006; Revised June 2016

Directions for Use

Under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), a transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either: (1) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due. (Civ. Code, § 3439.04(a)(2).)

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence if the plaintiff is asserting claims for both actual and constructive fraud. Read the last bracketed sentence if the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523].) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even if a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made") (Civ. Code, § 3439.08(b)(1)(A)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Sources and Authority

- Transfer Without Reasonably Equivalent Value in Exchange. Civil Code section 3439.04(a)(2).
- When Value Is Given. Civil Code section 3439.03.
- "There are two forms of constructive fraud under the UFTA. Civil Code section 3439.04 . . . provides that a transfer is fraudulent if the debtor did not receive reasonably equivalent consideration and either '(1) Was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.' Civil Code section 3439.05 provides that a transfer is fraudulent as to an existing creditor if the debtor does not receive reasonably equivalent value and 'was insolvent at that time or . . . became insolvent as a result of the transfer . . . .' " (*Mejia v. Reed* (2003) 31 Cal.4th 657, 669–670 [3 Cal.Rptr.3d 390, 74 P.3d 166].)
- "A well-established principle of the law of fraudulent transfers is, 'A transfer in

fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prelawsuit Considerations*, ¶ 3:291 et seq. (The Rutter Group)

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-B, *Elements of Claim*, ¶ 5:528 (The Rutter Group)

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.70[5], 215.111[2][c] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.42, 270.193, 270.194 (Matthew Bender)

4203. Constructive Fraudulent Transfer—Insolvency—Essential Factual Elements (Civ. Code, § 3439.05)

[*Name of plaintiff***] claims [he/she/***nonbinary pronoun***/it] was harmed because [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***] and was unable to pay [***name of plaintiff***] money that was owed. [This is called "constructive fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**
2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**
3. **That [***name of debtor***] did not receive a reasonably equivalent value in exchange for the [transfer/obligation];**
4. **That [***name of plaintiff***]'s right to payment from [***name of debtor***] arose before [***name of debtor***] [transferred property/incurred an obligation];**
5. **That [***name of debtor***] was insolvent at that time or became insolvent as a result of the transfer or obligation;**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of debtor***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

If you decide that [*name of plaintiff***] has proved all of the above, [he/she/***nonbinary pronoun***/it] does not have to prove that [***name of debtor***] intended to defraud creditors.**

New June 2006; Revised June 2016

Directions for Use

Under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), a transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation. (Civ. Code, § 3439.05.)

This instruction assumes the defendant is a transferee of the debtor. This instruction may be used along with CACI No. 4202, *Constructive Fraudulent Transfer—No*

Reasonably Equivalent Value Received—Essential Factual Elements, if it is alleged that the plaintiff became a creditor before the transfer was made or the obligation was incurred. Read the bracketed second sentence if the plaintiff is asserting causes of action for both actual and constructive fraud. Also give CACI No. 4205, *"Insolvency" Explained*, and CACI No. 4206, *Presumption of Insolvency*.

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523].) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even if a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made" (Civ. Code, § 3439.08(b)(1)(A)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Sources and Authority

- Voidable Transaction Involving Insolvency. Civil Code section 3439.05.
- When Value Is Given. Civil Code section 3439.03.
- "There are two forms of constructive fraud under the UFTA. Civil Code section 3439.04 . . . provides that a transfer is fraudulent if the debtor did not receive reasonably equivalent consideration and either '(1) Was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.' " (*Mejia v. Reed* (2003) 31 Cal.4th 657, 669–670 [3 Cal.Rptr.3d 390, 74 P.3d 166].)
- "Even without actual fraudulent intent, a transfer may be fraudulent as to present creditors if the debtor did not receive 'a reasonably equivalent value in exchange for the transfer' and 'the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.' " (*PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 169 [221 Cal.Rptr.3d 353].)
- "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

Secondary Sources

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims &

Defenses, Ch. 5(III)-B, *Elements of Claim*, ¶ 5:545 et seq. (The Rutter Group)

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.70[5], 215.111[2][c] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.42, 270.191, 270.192 (Matthew Bender)

4204. "Transfer" Explained

"Transfer" means every method of parting with a debtor's property or an interest in a debtor's property.

[*Read one of the following options:***]**

[A transfer may be direct or indirect, absolute or conditional, voluntary or involuntary. A transfer includes [the payment of money/a release/a lease/a license/ [and] the creation of a lien or other encumbrance].]

[In this case, [*describe transaction***] is a transfer.]**

New June 2006; Revised June 2016

Directions for Use

This instruction sets forth the statutory definition of a "transfer" within the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act). (See Civ. Code, § 3439.01(m).) Read the second bracketed option for the second sentence if the transaction has been stipulated to or determined as a matter of law. Otherwise, read the first bracketed option. Include only the bracketed terms at the end of the first option that are at issue in the case.

Sources and Authority

- "Transfer" Defined. Civil Code section 3439.01(m).
- "On its face, the UFTA applies to all transfers. Civil Code, section § 3439.01, subdivision (i) defines '[t]ransfer' as 'every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset . . . .' The UFTA excepts only certain transfers resulting from lease terminations or lien enforcement." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 664 [3 Cal.Rptr.3d 390, 74 P.3d 166], internal citations omitted.)
- "Civil Code section 3439.01, subdivision (m) broadly defines 'transfer' to mean "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, license, and creation of a lien or other encumbrance.' This definition is broad enough to include transfers of assets by means of executing on a judgment obtained by fraud or collusion." (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 817 [245 Cal.Rptr.3d 378], internal citation omitted.)
- "Under this definition, there is no doubt that an agreement made *during marriage* in which a debtor-spouse agrees that the nondebtor-spouse's future earnings, income, or assets would be the nondebtor-spouse's separate property constitutes a transfer because the debtor-spouse is parting with an interest in an asset—the community property represented by the other spouse's earnings—in

which he or she has a 'present [and] existing . . . interest[] during continuance of the marriage.' " (*Sturm v. Moyer* (2019) 32 Cal.App.5th 299, 308 [243 Cal.Rptr.3d 556], original italics, internal citations omitted.)

- "In light of the suggestions raised by the legislative language and history, and the strong policy—advanced by both the UFTA and section 911 of the Family Code—of protecting the rights of creditors from fraudulent transfers, we conclude that the Legislature must have intended that UFTA can apply to premarital agreements in which the prospective spouses agree that each spouse's earnings, income, and property acquired during marriage will be that spouse's separate property." (*Sturm, supra*, 32 Cal.App.5th at p. 315.)
- "Transfers to bogus corporations that are wholly owned and controlled by the debtor are 'transfers' for purposes of the UFTA." (*PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 173 [221 Cal.Rptr.3d 353].)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prelawsuit Considerations*, ¶ 3:319 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.35[1], 270.37 (Matthew Bender)

1 Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 4, *Voidable Transactions*, 4.07

4205. "Insolvency" Explained

[[*Name of debtor***] was insolvent [at the time/as a result] of the transaction if, at fair valuation, the total amount of [his/her/***nonbinary pronoun***/its] debts was greater than the total amount of [his/her/***nonbinary pronoun***/its] assets.]**

In determining [*name of debtor***]'s assets, do not include property that has been [transferred, concealed, or removed with intent to hinder, delay, or defraud creditors/ [or] transferred [***specify grounds for voidable transfer based on constructive fraud***]]. [In determining [***name of debtor***]'s debts, do not include a debt to the extent it is secured by a valid lien on [his/her/***nonbinary pronoun***/its] property that is not included as an asset.]**

New June 2006; Revised June 2016

Directions for Use

Give this instruction with CACI No. 4203, *Constructive Fraudulent Transfer—Insolvency—Essential Factual Elements*. Give also CACI No. 4206, *Presumption of Insolvency*.

Property the transfer of which is potentially voidable under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act) is to be excluded from the computation of the debtor's assets for purposes of determining insolvency. (Civ. Code, § 3439.02(c).) In the first sentence of the second paragraph select the first option if there is property transferred and alleged to be voidable for actual fraud (see Civ. Code, § 3439.04(a)(1).), and specify the grounds in the second option if there is property transferred and alleged to be voidable for constructive fraud. (See Civ. Code, §§ 3439.04(a)(2), 3904.05.) Read the bracketed last sentence if appropriate to the facts. (See Civ. Code, § 3439.02(d).)

Sources and Authority

- When Debtor Is Insolvent. Civil Code section 3439.02.
- "Asset" Defined. Civil Code section 3439.01(a).
- "To determine solvency, the value of a debtor's assets and debts are compared. By statutory definition, a debtor's assets exclude property that is exempt from judgment enforcement. Retirement accounts are generally exempt." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 670 [3 Cal.Rptr.3d 390, 74 P.3d 166], internal citations omitted.)
- "We conclude . . . that future child support payments should not be viewed as a debt under the UFTA." (*Mejia, supra,* 31 Cal.4th at p. 671.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C,

Prelawsuit Considerations, ¶ 3:327 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.42[3], 270.192 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 307, *Insolvency*, § 307.32 (Matthew Bender)

4206. Presumption of Insolvency

A debtor who is generally not paying [his/her/*nonbinary pronoun*/its] debts as they become due, other than because of a legitimate dispute, is presumed to be insolvent.

In determining whether [*name of debtor*] was generally not paying [his/her/*nonbinary pronoun*/its] debts as they became due, you may consider all of the following:

(a) The number of [*name of debtor*]'s debts;

(b) The percentage of debts that were not being paid;

(c) How long those debts remained unpaid;

(d) Whether special circumstances explain any failure to pay the debts; and

(e) [*Name of debtor*]'s payment practices before the period of alleged nonpayment [and the payment practices of [*name of debtor*]'s [trade/industry]].

If [*name of plaintiff*] proves that [*name of debtor*] was generally not paying debts as they became due, then you must find that [*name of debtor*] was insolvent unless [*name of defendant*] proves that [*name of debtor*] was solvent.

New June 2006; Revised June 2016

Directions for Use

This instruction should be read in conjunction with CACI No. 4203, *Constructive Fraudulent Transfer—Insolvency—Essential Factual Elements*, and CACI No. 4205, *Insolvency Explained*.

Sources and Authority

- Presumption of Insolvency. Civil Code section 3439.02(b).
- "Subdivision (c) [now subdivision (b)] establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. . . . The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency as defined in subdivision (a) is more probable than its existence." (Legislative Committee Comment to Civil Code section 3439.02.)
- "In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not being paid, the duration

of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged." (Legislative Committee Comment to Civil Code section 3439.02.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prelawsuit Considerations*, ¶ 3:328 (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.42[3][e], [4] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 307, *Insolvency*, § 307.20 (Matthew Bender)

4207. Affirmative Defense—Good Faith (Civ. Code, § 3439.08(a), (f)(1))

[*Name of defendant***] is not liable to [***name of plaintiff***] [on the claim for actual fraud] if [***name of defendant***] proves both of the following:**

[*Use one of the following two sets of elements:*]

[1. That [*name of defendant***] took the property from [***name of debtor***] in good faith; and**

2. That [he/she/*nonbinary pronoun*/it] took the property for a reasonably equivalent value.]

[*or*]

[1. That [*name of defendant***] received the property from [***name of third party***], who had taken the property from [***name of debtor***] in good faith; and**

2. That [*name of third party***] had taken the property for a reasonably equivalent value.]**

"Good faith" means that [*name of defendant/third party***] acted without actual fraudulent intent and that [he/she/*nonbinary pronoun*/it] did not collude with [***name of debtor***] or otherwise actively participate in any fraudulent scheme. If you decide that [***name of defendant/third party***] knew facts showing that [***name of debtor***] had a fraudulent intent, then [***name of defendant/third party***] cannot have taken the property in good faith.**

New June 2006; Revised June 2016, November 2017

Directions for Use

This instruction presents a defense that is available to a good-faith transferee for value in cases involving allegations of actual fraud under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act). (See Civ. Code, § 3439.08(a), (f)(1).) Include the bracketed language in the first sentence if the plaintiff is bringing claims for both actual fraud and constructive fraud.

The Legislative Committee Comments—Assembly to Civil Code section 3439.08(a) provides that the transferee's knowledge of the transferor's fraudulent intent may, *in combination with other facts,* be relevant on the issue of the transferee's good faith. (See *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924], emphasis added.) However, another sentence of the same comment provides "knowledge of facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee." This language indicates that if the transferee knew facts showing that the transferor had a

fraudulent intent, there cannot be a finding of good faith regardless of any combination of facts; and one court has so held. (See *Nautilus, Inc. v. Yang* (2017) 11 Cal.App.5th 33, 46 [217 Cal.Rptr.3d 458].) The committee believes that *Nautilus* presents the better rule.

Sources and Authority

- Transaction Not Voidable as to Good-Faith Transferee for Reasonable Value. Civil Code section 3439.08(a).
- Transferee's Burden of Proving Good Faith and Reasonable Value. Civil Code section 3439.08(f)(1).
- When Value is Given. Civil Code section 3439.03.
- "If a transferee or obligee took in good faith and for a reasonably equivalent value, however, the transfer or obligation is not voidable. Whether a transfer is made with fraudulent intent and whether a transferee acted in good faith and gave reasonably equivalent value within the meaning of section 3439.08, subdivision (a), are questions of fact." (*Nautilus Inc., supra,* 11 Cal.App.5th at p. 40, internal citation and footnote omitted.)
- "The Legislative Committee comment to Civil Code section 3439.08, subdivision (a), provides that 'good faith,' within the meaning of the provision, 'means that the transferee acted without actual fraudulent intent and that he or she did not collude with the debtor or otherwise actively participate in the fraudulent scheme of the debtor. The transferee's knowledge of the transferor's fraudulent intent may, in combination with other facts, be relevant on the issue of the transferee's good faith . . . .' " (*Annod Corp., supra,* 100 Cal.App.4th at p. 1299, internal citations omitted.)
- " 'Fraudulent intent,' 'collusion,' 'active participation,' 'fraudulent scheme'—this is the language of *deliberate wrongful conduct*. It belies any notion that one can become a fraudulent transferee by accident, or even negligently. It certainly belies the notion that guilty knowledge can be created by the fiction of constructive notice." (*Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1859 [37 Cal.Rptr.2d 63], original italics.)
- "We read *Brincko* [*v. Rio Props.* (D.Nev., Jan. 14, 2013, No. 2:10-CV-00930-PMP-PAL) 2013 U.S.Dist. Lexis 5986, pp. *51–*52] as requiring *actual* knowledge by the transferee of a fraudulent intent on the part of the transferor—not merely *constructive* knowledge or inquiry notice. To that extent, we agree with *Brincko's* construction of the proper test for application of the good faith defense. However, our formulation of the test (1) does not use the words 'suggest to a reasonable person' because that phrase might imply inquiry notice—a concept rejected in *Lewis* and *Brincko*—and (2) avoids use of the words 'voidable' and 'fraudulent transfer' because those concepts are inconsistent with the Legislative Committee comment to section 3439.08. Accordingly, we hold that a transferee does not take in good faith if the transferee had actual knowledge of facts showing the transferor had fraudulent

intent." (*Nautilus, Inc., supra,* 11 Cal.App.5th at p. 46, original italics.)

- "[T]he trial court erred in placing the burden of proof on [plaintiff] to prove the good faith defense did not apply." (*Nautilus, Inc., supra,* 11 Cal.App.5th at p. 41.)
- "[U]nder section 3439.08, subdivision (b)(1)(A), judgment for a fraudulent transfer may be entered against '[t]he first transferee of the asset *or the person for whose benefit the transfer was made*.' " (*Lo v. Lee* (2018) 24 Cal.App.5th 1065, 1072 [234 Cal.Rptr.3d 824], original italics.)
- "Contrary to plaintiff's suggestion, the fact that a person received any kind of 'benefit,' no matter how intangible or indirect, from a fraudulent transaction does not necessarily subject that person to liability. There are limits to the legal assessment of the type of 'benefit' that will subject a beneficiary to liability for the debtor's alleged fraudulent transfer. The benefit received must be 'direct, ascertainable and quantifiable' and must bear a ' "necessary correspondence to the value of the property transferred." ' ' "[T]ransfer beneficiary status depends on three aspects of the 'benefit': (1) it must actually have been received by the beneficiary; (2) it must be quantifiable; and (3) it must be accessible to the beneficiary." ' " (*Lo*, *supra*, 24 Cal.App.5th at p. 1073.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prelawsuit Considerations*, ¶ 3:324 (The Rutter Group)

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 5(III)-C, *Particular Defenses*, ¶ 5:580 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.35[2], 270.44[1], 270.47[2], [3] (Matthew Bender)

4208. Affirmative Defense—Statute of Limitations—Actual and Constructive Fraud (Civ. Code, § 3439.09(a), (b))

[*Name of defendant*] contends that [*name of plaintiff*]'s lawsuit was not filed within the time set by law.

[[With respect to [*name of plaintiff*]'s claim of actual intent to hinder, delay, or defraud,] [To/to] succeed on this defense, [*name of defendant*] must prove that [*name of plaintiff*] filed [his/her/*nonbinary pronoun*/its] lawsuit later than four years after the [transfer was made/obligation was incurred] [or, if later than four years, no later than one year after the [transfer/obligation] was or could reasonably have been discovered by [*name of plaintiff*]].

[[With respect to [*name of plaintiff*]'s claim of constructive fraud,] [To/to] succeed on this defense, [*name of defendant*] must prove that [*name of plaintiff*] filed [his/her/*nonbinary pronoun*/its] lawsuit later than four years after the [transfer was made/obligation was incurred].]

New June 2006; Revised December 2007, June 2016, May 2018

Directions for Use

This instruction provides an affirmative defense for failure to file within the statute of limitations. (See Civ. Code, § 3439.09(a), (b).) Read the first bracketed paragraph regarding delayed discovery in cases involving actual intent to hinder, delay, or defraud. (See Civ. Code, § 3439.04(a)(1); CACI No. 4200.) Read the second in cases involving constructive fraud. (See Civ. Code, §§ 3439.04(a)(2), 3439.05; CACI Nos. 4202, 4203.) Read the first bracketed phrases in those paragraphs if the plaintiff has brought both actual and constructive fraud claims.

This instruction may not be modified to assert the seven-year period under Civil Code section 3439.09(c). (See *PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 178–185 [221 Cal.Rptr.3d 353] [Civil Code section 3439.09(c) is a statute of repose, not a statute of limitations].)

Sources and Authority

- Statute of Limitations. Civil Code section 3439.09(a), (b).
- Statute of Repose. Civil Code section 3439.09(c).
- "[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked. They may also be attacked by, as it were, a common law action. If and as such an action is brought, the applicable statute of limitations is section 338 (d) and, more importantly, the cause of action accrues not when the fraudulent transfer occurs but when the judgment against the debtor is secured (or maybe even later, depending upon the belated discovery

issue).” (*Macedo v. Bosio* (2001) 86 Cal.App.4th 1044, 1051 [104 Cal.Rptr.2d 1].)

- “In the context of the scheme of law of which section 3934.09 is a part, where an alleged fraudulent transfer occurs while an action seeking to establish the underlying liability is pending, and where a judgment establishing the liability later becomes final, we construe the four-year limitation period, i.e., the language, ‘four years after the transfer was made or the obligation was incurred,’ to accommodate a tolling until the underlying liability becomes fixed by a final judgment.” (*Cortez v. Vogt* (1997) 52 Cal.App.4th 917, 920 [60 Cal.Rptr.2d 841].)
- “ ‘Cal. Civ. Code § 3439.09(a) and (b) are statutes of limitation requiring a plaintiff to file a fraudulent transfer action within four years of the transfer or, for an intentional fraud, within one year after the transfer was or could reasonably have been discovered.’ [Citation]” *(PGA West Residential Assn., Inc.*, *supra*, 14 Cal.App.5th at p. 179.)
- “However, ‘*even if* belated discovery can be pleaded and proven’ with respect to the statute of limitations applicable to common law remedies for fraudulent transfers, ‘in any event the maximum elapsed time for a suit *under either the UFTA or otherwise* is seven years after the transfer. [Citation.]’ This conclusion logically follows from the language of section 3439.09(c). ‘[B]y its use of the term “[n]otwithstanding any other provision of law,” the Legislature clearly meant to provide an overarching, all-embracing maximum time period to attack a fraudulent transfer, no matter whether brought under the UFTA or otherwise.’ ” (*PGA West Residential Assn., Inc.*, *supra*, 14 Cal.App.5th at pp. 170–171, original italics, internal citation omitted.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prelawsuit Considerations*, ¶ 3:351 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.49, 270.50 (Matthew Bender)

4209–4299. Reserved for Future Use

VF-4200. Actual Intent to Hinder, Delay, or Defraud Creditor—Affirmative Defense—Good Faith

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] have a right to payment from [***name of debtor***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of debtor***] [transfer property/incur an obligation] to [***name of defendant***]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of debtor***] [transfer the property/incur the obligation] with the intent to hinder, delay, or defraud one or more of [his/her/***nonbinary pronoun***/its] creditors?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of debtor***]'s conduct a substantial factor in causing [***name of plaintiff***]'s harm?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [[***name of defendant***]/[***name of third party***]] receive the property from [***name of debtor***] in good faith?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, skip question 6 and answer question 7.

6. **Did [[***name of defendant***]/[***name of third party***]] receive the property for a reasonably equivalent value?**

_____ Yes _____ No

If your answer to question 6 is yes, stop here, answer no further questions, and have the presiding juror sign and date this form. If you answered no, then answer question 7.

7. What are [*name of plaintiff*]'s damages?

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2011; Revised June 2016, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 4200, *Actual Intent to Hinder, Delay, or Defraud a Creditor—Essential Factual Elements*, and CACI No. 4207, *Affirmative Defense—Good Faith*. The defendant is the transferee of the property. The transferee may have received the property in good faith even though the debtor had a fraudulent intent. (See *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924].)

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-4201. Constructive Fraudulent Transfer—No Reasonably Equivalent Value Received

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] have a right to payment from [***name of debtor***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of debtor***] [transfer property/incur an obligation] to [***name of defendant***]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of debtor***] fail to receive a reasonably equivalent value in exchange for the [transfer/obligation]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **[[Was [***name of debtor***] [in business/about to start a business]/Did [***name of debtor***] enter into a transaction] when [his/her/***nonbinary pronoun***/its] remaining assets were unreasonably small for the [business/transaction]?]**

   [*or***]**

   [Did [*name of debtor***] intend to incur debts beyond [his/her/***nonbinary pronoun***/its] ability to pay as they became due?]**

   [*or***]**

   [Did [*name of debtor***] believe or should [he/she/***nonbinary pronoun***/it] reasonably have believed that [he/she/***nonbinary pronoun***/it] would incur debts beyond [his/her/***nonbinary pronoun***/its] ability to pay as they became due?]**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you

answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of debtor*]'s conduct a substantial factor in causing [*name of plaintiff*]'s harm?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **What are [*name of plaintiff*]'s damages?**

   TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2011; Revised June 2016, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 4202, *Constructive Fraudulent Transfer—No Reasonably Equivalent Value Received—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] have a right to payment from [*name of debtor*]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of debtor*] [transfer property/incur an obligation] to [*name of defendant*]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of debtor*] fail to receive a reasonably equivalent value in exchange for the [transfer/obligation]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of plaintiff*]'s right to payment from [*name of debtor*] arise before [*name of debtor*] [transferred property/incurred an obligation]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [*name of debtor*] insolvent at that time or did [*name of debtor*] become insolvent as a result of the [transfer/ obligation]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [*name of debtor*]'s conduct a substantial factor in causing [*name of plaintiff*]'s harm?**

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2011; Revised June 2016, December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 4203, *Constructive Fraudulent Transfer—Insolvency—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-4203–VF-4299. Reserved for Future Use

UNLAWFUL DETAINER

4300. Introductory Instruction

This is an action for what is called unlawful detainer. [*Name of plaintiff***], the [landlord/tenant], claims that [***name of defendant***] is [his/her/***nonbinary pronoun***/its] [tenant/subtenant] under a [lease/rental agreement/sublease] and that [***name of defendant***] no longer has the right to occupy the property [by subleasing to [***name of subtenant***]]. [***Name of plaintiff***] seeks to recover possession of the property from [***name of defendant***]. [***Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] still has the right to occupy the property because [***insert defenses at issue***].**

The property involved in this case is [*describe property: e.g., "an apartment," "a house," "space in a commercial building"***] located in [***city or area***] at [***address***].**

New August 2007

Directions for Use

If the plaintiff is the landlord or owner and the defendant is the tenant, select "landlord" and "tenant," in the first sentence. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "tenant" and "subtenant." (Code Civ. Proc., § 1161(3).)

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the first sentence. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease."

If the defendant is a tenant who has subleased the premises to someone else, add the bracketed language in the first paragraph referring to subleasing.

Sources and Authority

- Right to Jury Trial. Code of Civil Procedure section 1171.
- Right of Tenant to Bring Unlawful Detainer Against Subtenant. Code of Civil Procedure section 1161(3).
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Definition of "Just Cause." Civil Code section 1946.2(b).
- "The remedy of unlawful detainer is designed to provide means by which the timely possession of premises which are wrongfully withheld may be secured to the person entitled thereto." (*Knowles v. Robinson* (1963) 60 Cal.2d 620, 625 [36 Cal.Rptr. 33, 387 P.2d 833].)
- "Chapter 4 of title 3 of part 3 of the Code of Civil Procedure is commonly known as the Unlawful Detainer Act (hereafter, the Act). The Act is broad in

scope and available to both lessors and lessees who have suffered certain wrongs committed by the other. Procedures and proceedings in unlawful detainer were not known at common law and are entirely creatures of statute. As such, they are governed solely by the statutes which created them. Thus, where the Act 'deals with matters of practice, its provisions supersede the rules of practice contained in other portions of the code.' " (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799], internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 734

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 9.5, 9.34–9.36

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 1.4–1.5

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.01 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.02

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.12 (Matthew Bender)

Miller & Starr California Real Estate 4th, §§ 34:195, 34:200, 34:205 (Thomson Reuters)

4301. Expiration of Fixed-Term Tenancy—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because the [lease/rental agreement/sublease] has ended. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**
2. **That [***name of plaintiff***] [leased/subleased] the property to [***name of defendant***] until [***insert end date***];**
3. **That [***name of plaintiff***] did not give [***name of defendant***] permission to continue occupying the property after the [lease/rental agreement/sublease] ended; and**
4. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New August 2007; Revised June 2011, May 2020

Directions for Use

If the plaintiff is the landlord or owner, select "lease" or "rental agreement" in the first sentence and in element 3 as appropriate, "owns" in element 1, and "leased" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease" in the first paragraph and in element 3, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

If persons other than the tenant-defendant are occupying the premises, include the bracketed language in the first paragraph and in element 4.

The Tenant Protection Act of 2019 imposes additional requirements for the termination of a rental agreement for certain residential tenancies. (Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Holding Over After Expiration of Lease Term. Code of Civil Procedure section 1161.
- Conversion to Ordinary Civil Action If Possession Not at Issue. Civil Code

section 1952.3(a).

- Tenant Protection Act of 2019. Civil Code section 1946.2.
- " 'In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.' " (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908], internal citations omitted.)
- "The most important difference between a periodic tenancy and a tenancy for a fixed term—such as six months—is that the latter terminates at the end of such term, without any requirement of notice as in the former. In order to create an estate for a definite period, the duration must be capable of exact computation when it becomes possessory, otherwise no such estate is created." (*Camp v. Matich* (1948) 87 Cal.App.2d 660, 665–666 [197 P.2d 345], internal citations omitted.)
- "It is well established that it is the duty of the tenant as soon as his tenancy expires by its own limitations, to surrender the possession of the premises and that no notice of termination is necessary, the lease itself terminating the tenancy; and if he continues in possession beyond that period without the permission of the landlord, he is guilty of unlawful detainer, and an action may be commenced against him at once, under the provisions of subdivision 1 of section 1161 of the Code of Civil Procedure, without the service upon him of any notice." (*Ryland v. Appelbaum* (1924) 70 Cal.App. 268, 270 [233 P. 356], internal citations omitted.)
- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 691, 705, 754

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) § 8.82

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.4, 7.8

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.42 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

Miller & Starr, California Real Estate 4th, § 19:43 (Thomson Reuters)

4302. Termination for Failure to Pay Rent—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has failed to pay the rent. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**
2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**
3. **That under the [lease/rental agreement/sublease], [***name of defendant***] was required to pay rent in the amount of $[***specify amount***] per [***specify period, e.g., month***];**
4. **That [***name of plaintiff***] properly gave [***name of defendant***] three days' written notice to pay the rent or vacate the property;**
5. **That as of [***date of three-day notice***], at least the amount stated in the three-day notice was due;**
6. **That [***name of defendant***] did not pay the amount stated in the notice within three days after [service/receipt] of the notice; and**
7. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New August 2007; Revised June 2011, December 2011, December 2013, May 2021

Directions for Use

Modify this instruction as necessary for rent due on a residential tenancy between March 1, 2020, and June 30, 2021, including, but not limited to, substitution of the term "fifteen business days" wherever the term "three days" appears in the essential factual elements. (See COVID-19 Tenant Relief Act, Code Civ. Proc., § 1179.01 et seq.; Stats. 2021, ch. 2 (Sen. Bill 91), Code Civ. Proc., § 1179.02.)

Include the bracketed references to a subtenancy in the opening paragraph and in element 7 if persons other than the tenant-defendant are occupying the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1, "rented" in element 2, and either "lease" or "rental agreement" in element 3. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "leases"

in element 1, "subleased" in element 2, and "sublease" in element 3. (Code Civ. Proc., § 1161(3).)

Defective service may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in elements 4, 5, and 6, provided that it is not less than three days.

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in element 6.

See CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*, for an instruction regarding proper notice.

Sources and Authority

- Unlawful Detainer for Tenant's Default in Rent Payments. Code of Civil Procedure section 1161(2).
- COVID-19 Tenant Relief Act. Code of Civil Procedure section 1179.01 et seq.
- Senate Bill 91 (Stats. 2021, ch. 2). Code of Civil Procedure section 1179.02 et seq.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Conversion to Civil Action if Possession No Longer at Issue. Civil Code section 1952.3(a).
- "[M]ere failure of a tenant to quit the premises during the three-day notice period does not necessarily justify an unlawful detainer action. If a tenant vacates the premises and surrenders possession to the landlord prior to the complaint being filed, then no action for unlawful detainer will lie even though the premises were not surrendered during the notice period. This is true because the purpose of an unlawful detainer action is to recover possession of the

premises for the landlord. Since an action in unlawful detainer involves a forfeiture of the tenant's right to possession, one of the matters that must be pleaded and proved for unlawful detainer is that the tenant remains in possession of the premises. Obviously this cannot be established where the tenant has surrendered the premises to landlord prior to the filing of the complaint. In such a situation the landlord's remedy is an action for damages and rent." (*Briggs v. Electronic Memories & Magnetics Corp.* (1975) 53 Cal.App.3d 900, 905–906 [126 Cal.Rptr. 34], footnote and internal citations omitted.)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)
- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)
- "In the cases discussed . . . , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra*, 56 Cal.App.4th at p. 518.)
- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: . . . . As explained in *Liebovich, supra*, . . . , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)
- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 756,

758

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.35–8.45

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.17–6.37

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:96 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

Miller & Starr, California Real Estate 4th, § 19:200 (Thomson Reuters)

4303. Sufficiency and Service of Notice of Termination for Failure to Pay Rent

[*Name of plaintiff***] contends that [he/she/***nonbinary pronoun***/it] properly gave [***name of defendant***] three days' notice to pay the rent or vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/***nonbinary pronoun***/it] must pay the amount due within three days or vacate the property;**

2. **That the notice stated [no more than/a reasonable estimate of] the amount due, and the name, telephone number, and address of the person to whom the amount should be paid, and**

   [*Use if payment was to be made personally:*

   the usual days and hours that the person would be available to receive the payment; and]

   [*or: Use if payment was to be made into a bank account:*

   the number of an account in a bank located within five miles of the rental property into which the payment could be made, and the name and street address of the bank; and]

   [*or: Use if an electronic funds transfer procedure had been previously established:*

   that payment could be made by electronic funds transfer; and]

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

[The three-day notice period excludes Saturdays, Sundays, and judicial holidays, but otherwise begins the day after the notice to pay the rent or vacate the property was given to [*name of defendant***].]**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s residence or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her/***nonbinary pronoun***] residence/the commercial property]. In this case, notice is**

considered given on the date the second notice was [received by [*name of defendant*]/placed in the mail][./; or]]

[*for a residential tenancy:*

[*name of defendant*]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [*name of defendant*]. In this case, notice is considered given on the date the second notice was [received by [*name of defendant*]/placed in the mail].]

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant*]. In this case, notice is considered given on the date the second notice was [received by [*name of defendant*]/placed in the mail].]

[A notice stating a reasonable estimate of the amount of rent due that is within 20 percent of the amount actually due is reasonable unless [*name of defendant*] proves that it was not reasonable. In determining the reasonableness of the estimate, you may consider whether calculating the amount of rent required information primarily within the knowledge of [*name of defendant*] and whether [*name of defendant*] accurately furnished that information to [*name of plaintiff*].]

New August 2007; Revised December 2010, June 2011, December 2011, November 2019, May 2020, May 2021

Directions for Use

Modify this instruction as necessary for rent due on a residential tenancy between March 1, 2020, and June 30, 2021, including, but not limited to, substitution of the term "fifteen business days" wherever the term "three days" appears in the essential factual elements. (See COVID-19 Tenant Relief Act, Code Civ. Proc., § 1179.01 et seq.; Stats. 2021, ch. 2 (Sen. Bill 91), Code Civ. Proc., §§ 1179.02, 1179.03, 1179.04.)

Use the reasonable-estimate option in the first sentence of element 2 and include the final paragraph only in cases involving commercial leases. (Code Civ. Proc.,

§ 1161.1(a); see also Code Civ. Proc., § 1161.1(e) [presumption that if amount found to be due is within 20 percent of amount stated in notice, then estimate was reasonable].)

In element 2, select the applicable manner in which the notice specifies that payment is to be made; directly to the landlord, into a bank account, or by electronic funds transfer. (Code Civ. Proc., § 1161(2).)

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the paragraph that follows the elements if any of the three days of the notice period fell on a Saturday, Sunday, or judicial holiday. (See Code Civ. Proc., § 1161(2).) Judicial holidays are shown on the judicial branch website, www.courts.ca.gov/holidays.htm.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout, provided that it is not less than three days.

Defective service may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

The Tenant Protection Act of 2019 and/or local ordinances may impose additional notice requirements for the termination of a rental agreement. (See Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Conclusive Presumption of Receipt of Rent Sent to Address Provided in Notice. Code of Civil Procedure section 1161(2).
- COVID-19 Tenant Relief Act. Code of Civil Procedure section 1179.01 et seq.
- Senate Bill 91 (Stats. 2021, ch. 2). Code of Civil Procedure section 1179.02 et seq.
- Commercial Tenancy: Estimate of Rent Due in Notice. Code of Civil Procedure 1161.1.
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- " '[P]roper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. [Citations.]' [Citation.] 'A lessor must allege and prove proper service of the requisite notice. [Citations.] Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained. [Citations.]' " (*Borsuk v. Appellate Division of Superior Court* (2015) 242 Cal.App.4th 607, 611 [195 Cal.Rptr.3d 581].)
- "A three-day notice must contain 'the amount which is due.' A notice which demands rent in excess of the amount due does not satisfy this requirement. This rule ensures that a landlord will not be entitled to regain possession in an unlawful detainer action unless the tenant has had the opportunity to pay the delinquent rent." (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697 [32 Cal.Rptr.2d 635], internal citations and footnote omitted.)
- "As compared to service of summons, by which the court acquires personal jurisdiction, service of the three-day notice is merely an element of an unlawful detainer cause of action that must be alleged and proven for the landlord to acquire possession." (*Borsuk, supra*, 242 Cal.App.4th at pp. 612–613.)
- "[W]e do not agree that a proper notice may not include anything other than technical rent. It is true that subdivision 2 of Code of Civil Procedure section 1161 relates to a default in the payment of rent. However, the subdivision refers to the 'lease or agreement under which the property is held' and requires the notice state 'the amount which is due.' The language is not 'the amount of rent which is due' or 'the rent which is due.' We think the statutory language is sufficiently broad to encompass any sums due under the lease or agreement under which the property is held." (*Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 492 [144 Cal.Rptr. 474].)
- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)
- "We . . . hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)
- "We . . . hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)
- "An unlawful detainer action based on failure to pay rent must be preceded by a three-day notice to the tenant to pay rent or quit the premises. Failure to state the exact amount of rent due in the notice is fatal to the subsequent unlawful detainer action." (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 606, fn. 2 [267 Cal.Rptr. 189], internal citations omitted.)
- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov*, *supra*, 168 Cal.App.3d at p. 876.)
- "In the cases discussed . . . , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra*, 56 Cal.App.4th at p. 518.)
- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: . . . . As explained in *Liebovich, supra*, . . . , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)
- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions

governing unlawful detainer." (*Culver Center Partners East #1, L.P.*, *supra*, 185 Cal.App.4th at p. 750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P.*, *supra*, 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 755–758, 760

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.30, Ch. 8

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.10, 7:327 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.13, 236.13A (Matthew Bender)

Miller & Starr, California Real Estate 4th, §§ 34:183–34:187 (Thomson Reuters)

4304. Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has failed to perform [a] requirement(s) under [his/her/***nonbinary pronoun***/its] [lease/rental agreement/sublease]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**
2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**
3. **That under the [lease/rental agreement/sublease], [***name of defendant***] agreed [***insert required condition(s) that were not performed***];**
4. **That [***name of defendant***] failed to perform [that/those] requirement(s) by [***insert description of alleged failure to perform***];**
5. **That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to [either [***describe action to correct failure to perform***] or] vacate the property; [and]**

[6. That [*name of defendant***] did not [***describe action to correct failure to perform***]; and]**

[7. That [*name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to vacate the property; and]**

8. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

[[*Name of defendant***]'s failure to perform the requirement(s) of the [lease/rental agreement/sublease] must not be trivial, but must be a substantial violation of [an] important obligation(s).]**

New August 2007; Revised June 2010, December 2010, June 2011, December 2011, May 2020, November 2021

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph, in element 5, and in element 8 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in

the opening paragraph and in element 3, "owns" in element 1, and "rented" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease" in the opening paragraph and in element 3, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 5.

If the violation of the condition or covenant involves assignment, sublet, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4); *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, omit the bracketed language in element 5 and also omit element 6. If the violation involves nuisance or illegal activity, give CACI No. 4308, *Termination for Nuisance or Unlawful Use—Essential Factual Elements*.

The Tenant Protection Act of 2019 and/or local or federal law may impose additional requirements for the termination of a rental agreement based on breach of a condition. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable. For example, the Tenant Protection Act of 2019 requires a separate three-day notice to quit after the initial three-day notice to cure that is expressed in element 5. (See Civ. Code, § 1946.2(c).)

Element 7 applies only to a just cause eviction under the Tenant Protection Act of 2019, which governs certain residential real property tenancies of specified durations. (See *id.*, subd. (a) [stating occupancy requirement of 12 months of continuous tenancy, or, if any tenants have been added to the lease, after all tenants have lived at the property for a year or if the original tenant has lived there for 24

months or more], subd. (c) ["Before an owner of residential real property issues a notice to terminate a tenancy for just cause that is a curable lease violation, the owner shall first give notice of the violation to the tenant with an opportunity to cure the violation pursuant to paragraph (3) of Section 1161 of the Code of Civil Procedure. If the violation is not cured within the time period set forth in the notice, a three-day notice to quit without an opportunity to cure may thereafter be served to terminate the tenancy"].)

Include the last paragraph if the tenant alleges that the violation was trivial. (See *Boston LLC v. Juarez* (2016) 245 Cal.App.4th 75, 81 [199 Cal.Rptr.3d 452].) It is not settled whether the landlord must prove the violation was substantial or the tenant must prove triviality as an affirmative defense. (See *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487]; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 118 [108 P.2d 479].)

See CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement,* for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

Sources and Authority

- Unlawful Detainer Based on Failure to Perform Conditions. Code of Civil Procedure section 1161(3), (4).
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Dual Notice Requirement for Certain Residential Tenancies. Civil Code section 1946.2(c).
- Conversion of Unlawful Detainer to Ordinary Civil Action If Possession No Longer at Issue. Civil Code section 1952.3(a).
- "[Code of Civil Procedure section 1161(3)] provides, that where the conditions or covenants of a lease can be performed, a lessee may within three days after the service of the notice perform them, and so save a forfeiture of his lease. By performing, the tenant may defeat the landlord's claim for possession. Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event. If the covenants can be performed, the notice is in the alternative, either to perform them or deliver possession. When the covenants are beyond performance an alternative notice would be useless, and demand for possession alone is necessary. Bearing in mind that the object of this statute is to speedily permit a landlord to obtain possession of his premises where the tenant has violated the covenants of the lease, the only reasonable interpretation of the statute is, that before bringing suit he shall take that means which should be most effectual for the purpose of obtaining possession, which is to demand it. If upon demand the tenant surrenders possession, the necessity for any summary proceeding is at an end, and by the demand is accomplished what the law

otherwise would accord him under the proceeding." (*Schnittger v. Rose* (1903) 139 Cal. 656, 662 [73 P. 449].)

- "It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent or quit, perform the covenant or quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.)
- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman*, *supra*, 172 Cal.App.2d at p. 29.)
- "The law sensibly recognizes that although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated. Following the lead of the Restatements of Contracts, California courts allow termination only if the breach can be classified as 'material,' 'substantial,' or 'total.' " (*Superior Motels, Inc., supra,* 195 Cal.App.3d at p. 1051, internal citations omitted.)
- " '[A] lease may be terminated only for a substantial breach thereof, and not for a mere technical or trivial violation.' This materiality limitation even extends to leases which contain clauses purporting to dispense with the materiality limitation." (*Boston LLC, supra*, 245 Cal.App.4th at p. 81, internal citation omitted.)
- " 'Normally the question of whether a breach of an obligation is a material breach . . . is a question of fact,' however ' "if reasonable minds cannot differ on the issue of materiality, the issue may be resolved as a matter of law." ' " (*Boston LLC, supra*, 245 Cal.App.4th at p. 87.)
- "As to the substantiality of the violation, the evidence shows that the violation was wilful. Therefore, the court will not measure the extent of the violation." (*Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 66 [202 P.2d 378].)
- "Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action." (*Salton Community Services Dist.*, *supra*, 256 Cal.App.2d at p. 529.)
- "If the tenant gives up possession of the property after the commencement of an

unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)
- "Given the detailed requirements for payment instructions in section 1161, subdivision 2, the lack of specific notice requirements concerning return of the property to the owner in subdivisions 2, 3, and 4 is noteworthy. Rather, these subdivisions only require the notice to demand 'possession of the property' (§ 1161, subds. 2 & 3) or 'possession of the demised premises' (§ 1161, subd. 4). Had the Legislature sought to require more detailed instructions in the notice on how to restore possession of the property to the owner, the particularized requirements in subdivision 2 shows it knew how to do so. As such, the absence of any such requirements in the notice appears to be intentional." (*Lee v. Kotyluk* (2021) 59 Cal.App.5th 719, 730 [274 Cal.Rptr.3d 29].)
- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra*, 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)
- "In the cases discussed . . . , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra*, 56 Cal.App.4th at p. 518.)
- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: . . . . As explained in *Liebovich, supra*, . . . , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 759

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.50–8.54

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.38–6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch.12-G, *Termination of Section 8 Tenancies*, ¶ 12:200 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch.7-C, *Bases For Terminating Tenancy*, ¶ 7:93 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.20 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 34.182 (Thomson Reuters)

4305. Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement

[*Name of plaintiff***] contends that [he/she/***nonbinary pronoun***/it] properly gave [***name of defendant***] three days' notice to [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/***nonbinary pronoun***/it] must, within three days, [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property;**
2. **That the notice described how [***name of defendant***] failed to comply with the requirements of the [lease/rental agreement/sublease] [and how to correct the failure];**
3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

[The three-day notice period excludes Saturdays, Sundays, and judicial holidays, but otherwise begins on the day after the notice to correct the failure or vacate the property was given to [*name of defendant***].]**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s home or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her/***nonbinary pronoun***] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered**

given on the date the second notice was [received by [*name of defendant*]/placed in the mail].]

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant*]. In this case, notice is considered given on the date the second notice was [received by [*name of defendant*]/placed in the mail].]

New August 2007; Revised December 2010, June 2011, December 2011, November 2019, May 2020

Directions for Use

If the violation of the condition or covenant involves assignment, subletting, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4); *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, omit the bracketed language in the first paragraph and in elements 1 and 2. If the violation involves nuisance or illegal activity, give CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*.

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the optional language in the opening paragraph and in elements 1 and 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease." (Code Civ. Proc., § 1161(3).)

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the paragraph that follows the elements if any of the three days of the notice

period fell on a Saturday, Sunday, or judicial holiday. (See Code Civ. Proc., § 1161(3).) Judicial holidays are shown on the judicial branch website, www.courts.ca.gov/holidays.htm.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout the instruction, provided that it is not less than three days.

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

The Tenant Protection Act of 2019 and/or local ordinances may impose additional notice requirements for the termination of a rental agreement. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Unlawful Detainer Based on Failure to Perform Conditions. Code of Civil Procedure section 1161(3), (4).
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)
- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56

Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "We . . . hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)
- "We . . . hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)
- "It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent or quit, perform the covenant or quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.)
- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman*, *supra*, 172 Cal.App.2d at p. 29.)
- "Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action." (*Salton Community Services Dist.*, *supra*, 256 Cal.App.2d at p. 529.)
- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov*, *supra*, 168 Cal.App.3d at p. 876.)
- "In the cases discussed . . . , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in section 1162.

Therefore, the judgment must be reversed." (*Liebovich, supra*, 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: . . . . As explained in *Liebovich, supra*, . . . , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.'" (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)
- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P.*, *supra*, 185 Cal.App.4th at p.750.)
- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P.*, *supra*, 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 759, 760

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.46 et seq., 8.62 et seq.

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.16, 6.25–6.29, 6.38–6.49, Ch. 8

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.12

(Matthew Bender)

Miller & Starr, California Real Estate 4th, §§ 34:182, 34:183, 34:187 (Thomson Reuters)

4306. Termination of Month-to-Month Tenancy—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because the tenancy has ended. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**
2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***] under a month-to-month [lease/rental agreement/sublease];**
3. **That [***name of plaintiff***] gave [***name of defendant***] proper [30/60] days' written notice that the tenancy was ending; and**
4. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New August 2007; Revised June 2011, December 2011, May 2020

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in element 4 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1 and "rented" and either "lease" or "rental agreement" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "leases" in element 1 and "subleased" and "sublease" in element 2. (Code Civ. Proc., § 1161(3).)

In element 3, select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year's duration, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more's duration, 60 days' notice is generally required. (Civ. Code, §§ 1946, 1946.1(b)–(d).) The Tenant Protection Act of 2019 may impose additional requirements for the termination of a residential tenancy. (Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the

fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Do not give this instruction to terminate a tenancy if the tenant is receiving federal financial assistance through the Section 8 program. (See *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1115 [29 Cal.Rptr.3d 262, 112 P.3d 647]; Civ. Code, § 1954.535 (90 days' notice required).) Specific grounds for terminating a federally subsidized low-income housing tenancy are required and must be set forth in the notice. (See, e.g., 24 C.F.R. § 982.310.)

See CACI No. 4307, *Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy,* for an instruction on proper advanced written notice.

Sources and Authority

- Unlawful Detainer Based on Holdover After Expiration of Term. Code of Civil Procedure section 1161(1).
- Automatic Renewal Absent Notice of Termination on Expiration of Term. Civil Code section 1946.
- Time and Manner of Giving Notice of Termination. Civil Code section 1946.1.
- Presumption That Term Is Based on Period for Which Rent Is Paid. Civil Code section 1944.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Conversion of Unlawful Detainer to Ordinary Civil Action if Possession Not at Issue. Civil Code section 1952.3(a).
- " 'In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.' " (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908], internal citations omitted.)
- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)
- "The Act provides that as a prerequisite to filing an unlawful detainer action based on a terminated month-to-month tenancy, the landlord must serve the

tenant with a 30-day written notice of termination." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799], internal citations omitted.)

- "Proper service on the lessee of a valid . . . notice . . . is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)
- "Section 1162 does not authorize service of a . . . notice . . . by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra*, 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)
- "In the cases discussed . . . , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the . . . notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a . . . notice . . . provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra*, 56 Cal.App.4th at p. 518.)
- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the . . . notice may be effected on a residential tenant: . . . . As explained in *Liebovich, supra*, . . . , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 707 et seq.

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-B, *Unlawful Detainer Complaint*, ¶ 8:85 (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.69–8.80

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.3, 7.5, 7.11

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5,

Unlawful Detainer, 5.07

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.40 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 34:147 (Thomson Reuters)

4307. Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy

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[*Name of plaintiff*] contends that [he/she/*nonbinary pronoun*/it] properly gave [*name of defendant*] written notice that the tenancy was ending. To prove that the notice contained the required information and was properly given, [*name of plaintiff*] must prove all of the following:

1. **That the notice informed [*name of defendant*] in writing that the tenancy would end on a date at least [30/60] days after notice was given to [him/her/*nonbinary pronoun*/it];**
2. **That the notice was given to [*name of defendant*] at least [30/60] days before the date that the tenancy was to end; and**
3. **That the notice was given to [*name of defendant*] at least [30/60] days before [*insert date on which action was filed*];**

Notice was properly given if [*select one or more of the following manners of service:*]

[the notice was delivered to [*name of defendant*] personally[./; or]]

[the notice was sent by certified or registered mail in an envelope addressed to [*name of defendant*], in which case notice is considered given on the date the notice was placed in the mail[./; or]]

[[*name of defendant*] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[*name of defendant*]'s home or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [*name of defendant*] at [[his/her/*nonbinary pronoun*] residence/the commercial property]. In this case, notice is considered given on the date the second notice was placed in the mail[./; or]]

[*for a residential tenancy:*

[*name of defendant*]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the property in an envelope addressed to [*name of defendant*]. In this case, notice is considered given on the date the second notice was placed in the mail.]

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not

be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant*]. In this case, notice is considered given on the date the second notice was placed in the mail.]

[The [30/60]-day notice period begins on the day after the notice was given to [*name of defendant*]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [*name of defendant*]'s time to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]

New August 2007; Revised December 2010, June 2011, December 2011, May 2020

Directions for Use

Select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year's duration, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more's duration, 60 days is generally required. (Civ. Code, §§ 1946, 1946.1(b)–(d).)

If 30 days' notice is sufficient and the lease provided for a notice period other than the statutory 30-day period (but not less than 7), insert that number instead of "30" or "60" throughout the instruction. (Civ. Code, § 1946.)

Select all manners of service used, including personal service, certified or registered mail, substituted service by leaving the notice at the defendant's home or place of work or at the rental property, and substituted service by posting on the property. (See Civ. Code, §§ 1946, 1946.1(f); Code Civ. Proc., § 1162.)

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule

applies to a residential lease that specifies a method of service has not yet been decided.

The Tenant Protection Act of 2019 and/or local ordinances may impose additional requirements for the termination of a rental agreement. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Automatic Renewal of Tenancy at End of Term. Civil Code section 1946.
- Time and Manner of Giving Notice of Termination. Civil Code section 1946.1.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)
- "Section 1162 does not authorize service of a . . . notice . . . by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)
- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov*, *supra*, 168 Cal.App.3d at p. 876.)
- "In the cases discussed . . . , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the . . . notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a . . . notice . . . provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra*, 56 Cal.App.4th at p. 518.)
- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the . . . notice may be effected on a residential tenant: . . . . As explained in *Liebovich, supra*, . . . , '[w]hen the fact of service is contested, compliance with

one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P.*, *supra*, 185 Cal.App.4th at p.750.)
- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P.*, *supra*, 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 707 et seq., 760

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-B, *Unlawful Detainer Complaint*, ¶¶ 8:68, 8:69 (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:119, 7:190 et seq. (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.69–8.80

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 5.3, Ch. 7

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.10–236.12 (Matthew Bender)

Miller & Starr California Real Estate 4th, §§ 34:175, 34:181, 34:182 (Thomson Reuters)

4308. Termination for Nuisance or Unlawful Use—Essential Factual Elements (Code Civ. Proc., § 1161(4))

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has [created a nuisance on the property/ [or] used the property for an illegal purpose]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**
2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**
3. **That [***name of defendant***] [***include one or both of the following:***]**

   created a nuisance on the property by [*specify conduct constituting nuisance***];**

   [or]

   used the property for an illegal purpose by [*specify illegal activity***];**
4. **That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to vacate the property; and**
5. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

[A "nuisance" is anything that [[is harmful to health]/ [or] [is indecent or offensive to the senses of an ordinary person with normal sensibilities]/ [or] [is an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property]/ [or] [unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway]/[or] [is [a/an] [fire hazard/*specify other potentially dangerous condition***] to the property]].]**

New December 2010; Revised June 2011, December 2011, May 2020, November 2020, May 2021

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in elements 4 and 5 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1, and "rented" in element 2.

If the plaintiff is a tenant seeking to recover possession from a subtenant, include the bracketed language on subtenancy in the opening paragraph and in element 4, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

Include the optional last paragraph defining a nuisance if there is a factual dispute and the jury will determine whether the defendant's conduct constituted a nuisance. Omit any bracketed definitional options that are not at issue in the case. For additional authorities on nuisance, see the Sources and Authority to CACI No. 2020, *Public Nuisance—Essential Factual Elements*, and CACI No. 2021, *Private Nuisance—Essential Factual Elements*. Certain conduct or statutory violations that constitute or create a rebuttable presumption of a nuisance are set forth in Code of Civil Procedure section 1161(4). If applicable, insert the appropriate ground in element 3. (See also Health & Saf. Code, § 17922 [adopting various uniform housing and building codes].)

If the grounds for termination involve assigning, subletting, or committing waste in violation of a condition or covenant of the lease, give CACI No. 4304, *Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements*. (See Code Civ. Proc., § 1161(4).)

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 4.

For nuisance or unlawful use, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4).)

The Tenant Protection Act of 2019, local law, and/or federal law may impose additional requirements for the termination of a rental agreement based on nuisance or illegal activity. (See Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined], (b)(1)(C) [nuisance is "just cause"], (b)(1)(I) [unlawful purpose is "just cause"].) For example,

if the property in question is subject to a local rent control or rent stabilization ordinance, the ordinance may provide further definitions or conditions under which a landlord has just cause to evict a tenant for nuisance or unlawful use of the property. This instruction should be modified accordingly if applicable.

See CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*, for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

Sources and Authority

- Unlawful Detainer Based on Tenant Conduct. Code of Civil Procedure section 1161(4).
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- "Nuisance" Defined. Civil Code section 3479.
- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)
- "The basic concept underlying the law of nuisance is that one should use one's own property so as not to injure the property of another. An action for private nuisance is designed to redress a substantial and unreasonable invasion of one's interest in the free use and enjoyment of one's property. ' "The invasion may be intentional and unreasonable. It may be unintentional but caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability. On any of these bases the defendant may be liable. On the other hand, the invasion may be intentional but reasonable; or it may be entirely accidental and not fall within any of the categories mentioned above." ' Determination whether something, not deemed a nuisance per se, is a nuisance in fact in a particular instance, is a question for the trier of fact." (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230–1231 [8 Cal.Rptr.2d 293], internal citations omitted.)
- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra*, 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)
- "In the cases discussed . . . , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra*, 56 Cal.App.4th at p. 518.)
- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: . . . . As explained in *Liebovich, supra*, . . . , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 701, 759

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.55, 8.58, 8.59

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.46, 6.48, 6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:136 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 200, *Termination of Tenancies*, § 200.38 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.11 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 34:181 (Thomson Reuters)

4309. Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use

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[*Name of plaintiff***] contends that [he/she/***nonbinary pronoun***/it] properly gave [***name of defendant***] three days' notice to vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/***nonbinary pronoun***/it] must vacate the property within three days;**
2. **That the notice described how [***name of defendant***] [created a nuisance on the property/ [or] used the property for an illegal purpose]; and**
3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s residence or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her/***nonbinary pronoun***] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise

of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[The three-day notice period begins on the day after the notice was given to [*name of defendant***]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [***name of defendant***]'s time to correct the failure or to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]**

New December 2010; Revised June 2011, December 2011, May 2020

Directions for Use

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout the instruction, provided that it is not less than three days.

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule

applies to a residential lease that specifies a method of service has not yet been decided.

The Tenant Protection Act of 2019 and/or local ordinances may impose additional notice requirements for the termination of a rental agreement. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Unlawful Detainer Based on Tenant Conduct. Code of Civil Procedure section 1161(4).
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)
- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhan*y (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)
- "We . . . hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson*, *supra*, 138 Cal.App.3d Supp. at p. 14.)
- "We . . . hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters*, *supra*, 226 Cal.App.3d Supp. at p. 20.)
- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts

existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov*, *supra*, 168 Cal.App.3d at p. 876.)
- "In the cases discussed . . . , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the . . . notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a . . . notice . . . provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra*, 56 Cal.App.4th at p. 518.)
- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the . . . notice may be effected on a residential tenant: . . . . As explained in *Liebovich, supra*, . . . , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)
- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P.*, *supra*, 185 Cal.App.4th at p.750.)
- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P.*, *supra*, 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 701, 759, 760

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.62–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.25–6.29

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.5 et seq., 7:137 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.24 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.11 (Matthew Bender)

Miller & Starr California Real Estate 4th, §§ 34:182, 34:183 (Thomson Reuters)

4310–4319. Reserved for Future Use

4320. Affirmative Defense—Implied Warranty of Habitability

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] does not owe [any/the full amount of] rent because [***name of plaintiff***] did not maintain the property in a habitable condition. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***] failed to provide one or more of the following:**

a. [effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors][./; or]

b. [plumbing or gas facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

c. [a water supply capable of producing hot and cold running water furnished to appropriate fixtures, and connected to a sewage disposal system][./; or]

d. [heating facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

e. [electrical lighting with wiring and electrical equipment that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

f. [building, grounds, and all areas of the landlord's control, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin][./; or]

g. [an adequate number of containers for garbage and rubbish, in clean condition and good repair][./; or]

h. [floors, stairways, and railings maintained in good repair][./; or]

i. [*Insert other applicable standard relating to habitability***.]**

[*Name of plaintiff***]'s failure to meet these requirements does not necessarily mean that the property was not habitable. The failure must be substantial. A condition that occurred only after [***name of defendant***] failed or refused to pay rent and was served with a notice to pay rent or vacate the property cannot be a defense to the previous nonpayment.**

[Even if [*name of defendant***] proves that [***name of plaintiff***] substantially failed to meet any of these requirements, [***name of defendant***]'s defense fails if [***name of plaintiff***] proves that [***name of defendant***] has done any of the following that contributed substantially to the condition or interfered**

substantially with [*name of plaintiff*]'s ability to make the necessary repairs:

> **[substantially failed to keep [his/her/*nonbinary pronoun*] living area as clean and sanitary as the condition of the property permitted][./; or]**
>
> **[substantially failed to dispose of all rubbish, garbage, and other waste in a clean and sanitary manner][./; or]**
>
> **[substantially failed to properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permitted][./; or]**
>
> **[intentionally destroyed, defaced, damaged, impaired, or removed any part of the property, equipment, or accessories, or allowed others to do so][./; or]**
>
> **[substantially failed to use the property for living, sleeping, cooking, or dining purposes only as appropriate based on the design of the property.]]**

The fact that [*name of defendant*] has continued to occupy the property does not necessarily mean that the property is habitable.

New August 2007; Revised June 2010, June 2013, December 2014, November 2020

Directions for Use

This instruction applies only to residential tenancies. (See Code Civ. Proc., § 1174.2(a).)

The habitability standards included are those set forth in Civil Code section 1941.1. Use only those relevant to the case. Or insert other applicable standards as appropriate, for example, other statutory or regulatory requirements (*Knight v. Hallsthammar* (1981) 29 Cal.3d 46, 59, fn.10 [171 Cal.Rptr. 707, 623 P.2d 268]; see Health & Saf. Code, §§ 17920.3, 17920.10) or security measures. (See *Secretary of Housing & Urban Dev. v. Layfield* (1978) 88 Cal.App.3d Supp. 28, 30 [152 Cal.Rptr. 342].)

If the landlord alleges that the implied warranty of habitability does not apply because of the tenant's affirmative misconduct, select the applicable reasons. The first two reasons do not apply if the landlord has expressly agreed in writing to perform those acts. (Civ. Code, § 1941.2(b).)

In a case not involving unlawful detainer and the failure to pay rent, the California Supreme Court has stated that the warranty of habitability extends only to conditions of which the landlord knew or should have discovered through reasonable inspections. (See *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1206 [43 Cal.Rptr.2d 836, 899 P.2d 905].) The law on a landlord's notice in the

unlawful detainer context, however, remains unsettled. (*Knight, supra*, 29 Cal.3d at p. 55, fn. 6.) A landlord has a duty to maintain the premises in a habitable condition irrespective of whether the tenant knows about a particular condition. (*Knight, supra,* 29 Cal.3d at p. 54.)

Sources and Authority

- Landlord's Duty to Make Premises Habitable. Civil Code section 1941.
- Breach of Warranty of Habitability. Code of Civil Procedure section 1174.2.
- Untenantable Dwelling. Civil Code section 1941.1(a).
- Effect of Tenant's Violations. Civil Code section 1941.2.
- Liability of Landlord Demanding Rent for Uninhabitable Property. Civil Code section 1942.4(a).
- "Once we recognize that the tenant's obligation to pay rent and the landlord's warranty of habitability are mutually dependent, it becomes clear that the landlord's breach of such warranty may be directly relevant to the issue of possession. If the tenant can prove such a breach by the landlord, he may demonstrate that his nonpayment of rent was justified and that no rent is in fact 'due and owing' to the landlord. Under such circumstances, of course, the landlord would not be entitled to possession of the premises." (*Green v. Superior Court* (1974) 10 Cal.3d 616, 635 [111 Cal.Rptr. 704, 517 P.2d 1168].)
- "We have concluded that a warranty of habitability is implied by law in residential leases in this state and that the breach of such a warranty may be raised as a defense in an unlawful detainer action. Under the implied warranty which we recognize, a residential landlord covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease. This implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained. In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty of habitability we now recognize." (*Green, supra,* 10 Cal.3d at p. 637, footnotes omitted.)
- "It follows that substantial noncompliance with applicable code standards could lead to a breach of the warranty of habitability." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1298, fn. 9 [173 Cal.Rptr.3d 159].)
- "[U]nder *Green,* a tenant may assert the habitability warranty as a defense in an unlawful detainer action. The plaintiff, of course, is not required to plead negative facts to anticipate a defense." (*De La Vara v. Municipal Court* (1979) 98 Cal.App.3d 638, 641 [159 Cal.Rptr. 648], internal citations omitted.)
- "[T]he fact that a tenant was or was not aware of specific defects is not determinative of the duty of a landlord to maintain premises which are habitable. The same reasons which imply the existence of the warranty of habitability—the

inequality of bargaining power, the shortage of housing, and the impracticability of imposing upon tenants a duty of inspection—also compel the conclusion that a tenant's lack of knowledge of defects is not a prerequisite to the landlord's breach of the warranty." (*Knight, supra,* 29 Cal.3d at p. 54.)

- "The implied warranty of habitability recognized in *Green* gives a tenant a reasonable expectation that the landlord has inspected the rental dwelling and corrected any defects disclosed by that inspection that would render the dwelling uninhabitable. The tenant further reasonably can expect that the landlord will maintain the property in a habitable condition by repairing promptly any conditions, of which the landlord has actual or constructive notice, that arise during the tenancy and render the dwelling uninhabitable. A tenant injured by a defect in the premises, therefore, may bring a negligence action if the landlord breached its duty to exercise reasonable care. But a tenant cannot reasonably expect that the landlord will have eliminated defects in a rented dwelling of which the landlord was unaware and which would not have been disclosed by a reasonable inspection." (*Peterson, supra,* 10 Cal.4th at pp. 1205–1206, footnotes omitted.)
- "At least in a situation where, as here, a landlord has notice of alleged uninhabitable conditions not caused by the tenants themselves, a landlord's breach of the implied warranty of habitability exists whether or not he has had a 'reasonable' time to repair. Otherwise, the mutual dependence of a landlord's obligation to maintain habitable premises, and of a tenant's duty to pay rent, would make no sense." (*Knight, supra,* 29 Cal.3d at p. 55, footnote omitted.)
- "[A] tenant may defend an unlawful detainer action against a current owner, at least with respect to rent currently being claimed due, despite the fact that the uninhabitable conditions first existed under a former owner." (*Knight, supra,* 29 Cal.3d at p. 57.)
- "Without evaluating the propriety of instructing the jury on each item included in the defendants' requested instruction, it is clear that, where appropriate under the facts of a given case, tenants are entitled to instructions based upon relevant standards set forth in Civil Code section 1941.1 whether or not the 'repair and deduct' remedy has been used." (*Knight, supra,* 29 Cal.3d at p. 58.)
- "The defense of implied warranty of habitability is not applicable to unlawful detainer actions involving commercial tenancies." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174], internal citation omitted.)
- "In the event of a landlord's breach of the implied warranty of habitability, the tenant is not absolved of the obligation to pay rent; rather the tenant remains liable for the reasonable rental value as determined by the court for the period that the defective condition of the premises existed." (*Erlach*, *supra*, 226 Cal.App.4th at p. 1297.)
- "In defending against a 30-day notice, the sole purpose of the [breach of the warranty of habitability] defense is to reduce the amount of daily damages for

the period of time after the notice expires." (*N. 7th St. Assocs. v. Constante* (2001) 92 Cal.App.4th Supp. 7, 11, fn. 1 [111 Cal.Rptr.2d 815].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 651

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 3-A, *Warranty Of Habitability—In General*, ¶ 3:1 et seq. (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.109–8.112

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.64, 12.36–12.37

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 15

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.64, 210.95A (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.61 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

Miller & Starr, California Real Estate 4th, § 19:224 (Thomson Reuters)

4321. Affirmative Defense—Retaliatory Eviction—Tenant's Complaint (Civ. Code, § 1942.5)

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/***nonbinary pronoun***/it] because [***name of plaintiff***] filed this lawsuit in retaliation for [***name of defendant***]'s having exercised [his/her/***nonbinary pronoun***/its] rights as a tenant. To succeed on this defense, [***name of defendant***] must prove all of the following:**

[1. That [*name of defendant***] was not in default in the payment of [his/her/***nonbinary pronoun***/its] rent;]**

2. That [*name of plaintiff***] filed this lawsuit in retaliation because [***name of defendant***] had complained about the condition of the property to [[***name of plaintiff***]/[***name of appropriate agency***]]; and**

3. That [*name of plaintiff***] filed this lawsuit within 180 days after**

[*Select the applicable date(s) or event(s):***]**

[the date on which [*name of defendant***], in good faith, gave notice to [***name of plaintiff***] or made an oral complaint to [***name of plaintiff***] regarding the conditions of the property][./; or]**

[the date on which [*name of defendant***], in good faith, filed a written complaint, or an oral complaint that was registered or otherwise recorded in writing, with [***name of appropriate agency***], of which [***name of plaintiff***] had notice, for the purpose of obtaining correction of a condition of the property][./; or]**

[the date of an inspection or a citation, resulting from a complaint to [*name of appropriate agency***] of which [***name of plaintiff***] did not have notice][./; or]**

[the filing of appropriate documents to begin a judicial or an arbitration proceeding involving the conditions of the property][./; or]

[entry of judgment or the signing of an arbitration award that determined the issue of the conditions of the property against [*name of plaintiff***]].**

[Even if [*name of defendant***] has proved that [***name of plaintiff***] filed this lawsuit with a retaliatory motive, [***name of plaintiff***] is still entitled to possession of the premises if [he/she/***nonbinary pronoun***/it] proves that [he/she/***nonbinary pronoun***/it] also filed the lawsuit in good faith for a reason stated in the [3/30/60]-day notice.]**

New August 2007; Revised June 2010, May 2020

Directions for Use

This instruction is based solely on Civil Code section 1942.5(a), which has the 180-day limitation. The remedies provided by this statute are in addition to any other remedies provided by statutory or decisional law. (Civ. Code, § 1942.5(j).) Thus, there are two parallel and independent sources for the doctrine of retaliatory eviction: the statute and the common law. (*Barela v. Superior Court* (1981) 30 Cal.3d 244, 251 [178 Cal.Rptr. 618, 636 P.2d 582].) Whether the common law provides additional protection against retaliation beyond the 180-day period has not been decided. (See *Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 776 [187 Cal.Rptr. 242] [statute not a limit in tort action for wrongful eviction; availability of the common law retaliatory eviction defense, unlike that authorized by section 1942.5, is apparently not subject to time limitations].)

Include element 1 only if the landlord's asserted ground for eviction is something other than nonpayment of rent. If nonpayment is the ground, the landlord has the burden to prove that the tenant is in default. (See CACI No. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements*.)

If element 1 is included, there may be additional issues of fact that the jury must resolve in order to decide whether the tenant is in default in the payment of rent. If necessary, instruct that the tenant is not in default if the tenant has exercised any legally protected right not to pay the contractual amount of rent, such as a habitability defense, a "repair and deduct" remedy, or a rent increase that is alleged to be retaliatory.

For element 3, select the appropriate date or event that triggered the 180-day period within which a landlord may not file an unlawful detainer. (Civ. Code, § 1942.5(a).)

Include the last paragraph if the landlord alleges that there was also a lawful cause for the eviction (see Civ. Code, § 1942.5(f) [landlord may proceed "for any lawful cause"]), and that this cause was both asserted in good faith and set forth in the notice terminating the tenancy. (See Civ. Code, § 1942.5(g); *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 595–596 [3 Cal.Rptr.3d 205, 73 P.3d 1185] [landlord asserting lawful cause under 1942.5(f) must also establish good faith under 1942.5(g), but need not establish total absence of retaliatory motive].)

Sources and Authority

- Retaliatory Eviction: Tenant Complaints. Civil Code section 1942.5(a).
- Lawful Acts Permitted; No Tenant Waiver. Civil Code section 1942.5(f).
- Landlord's Good Faith Acts. Civil Code section 1942.5(g).
- "The defense of 'retaliatory eviction' has been firmly ensconced in this state's statutory law and judicial decisions for many years. 'It is settled that a landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has no right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction

in an unlawful detainer proceeding.' The retaliatory eviction doctrine is founded on the premise that '[a] landlord may normally evict a tenant for any reason or for no reason at all, but he may not evict for an improper reason . . . .' " (*Barela, supra,* 30 Cal.3d at p. 249, internal citations omitted.)

- "Thus, California has two parallel and independent sources for the doctrine of retaliatory eviction. This court must decide whether petitioner raised a legally cognizable defense of retaliatory eviction under the statutory scheme and/or the common law doctrine." (*Barela, supra,* 30 Cal.3d at p. 251.)
- "Retaliatory eviction occurs, as Witkin observes, '[When] a landlord exercises his legal right to terminate a residential tenancy in an authorized manner, but with the motive of retaliating against a tenant who is not in default but has exercised his legal right to obtain compliance with requirements of habitability.' It is recognized as an affirmative defense in California; and as appellant correctly argues, it extends beyond warranties of habitability into the area of First Amendment rights." (*Four Seas Inv. Corp. v. International Hotel Tenants' Assn.* (1978) 81 Cal.App.3d 604, 610 [146 Cal.Rptr. 531], internal citations omitted.)
- "If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction. Of course, we do not imply that a tenant who proves a retaliatory purpose is entitled to remain in possession in perpetuity. . . . 'If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all.' " (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97], internal citations omitted.)
- "The existence or nonexistence of a landlord's retaliatory motive is ordinarily a question of fact." (*W. Land Office v. Cervantes* (1985) 175 Cal.App.3d 724, 731 [220 Cal.Rptr. 784].)
- "[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith—i.e., a bona fide—intent to withdraw the property from the rental market. If the tenant controverts the landlord's good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence." (*Drouet, supra,* 31 Cal.4th at p. 596.)
- "Only when the landlord has been unable to establish a bona fide intent need the fact finder proceed to determine whether the eviction is for the purpose of retaliating against the tenant under subdivision (a) or (c) of section 1942.5." (*Drouet, supra,* 31 Cal.4th at p. 600.)
- "*Drouet*'s interpretation 'give[s] effect to the plain language of [Civil Code section 1942.5], including [former] subdivisions (d) and (e), which permit a landlord to go out of business and evict the tenants—even if the landlord has a

retaliatory motive—so long as the landlord *also* has the bona fide intent to go out of business. . . . If, on the other hand, the landlord cannot establish a bona fide intent to go out of business, the tenants may rely on [former] subdivisions (a) and (c) to resist the eviction.' " (*Coyne v. De Leo* (2018) 26 Cal.App.5th 801, 806 [237 Cal.Rptr.3d 359], original italics.)

- "[T]he cause of action for retaliation recognized by section 1942.5 applies to tenants of a mobilehome park. . . . 'By their terms, subdivisions (c) and (f) of section 1942.5 give a right of action to any lessee who has been subjected to an act of unlawful retaliation. Thus, on its face the statute provides protection to mobilehome park tenants who own their own dwellings and merely rent space from their landlord.' " (*Banuelos v. LA Investment, LLC* (2013) 219 Cal.App.4th 323, 330 [161 Cal.Rptr.3d 772].)
- "[T]he Legislature intended to create a cause of action for retaliatory eviction that is not barred by the litigation privilege. If the litigation privilege trumped a suit for retaliatory eviction under section 1942.5 the privilege would " 'effectively immunize conduct that the [statute] prohibits' " [citation], thereby encouraging, rather than suppressing, " 'the mischief at which it was directed. [Citation.]' " ' " (*Winslett v. 1811 27th Avenue LLC* (2018) 26 Cal.App.5th 239, 254 [237 Cal.Rptr.3d 25].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 739, 742, 745

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.113–8.117

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.65, 12.38

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 16

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.62 (Matthew Bender)

Miller & Starr, California Real Estate 4th, § 34:206 (Thomson Reuters)

4322. Affirmative Defense—Retaliatory Eviction—Engaging in Legally Protected Activity (Civ. Code, § 1942.5(d))

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/***nonbinary pronoun***/it] because [***name of plaintiff***] filed this lawsuit in retaliation for [***name of defendant***]'s having engaged in legally protected activities. To succeed on this defense, [***name of defendant***] must prove both of the following:**

1. **[***Insert one or both of the following options:***]**

   [That [*name of defendant***] lawfully organized or participated in [a tenants' association/an organization advocating tenants' rights];] [or]**

   [That [*name of defendant***] lawfully and peaceably [***insert description of lawful activity***];]**

AND

2. **That [***name of plaintiff***] filed this lawsuit because [***name of defendant***] engaged in [this activity/these activities].**

[Even if [*name of defendant***] has proved that [***name of plaintiff***] filed this lawsuit with a retaliatory motive, [***name of plaintiff***] is still entitled to possession of the premises if [he/she/***nonbinary pronoun***/it] proves that [he/she/***nonbinary pronoun***/it] also filed the lawsuit in good faith for a reason stated in the [3/30/60]-day notice.]**

New August 2007

Directions for Use

In element 1, select the tenant's conduct that is alleged to be the reason for the landlord's retaliation. (Civ. Code, § 1942.5(d).)

Include the last paragraph if the landlord alleges that there was also a lawful cause for the eviction (see Civ. Code, § 1942.5(f)), and that this cause was both asserted in good faith and set forth in the notice terminating the tenancy. (See Civ. Code, § 1942.5(g); *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 595–596 [3 Cal.Rptr.3d 205, 73 P.3d 1185] [landlord asserting lawful cause under 1942.5(f) must also establish good faith under 1942.5(g), but need not establish total absence of retaliatory motive].)

Sources and Authority

- Retaliatory Eviction: Exercise of Tenant Rights. Civil Code section 1942.5(d).
- Lawful Acts Permitted; No Tenant Waiver. Civil Code section 1942.5(f).
- Landlord's Good-Faith Acts. Civil Code section 1942.5(g).

- "If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction. Of course, we do not imply that a tenant who proves a retaliatory purpose is entitled to remain in possession in perpetuity. . . . 'If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all. The question of permissible or impermissible purpose is one of fact for the court or jury.' " (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97], internal citations omitted.)
- "In an unlawful detainer action, where the defense of retaliatory eviction is asserted pursuant to Civil Code section 1942.5, the tenant has the overall burden of proving his landlord's retaliatory motive by a preponderance of the evidence. If the landlord takes action for a valid reason not listed in the unlawful detainer statutes, he must give notice to the tenant of the ground upon which he proceeds; and if the tenant controverts that ground, the landlord has the burden of proving its existence by a preponderance of the evidence." (*Western Land Office, Inc. v. Cervantes* (1985) 175 Cal.App.3d 724, 741 [220 Cal.Rptr. 784].)
- "[T]he burden was on the tenants to establish retaliatory motive by a preponderance of the evidence." (*Western Land Office, Inc., supra,* 175 Cal.App.3d at p. 744.)
- "[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith—i.e., a bona fide—intent to withdraw the property from the rental market. If the tenant controverts the landlord's good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence." (*Drouet, supra,* 31 Cal.4th at p. 596.)
- "Only when the landlord has been unable to establish a bona fide intent need the fact finder proceed to determine whether the eviction is for the purpose of retaliating against the tenant under subdivision (a) or (c) of section 1942.5." (*Drouet, supra,* 31 Cal.4th at p. 600.)
- "*Drouet*'s interpretation 'give[s] effect to the plain language of [Civil Code section 1942.5], including [former] subdivisions (d) and (e), which permit a landlord to go out of business and evict the tenants—even if the landlord has a retaliatory motive—so long as the landlord *also* has the bona fide intent to go out of business. . . . If, on the other hand, the landlord cannot establish a bona fide intent to go out of business, the tenants may rely on [former] subdivisions (a) and (c) to resist the eviction.' " (*Coyne v. De Leo* (2018) 26 Cal.App.5th 801, 806 [237 Cal.Rptr.3d 359], original italics.)
- "[T]he cause of action for retaliation recognized by section 1942.5 applies to tenants of a mobilehome park. . . . 'By their terms, subdivisions (c) and (f) of

section 1942.5 give a right of action to any lessee who has been subjected to an act of unlawful retaliation. Thus, on its face the statute provides protection to mobilehome park tenants who own their own dwellings and merely rent space from their landlord.' " (*Banuelos v. LA Investment, LLC* (2013) 219 Cal.App.4th 323, 330 [161 Cal.Rptr.3d 772].)

- "[T]he Legislature intended to create a cause of action for retaliatory eviction that is not barred by the litigation privilege. If the litigation privilege trumped a suit for retaliatory eviction under section 1942.5 the privilege would " 'effectively immunize conduct that the [statute] prohibits' " [citation], thereby encouraging, rather than suppressing, " 'the mischief at which it was directed. [Citation.]' " ' " (*Winslett v. 1811 27th Avenue LLC* (2018) 26 Cal.App.5th 239, 254 [237 Cal.Rptr.3d 25].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 739, 742, 745

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.113–8.117

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.65, 12.38

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 16

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.62 (Matthew Bender)

Miller & Starr, California Real Estate 4th, § 34:206 (Thomson Reuters)

4323. Affirmative Defense—Discriminatory Eviction (Unruh Act)

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/***nonbinary pronoun***] because [***name of plaintiff***] is discriminating against [him/her/***nonbinary pronoun***] because of [***insert protected class, e.g., her national origin, or other characteristic protected from arbitrary discrimination***]. To succeed on this defense, [***name of defendant***] must prove both of the following:**

1. **That [***name of defendant***] is [perceived as/associated with someone who is [perceived as]] [***insert protected class, e.g., Hispanic, or other characteristic***]; and**
2. **That [***name of plaintiff***] filed this lawsuit because of [***insert one of the following:***]**

   [[his/her/*nonbinary pronoun***/its] [perception of] [***name of defendant***]'s [***insert protected class, e.g., national origin, or other characteristic***].]**

   [[*name of defendant***]'s association with someone who is [perceived as] [***insert protected class, e.g., Hispanic, or other characteristic***].]**

New August 2007; Revised May 2020

Directions for Use

Throughout the instruction, insert either the defendant's protected status under the Unruh Act (see Civ. Code, § 51) or other characteristic on the basis of which the defendant alleges that the defendant has been arbitrarily discriminated against. (See *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 725–726 [180 Cal.Rptr. 496, 640 P.2d 115] [excluding all tenants with children is arbitrary illegal discrimination].)

In element 1, select the appropriate language based on whether the defendant (1) is a member of the protected class, (2) is perceived as a member of the protected class, (3) is associated with someone who is a member of the protected class, or (4) is associated with someone who is perceived as a member of the protected class.

In element 2, include the bracketed language regarding perception if the defendant is not actually a member of the protected class, but the allegation is that the plaintiff believes that the defendant is a member.

See also the Sources and Authority section under CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements.*

Sources and Authority

- Discrimination in Public Accommodations Prohibited (Unruh Act). Civil Code section 51.

- "In evaluating the legality of the challenged exclusionary policy in this case, we must recognize at the outset that in California, unlike many other jurisdictions, the Legislature has sharply circumscribed an apartment owner's traditional discretion to accept and reject tenants on the basis of the landlord's own likes or dislikes. California has brought such landlords within the embrace of the broad statutory provisions of the Unruh Act, Civil Code section 51. Emanating from and modeled upon traditional 'public accommodations' legislation, the Unruh Act expanded the reach of such statutes from common carriers and places of public accommodation and recreation, e.g., railroads, hotels, restaurants, theaters and the like, to include 'all business establishments of every kind whatsoever.' " (*Marina Point, Ltd., supra*, 30 Cal.3d at pp. 730–731, footnote omitted.)
- "[T]he 'identification of particular bases of discrimination—color, race, religion, ancestry, and national origin—*is illustrative rather than restrictive*. Although the legislation has been invoked primarily by persons alleging discrimination on racial grounds, its language and its history compel the conclusion that the Legislature intended to prohibit *all arbitrary discrimination by business establishments*.' " (*Marina Point, Ltd., supra*, 30 Cal.3d at p. 732, original italics.)
- "We hold that defendant should have been permitted to produce proof of the allegations of his special defenses of discrimination, which if proven would bar the court from ordering his eviction because such 'state action' would be violative of both federal and state Constitutions." (*Abstract Inv. Co. v. Hutchinson* (1962) 204 Cal.App.2d 242, 255 [22 Cal.Rptr. 309].)
- Evictions that contravene statutory or constitutional strictures provide a valid defense to unlawful detainer actions. (*Marina Point, Ltd., supra,* 30 Cal.3d at p. 727.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 712–713

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.118–8.128

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.53, 10.67, 10.68

7 California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement*, § 214.10 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.31 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Unlawful Detainer*, § 35.45 (Matthew Bender)

Miller & Starr, California Real Estate 4th, § 19:223 (Thomson Reuters)

4324. Affirmative Defense—Waiver by Acceptance of Rent

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/***nonbinary pronoun***/it] because [***name of plaintiff***] accepted payment of rent [after the three-day notice period had expired/[***name of defendant***] had violated the [lease/rental agreement]]. To succeed on this defense, [***name of defendant***] must prove:**

[1. That [*name of plaintiff***] accepted a [partial] payment of rent after [the three-day notice period had expired/[***name of plaintiff***] knew that [***name of defendant***] had violated the [lease/rental agreement]] [./; and]**

[2. That [*name of plaintiff***] failed to provide actual notice to [***name of defendant***] that partial payment would be insufficient to avoid eviction.]**

If [*name of defendant***] has proven that [he/she/***nonbinary pronoun***/it] paid rent, then [he/she/***nonbinary pronoun***/it] has the right to continue occupying the property unless [***name of plaintiff***] proves [one of the following:]**

[1. That even though [*name of plaintiff***] received [***name of defendant***]'s [***specify noncash form of payment, e.g., check***], [he/she/***nonbinary pronoun***/it] rejected the rent payment because [***e.g., it never cashed the check***]][./; or]**

[2. That the lease contained a provision stating that acceptance of [late rent/rent after knowing of a violation of the [lease/rental agreement]] would not affect [his/her/*nonbinary pronoun***/its] right to evict [***name of defendant***]][./; or]**

[3. That [*name of plaintiff***] clearly and continuously objected to the violation of the [lease/rental agreement].]**

New August 2007; Revised April 2008, June 2010, December 2011

Directions for Use

The affirmative defense in this instruction applies to an unlawful detainer for nonpayment of rent or breach of another condition of the lease if either the landlord accepts a rent payment after the three-day period to cure or quit has expired or the landlord waived a breach of a condition by accepting rent after the breach and then subsequently served a notice of forfeiture and filed an unlawful detainer. Acceptance of rent may also be a defense to an unlawful detainer if the tenant remains in possession after the expiration of the terms of the lease. (See Civ. Code, § 1945; *Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 740 [124 Cal.Rptr.3d 555].) This defense is available for breach of a covenant prohibiting a sublease or assignment

only if the landlord received written notice of the sublease or assignment from the tenant and accepted rent thereafter. (See Civ. Code, § 1954.53(d)(4).)

With regard to the tenant-defendant's burden, include the word "partial" in element 1 and read element 2 only in cases involving commercial tenancies and partial payment. (Code Civ. Proc., § 1161.1(c).)

With regard to the landlord plaintiff's burden, give option 3 if there is evidence that the landlord at all times made it clear that acceptance of rent was not a waiver of the breach. (See *Thriftimart, Inc. v. Me & Tex* (1981) 123 Cal.App.3d 751, 754 [177 Cal.Rptr. 24] [accepting rent for five years was not a waiver].)

Sources and Authority

- Commercial Tenancy: Acceptance of Partial Payment Not Waiver. Code of Civil Procedure section 1161.1(c).
- Acceptance of Rent After Expiration of Term. Civil Code section 1945.
- When Acceptance of Rent Is Not Waiver. Civil Code section 1954.53(d)(4).
- "It is a general rule that the right of a lessor to declare a forfeiture of the lease arising from some breach by the lessee is waived when the lessor, with knowledge of the breach, accepts the rent specified in the lease. While waiver is a question of intent, the cases have required some positive evidence of rejection on the landlord's part or a specific reservation of rights in the lease to overcome the presumption that tender and acceptance of rent creates." (*EDC Assocs. v. Gutierrez* (1984) 153 Cal.App.3d 167, 170 [200 Cal.Rptr. 333], internal citations omitted.)
- "The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach. This is the general rule and is supported by ample authority. . . . 'The most familiar instance of the waiver of the forfeiture of a lease arises from the acceptance of rent by the landlord after condition broken, and it is a universal rule that if the landlord accepts rent from his tenant after full notice or knowledge of a breach of a covenant or condition in his lease for which a forfeiture might have been demanded, this constitutes a waiver of forfeiture which cannot afterward be asserted for that particular breach or any other breach which occurred prior to the acceptance of the rent. In other words, the acceptance by a landlord of the rents, with full knowledge of a breach in the conditions of the lease, and of all of the circumstances, is an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease, and demanding a forfeiture thereof.' " (*Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal. 435, 440–441 [6 P.2d 71], internal citations omitted.)
- "Here the lessor not only relied upon the express agreement in the contract of the lease against waiver of its right to assert a forfeiture for the acceptance of rent after knowledge of the breach of covenant prohibiting assignment of the

lease without its written consent first obtained, but it also gave notice that its acceptance of the rent after the breach of covenant became known was not to be construed as a consent to the assignment of the lease or a waiver of its right to assert a forfeiture." (*Karbelnig v. Brothwell* (1966) 244 Cal.App.2d 333, 342 [53 Cal.Rptr. 335].)

- "The landlord had the obligation of going forward with the evidence in order to prove that the money orders were not negotiated or that it took other action to insure that there was no waiver. 'Although a plaintiff ordinarily has the burden of proving every allegation of the complaint and a defendant of proving any affirmative defense, fairness and policy may sometimes require a different allocation. Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim.' " (*EDC Assocs., supra,* 153 Cal.App.3d at p. 171, internal citations omitted.)
- "Waiver is a matter of intent. Here plaintiff, from the start, evidenced, not a willingness to waive—which would have kept the original lease in force at the contractual rent—but a willingness to lease the land encroached upon and, if that extended lease were arrived at, to continue the lease on the original parcel. We cannot impose on plaintiff a penalty for a reasonable effort to achieve an amicable adjustment of the breach." (*Thriftimart, Inc., supra,* 123 Cal.App.3d at p. 754.)
- " 'When the term of a lease expires but the lessee holds over without the owner's consent, he becomes a tenant at sufferance. [Citation.] "Since the possession of the tenant at sufferance is wrongful, the owner may elect to regard the tenant as a trespasser . . . ." [Citation.] If instead the owner accepts rent from a tenant at sufferance he accepts the tenant's possession as rightful and the tenancy is converted into a periodic one.' " (*Kaufman, supra*, 195 Cal.App.4th at p. 740.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 696

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) § 10.60

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.31–6.37, 6.41, 6.42

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.65 (Matthew Bender)

Miller & Starr, California Real Estate 4th, § 19:205 (Thomson Reuters)

4325. Affirmative Defense—Failure to Comply With Rent Control Ordinance/Tenant Protection Act

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[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/***nonbinary pronoun***] because [***name of plaintiff***] violated [[***insert name of local governmental entity***]'s rent control law]/[the Tenant Protection Act]. To succeed on this defense, [***name of defendant***] must prove the following:**

[*Insert elements of rent control defense.***]**

New August 2007; Revised May 2020

Directions for Use

Insert the elements of the Tenant Protection Act of 2019 and/or the relevant local rent control law into this instruction.

Sources and Authority

- Tenant Protection Act of 2019. Civil Code section 1946.2.
- "[T]he statutory remedies for recovery of possession and of unpaid rent do not preclude a defense based on municipal rent control legislation enacted pursuant to the police power imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings." (*Birkenfeld v. Berkeley* (1976) 17 Cal.3d 129, 149 [130 Cal.Rptr. 465, 550 P.2d 1001], internal citations and footnote omitted.)
- "Although municipalities have power to enact ordinances creating substantive defenses to eviction, such legislation is invalid to the extent it conflicts with general state law." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 697 [209 Cal.Rptr. 682, 693 P.2d 261], internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 618

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 7.53–7.76

2 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 17

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy Actions*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant:*

Eviction Actions, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.74 (Matthew Bender)

Miller & Starr California Real Estate 4th, §§ 34:204, 34:256 (Thomson Reuters)

4326. Affirmative Defense—Repair and Deduct

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] does not owe [any/the full amount of] rent because [he/she/***nonbinary pronoun***] was not given credit against the rent for repairs performed during the period for which rent was not paid. To succeed on this defense, [***name of defendant***] must prove the following:**

1. **[***Name of defendant***] gave notice to [***name of plaintiff***]['s agent] of one or more conditions on the premises in need of repair;**
2. **[***Name of plaintiff***] did not make the requested repairs within a reasonable time after receiving notice;**
3. **[***Name of defendant***] spent $_____ to make the repairs and gave [***name of plaintiff***] notice of this expenditure;**
4. **[***Name of plaintiff***] did not give [***name of defendant***] credit for this amount against the rent that was due; and**
5. **[***Name of defendant***] had not exercised the right to repair and deduct more than once within the 12 months before the month for which the cost of repairs was deducted from the rent.**

If [*name of defendant***] acts to repair and deduct more than 30 days after the notice, [he/she/***nonbinary pronoun***] is presumed to have waited a reasonable time. This presumption may be overcome by evidence showing that a [shorter/ [or] longer] period is more reasonable. [[***Name of defendant***] may repair and deduct after a shorter notice if all the circumstances require shorter notice.]**

[Even if [*name of defendant***] proves all of the above requirements, [***name of defendant***] was not entitled to repair and deduct if [***name of plaintiff***] proves that [***name of defendant***] has done any of the following that contributed substantially to the need for repair or interfered substantially with [***name of plaintiff***]'s ability to make the necessary repairs:**

[Failed to keep [his/her/*nonbinary pronoun***] living area as clean and sanitary as the condition of the property permits][./; or]**

[Failed to dispose of all rubbish, garbage, and other waste in a clean and sanitary manner][./; or]

[Failed to properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permits][./; or]

[Intentionally destroyed, defaced, damaged, impaired, or removed

any part of the property, equipment, or accessories, or allowed others to do so][./; or]

[Failed to use the property for living, sleeping, cooking, or dining purposes only as appropriate based on the design of the property][./;or]

[Otherwise failed to exercise reasonable care.]]

New April 2008

Directions for Use

Give this instruction if the tenant alleges the affirmative defense of having exercised the right to make repairs and deduct their cost from the rent. (See Civ. Code, § 1942.) If the landlord alleges that repair and deduct is not available because of the tenant's affirmative misconduct, select the applicable reasons. The first two reasons do not apply if the landlord has expressly agreed in writing to perform those acts. (Civ. Code, § 1941.2(b).)

Sources and Authority

- Tenant's Right to Repair and Deduct. Civil Code section 1942.
- Repairs Caused by Lack of Ordinary Care. Civil Code section 1929.
- When Landlord Not Obligated to Repair. Civil Code section 1941.2.
- "[T]he limited nature of the 'repair and deduct' remedy, in itself, suggests that it was not designed to serve as an exclusive remedy for tenants in this area. As noted above, section 1942 only permits a tenant to expend up to one month's rent in making repairs, and now also provides that this self-help remedy can be invoked only once in any 12-month period. These limitations demonstrate that the Legislature framed the section only to encompass relatively minor dilapidations in leased premises. As the facts of the instant case reveal, in the most serious instances of deterioration, when the costs of repair are at all significant, section 1942 does not provide, and could not have been designed as, a viable solution." (*Green v. Superior Court of San Francisco* (1974) 10 Cal.3d 616, 630–631 [111 Cal.Rptr. 704, 517 P.2d 1168], internal citations omitted.)
- "Clearly, sections 1941 and 1942 express the policy of this state that landlords in the interest of public health and safety have the duty to maintain leased premises in habitable condition and that tenants have the right, after notice to the landlord, to repair dilapidations and deduct the cost of the repairs from the rent. The policy expressed in these sections cannot be effectuated if landlords may evict tenants who invoke the provisions of the statute. Courts would be withholding with one hand what the Legislature has granted with the other if they order evictions instituted in retaliation against the exercise of statutory rights." (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 516 [90 Cal.Rptr. 729, 476 P.2d 97].)

- "[T]he statutory remedies provided a tenant under Civil Code section 1941 et seq. were not intended by the Legislature as the tenant's exclusive remedy for the landlord's failure to repair. 'Although past cases have held that the Legislature intended the remedies afforded by section 1942 to be the sole procedure for enforcing the statutory duty on landlords imposed by section 1941 [citations], no decision has suggested that the Legislature designed these statutory provisions to displace the common law in fixing the respective rights of landlord and tenant. On the contrary, the statutory remedies of section 1942 have traditionally been viewed as additional to, and complementary of, the tenant's common law rights.' Thus, '. . . *the statutory framework of section 1941 et seq. has never been viewed as a curtailment of the growth of the common law in this field*.' " (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 914–915 [162 Cal.Rptr. 194], original italics, internal citations and footnote omitted.)

Secondary Sources

1 California Landlord-Tenant Practice, Ch. 3, *Rights and Duties During Tenancy* (Cont.Ed.Bar 2d ed.) § 3.12 et seq.

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities,* § 170.42[3] (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer,* § 210.64[10] (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damage*, § 334.117 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.62 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.30 (Matthew Bender)

4327. Affirmative Defense—Landlord's Refusal of Rent

[*Name of defendant*] claims that [*name of plaintiff*] is not entitled to evict [him/her/*nonbinary pronoun*/it] because [*name of plaintiff*] refused to accept [*name of defendant*]'s payment of the rent. To succeed on this defense, [*name of defendant*] must prove:

1. **That after service of the three-day notice but before the three-day period had expired, [*name of defendant*] presented the full amount of rent that was due to [*name of plaintiff*]; and**
2. **That [*name of plaintiff*] refused to accept the payment.**

[Giving a check constitutes payment if [*name of plaintiff*]'s practice was to accept payment by check unless [*name of plaintiff*] had previously notified [*name of defendant*] that payment by check was no longer acceptable.]

New October 2008

Directions for Use

Give the last bracketed paragraph if the tender was by check and there is an issue as to the landlord's motive in refusing the check.

Sources and Authority

- Debtor's Deposit of Amount of Debt. Civil Code section 1500.
- "The mere giving of a check or checks does not constitute payment." (*Mau v. Hollywood Commercial Bldgs., Inc.* (1961) 194 Cal.App.2d 459, 470 [15 Cal.Rptr. 181], internal citation omitted.)
- "On this appeal appellants do not discuss or mention the above finding of their bad faith, but argue that respondent was in default because its rental debt was not extinguished within the three-day period as respondent tendered checks instead of money, sent the checks by mail without checking delivery instead of making personal tender and did not keep the tender alive by deposit in a bank as provided by section 1500 of the Civil Code within the three-day period. However, we think that the finding of bad faith, which is supported by the evidence showing the facts, as stated hereinbefore, is of primary importance where appellants try to enforce a forfeiture." (*Strom v. Union Oil Co.* (1948) 88 Cal.App.2d 78, 81 [198 P.2d 347].)
- "With respect to appellants there is no doubt that they could have had timely payment if they had so desired, but that they were intentionally evasive and uncooperative, hoping thereby to induce some technical shortcoming on which to terminate a lease which they thought disadvantageous." (*Strom, supra,* 88 Cal.App.2d at pp. 83–84.)

- "Appellants complain that respondent mailed checks for the rent instead of tendering money in person. The lease does not contain any place or mode of payment of rent. Payment of rent to the original lessor had been made by mailing of checks to his assignee. Appellant was entitled to continue payment by mailing of checks so long as he had not been notified that this form of payment was no longer acceptable. . . . If the payment by mailing of check, a normal mode of payment though not a legal tender, was not acceptable to appellants, as it had been to their predecessors, they should have notified respondent to that effect. Neither was respondent after the mailing under duty to take special measures to check timely receipt of the checks. 'The ordinary principles of reason, common sense, and justice should govern in questions of this kind. The lessee, in law, had a right to assume that the Post [O]ffice Department would do its duty and deliver the envelop[e] containing the rent in due time, and that the lessor would, in justice, accept such rent; and if for any reason it was not received or delivered the lessee should, as a matter of ordinary fairness and justice, be advised of such fact and have a chance to remedy the same.' This principle was held applicable even where the letter containing the rent was lost in the mail. It must govern a fortiori here, where the mail functioned correctly and the fact that the checks did not reach appellants was solely attributable to circumstances for which they were responsible. No further action of any kind could be expected from respondent until it was informed, by the return of the unclaimed letter, of the fact that the payment had not been effectuated. If respondent's action is open to any criticism it would be that the deposit of the rent in a bank . . . did not follow soon enough after the checks were returned . . . . However the delay did not cause any prejudice or make any difference to appellants as they had then already launched the action in unlawful detainer at which they had been aiming ever since respondent refused increase of rent. The shortcoming of respondent is trivial compared to appellants' bad faith." (*Strom, supra,* 88 Cal.App.2d at p. 84.)
- "Nor does the rejection of the 'tender' that appellants made by letter, unaccompanied by payment, and conditioned upon dismissal of the action, after the action was brought, compel a finding of bad faith. It did not extinguish the debt, since the procedure prescribed by Civil Code, section 1500, was not followed. Nor was there a showing of continuous readiness to pay after the tender." (*Budaeff v. Huber* (1961) 194 Cal.App.2d 12, 21 [14 Cal.Rptr. 729].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 797

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 7.53–7.56

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 17.21

3 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer,* § 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer,* 5.21

4328. Affirmative Defense—Victim of Abuse or Violence (Code Civ. Proc., § 1161.3)

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/***nonbinary pronoun***] because [***name of plaintiff***] filed this lawsuit based on [an] act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]] against [[***name of defendant***]/ [or] a member of [***name of defendant***]'s immediate family/ [or] a member of [***name of defendant***]'s household]. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] received documentation showing that [[***name of defendant***]/ [or] a member of [***name of defendant***]'s immediate family/ [or] a member of [***name of defendant***]'s household] was a victim of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]];**
2. **That the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]] [was/were] documented in a [court order/law enforcement report/statement of a qualified third party acting in a professional capacity/[***specify other evidence or documentation***]];**
3. **That the person who committed the act[s] of [domestic violence/ sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]] is not a tenant of the same living unit as [[***name of defendant***]/ [or] a member of [***name of defendant***]'s immediate family/ [or] a member of [***name of defendant***]'s household]; and**
4. **That [***name of plaintiff***] filed this lawsuit seeking to evict [***name of defendant***] because of the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]].**

Even if [*name of defendant***] proves all of the above, [***name of plaintiff***] may still evict [***name of defendant***] if [***name of plaintiff***] proves all of the following:**

1. **That the person who committed the abuse or violence threatened, by words or by actions, the physical safety of other [tenants/ [or] guests/ [or] invitees/ [,/or] licensees];**

2. **That [*name of plaintiff*] gave [*name of defendant*] a three-day notice requiring [*him/her/nonbinary pronoun*] not to voluntarily permit or consent to the presence on the property of the person who committed the abuse or violence; and**

3. **That, after the three-day notice expired, [*name of defendant*] voluntarily permitted or consented to the presence on the property of the person who committed the abuse or violence.**

[If the person who committed the abuse or violence is also a defendant in this case, I will decide if an eviction of only that person is appropriate after you, the jury, decide certain facts.]

New December 2011; Revised June 2013, June 2014, January 2019, May 2020, May 2024, November 2024

Directions for Use

This instruction is a tenant's affirmative defense alleging that the tenant is being evicted because the tenant, the tenant's immediate family member, or a tenant's household member was the victim of abuse or violence, including domestic violence, sexual assault, stalking, human trafficking, elder or dependent adult abuse, and other crimes. (See Code Civ. Proc., § 1161.3.) If the tenant establishes the elements of the defense, the landlord may attempt to establish a statutory exception that would allow the eviction. The last part of the instruction sets forth the exception.

"Abuse and violence" is defined by statute to include several acts. (Code Civ. Proc., § 1161.3(a); see Code Civ. Proc., § 1219 [sexual assault]; Civ. Code, §§ 1708.7 [stalking], 1946.7(a)(6) [a crime that caused bodily injury or death], (a)(7) [a crime that included the exhibition, drawing, brandishing, or use of a firearm or other deadly weapon or instrument], (a)(8) [a crime that included the use of force against the victim or a threat of force against the victim]; Fam. Code, § 6211 [domestic violence]; Pen. Code, §§ 236.1 [human trafficking], Section 646.9 [stalking]; Welf. & Inst. Code, § 15610.07 [abuse of elder or dependent adult].) Consider giving an additional special instruction defining the specific abuse or violence alleged to make the meaning clear to the jury.

Evidence of abuse or violence must be documented in a court order, law enforcement report, qualified third-party statement, or any other form of documentation or evidence that reasonably verifies that the abuse or violence occurred (element 2). (Code Civ. Proc., § 1161.3(a)(2)(A)–(D).) Consider giving an additional special instruction defining the type of documentation if it is necessary to make the meaning clear to the jury. A "qualified third party" is a health practitioner, domestic violence counselor, a sexual assault counselor, a human trafficking caseworker, or a victim of violent crime advocate. (Code Civ. Proc., § 1161.3(a)(6).) If the parties dispute whether a third party is qualified, consider giving an additional special instruction on the definition of "qualified third party."

The tenant has a complete defense to the unlawful detainer cause of action if the tenant proves that the perpetrator is not a tenant of the same "dwelling unit" as the tenant, the tenant's immediate family member, or household member unless the statutory exception is established. (Code Civ. Proc., § 1161.3(d)(1); see Code Civ. Proc., § 1161.3(b)(2)(B).) "Dwelling unit" is expressed in element 3 as "living unit." If the person who committed the abuse or violence is a tenant in residence of the same residential dwelling unit, then the statute provides for the possibility of a partial eviction process under Code of Civil Procedure section 1174.27 removing only the perpetrator of the abuse or violence.

Whether the determinations underlying the partial eviction order are to be made by the court or the jury is unsettled. Code of Civil Procedure section 1174.27(c) provides that *the court* "shall determine whether there is documentation evidencing abuse or violence against the tenant, the tenant's immediate family member, or the tenant's household member." The statute also provides that *the court* shall deny the affirmative defense if the court determines there is not documentation evidencing abuse or violence and *the court* shall issue a partial eviction if certain conditions are met, both of which would not be jury functions. If the court determines that there is documentation evidencing abuse or violence against the tenant, the tenant's immediate family member, or the tenant's household member, and the court does not find the defendant raising the affirmative defense guilty of an unlawful detainer on any other grounds, and upon a showing that any other defendant was the perpetrator of the abuse or violence, then the court shall issue a partial eviction.

Include the final bracketed sentence only in cases involving more than one defendant, one of whom is the alleged perpetrator of the abuse or violence and resides in the same living unit. If the court is making determinations under section 1174.27, it may also be necessary to instruct that the proceeding involves a residential premises or to define "a residential premises" for the jury (Code Civ. Proc., § 1174.27(a)(1)) and to instruct that the defendant raising the defense has not been found guilty of an unlawful detainer on any other grounds. (Code Civ. Proc., § 1174.27(e).) Note that CACI No. VF-4328, *Affirmative Defense—Victim of Abuse or Violence*, includes questions that are not necessary if the victim is not seeking remedies under section 1174.27.

Sources and Authority

- Defense to Termination of Tenancy: Tenant Was Victim of Abuse or Violence. Code of Civil Procedure section 1161.3.
- Unlawful Detainer Remedies for Abuse or Violence Against Tenant. Code of Civil Procedure section 1174.27.

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 714

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 11(I)-C, Particular Defenses, ¶¶ 11:230–231 (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 4-D, *Other Issues*,

¶ 4:240 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶ 5:288 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-D, *Answer To Unlawful Detainer Complaint*, ¶ 8:297 et seq., 8:381.10 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.41 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64[15] (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28[8] (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.76 (Matthew Bender)

1 Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.20B

1 Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21[12]

4329. Affirmative Defense—Failure to Provide Reasonable Accommodation

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[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/***nonbinary pronoun***] because [***name of plaintiff***] violated fair housing laws by refusing to provide [[***name of defendant***]/a member of [***name of defendant***]'s household] [a] reasonable accommodation[s] for [his/her/***nonbinary pronoun***] disability as necessary to afford [him/her/***nonbinary pronoun***] an equal opportunity to use and enjoy [a/an] [***specify nature of dwelling or public and common use area at issue, e.g., the apartment building's mail room***].**

To establish this defense, [*name of defendant***] must prove all of the following:**

1. **That [[***name of defendant***]/a member of [***name of defendant***]'s household] has a disability;**
2. **That [***name of plaintiff***] knew of, or should have known of, [[***name of defendant***]/the member of [***name of defendant***]'s household]'s disability;**
3. **That [[***name of defendant***]/a member of [***name of defendant***]'s household/an authorized representative of [***name of defendant***]] requested [an] accommodation[s] on behalf of [himself/herself/***nonbinary pronoun/name of defendant***] [or] [another household member with a disability];**
4. **That [an] accommodation[s] [was/were] necessary to afford [[***name of defendant***]/a member of [***name of defendant***]'s household] an equal opportunity to use and enjoy the [***specify nature of dwelling or public and common use area at issue, e.g., the apartment building's mail room***]; and**
5. **[That [***name of plaintiff***] failed to provide the reasonable accommodation[s]]**

   [or]

   [That [*name of plaintiff***] failed to engage in the interactive process to try to accommodate the disability].**

New May 2021

Directions for Use

An individual with a disability may raise failure to provide a reasonable accommodation as an affirmative defense to an unlawful detainer action. (Cal. Code Regs., tit. 2, § 12176(c)(8)(A).) The individual with a disability seeking a reasonable

accommodation must make a request for an accommodation. (Cal. Code Regs., tit. 2, § 12176(c)(1).) Such a request may be made by the individual with a disability, a family member, or someone authorized by the individual with a disability to act on the individual's behalf. (Cal. Code Regs., tit. 2, § 12176(c)(2).)

A reasonable accommodation request that is made during a pending unlawful detainer action is subject to the same regulations that govern reasonable accommodation requests made at any other time. (Cal. Code Regs., tit. 2, § 12176(c)(8).)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Association With Person With a Disability or Perceived to Have a Disability Protected. Government Code section 12926(o).
- Reasonable Accommodations. California Code of Regulations, title 2, section 12176(a), (c).
- Reasonable Accommodation Requests in Unlawful Detainer Actions. Cal. Code Regs., tit. 2, § 12176(c)(8).

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 977, 1062–1064

3 California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers*, § 63.121 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35, 115.92 (Matthew Bender)

4330. Denial of Requested Accommodation

[*Name of plaintiff***] claims that the requested accommodation for [[***name of defendant***]'s/a member of [***name of defendant***]'s household's] disability was properly denied because of an exception to [***name of plaintiff***]'s duty to reasonably accommodate a tenant's disability. To defeat [***name of defendant***]'s accommodation defense, [***name of plaintiff***] must prove:**

[*Specify the provision(s) at issue from California Code of Regulations, title 2, section 12179, e.g., that the requested accommodation would impose an undue financial and administrative burden on the plaintiff***].**

New November 2021

Directions for Use

This instruction is for use with CACI No. 4329, *Affirmative Defense—Failure to Provide Reasonable Accommodation*. Give this instruction only if the plaintiff in an unlawful detainer case claims that the requested accommodation was properly denied. (See Cal. Code Regs., tit. 2, § 12179.) Include only factors from the regulation that are at issue.

Sources and Authority

- Denial of Reasonable Accommodation in Unlawful Detainer Case. Title 2 California Code of Regulations section 12179.

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 734–738, 752

3 California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers*, § 63.121 (Matthew Bender)

4331–4339. Reserved for Future Use

4340. Damages for Reasonable Rental Value

[*Name of plaintiff*] also claims that [he/she/*nonbinary pronoun*/it] was harmed by [*name of defendant*]'s wrongful occupancy of the property. If you decide that [*name of defendant*] wrongfully occupied the property, you must also decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages."

The amount of damages is the reasonable rental value of the premises during the time [*name of defendant*] occupied the property after the [_____]-day notice period expired. The amount agreed between the parties as rent is evidence of the reasonable rental value of the property, but you may award a greater or lesser amount based on all the evidence presented during the trial.

[In determining the reasonable rental value of the premises, do not consider any limitations on the amount of rent that can be charged because of a local rent control ordinance.]

New August 2007

Directions for Use

In the second paragraph, insert the applicable number of days' notice required, whether 3, 30, 60, or some other number provided for in the lease. (Civ. Code, §§ 1946, 1946.1; Code Civ. Proc., § 1161.)

Include the optional last paragraph if the property is subject to rent control.

Sources and Authority

- Damages. Code of Civil Procedure section 1174(b).
- "It is well established that losses sustained after termination of a tenancy may be recovered, and that 'damages awarded . . . in an unlawful detainer action for withholding possession of the property are not "rent" but are in fact damages.' Thus, a landlord is entitled to recover as damages the reasonable value of the use of the premises during the time of the unlawful detainer either on a tort theory or a theory of implied-in-law contract. It is also settled that rent control regulations have no application to an award of damages for unlawfully withholding property." (*Adler v. Elphick* (1986) 184 Cal.App.3d 642, 649–650 [229 Cal.Rptr. 254], internal citations omitted.)
- "In unlawful detainer, recovery of possession is the main object and recovery of rent a mere incident." (*Harris v. Bissell* (1921) 54 Cal.App. 307, 313 [202 P. 453].)
- "It is well established that unlawful detainer actions are wholly created and strictly controlled by statute in California. The 'mode and measure of plaintiff's

recovery' are limited by these statutes. The statutes prevail over inconsistent general principles of law and procedure because of the special function of unlawful detainer actions to restore immediate possession of real property." (*Balassy v. Superior Court* (1986) 181 Cal.App.3d 1148, 1151 [226 Cal.Rptr. 817], internal citations omitted.)

- "It is well settled that damages allowed in unlawful detainer proceedings are only those which *result from* the unlawful detention and accrue during that time. Although a lessee guilty of unlawful detention may have also breached the terms of the lease contract, damages resulting therefrom are not necessarily damages resulting from the unlawful detention. As such, he is precluded from litigating a cause of action for these breaches in unlawful detainer proceedings." (*Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742, 748 [139 Cal.Rptr. 72], original italics, internal citations omitted.)
- "[W]hen a 30-day notice is used to terminate a month-to-month tenancy, and any default in the payment of rents to that time are not claimed in a 3-day notice to pay rent or quit, the unlawful detainer proceeding thereon is not founded on a default in the payment of rent within the meaning of section 1174, subdivision (b); damages for the detention of the premises commencing with the end of the tenancy may be recovered, but rents accrued and unpaid prior to the end of the tenancy may not be recovered in that unlawful detainer proceeding." (*Castle Park No. 5 v. Katherine* (1979) 91 Cal.App.3d Supp. 6, 12 [154 Cal.Rptr. 498].)
- " 'If a tenant unlawfully detains possession after the termination of a lease, the landlord is entitled to recover as damages the reasonable value of the use of the premises during the time of such unlawful detainer. He is not entitled to recover rent for the premises because the leasehold interest has ended.' [¶] The amount agreed between the parties as rent is evidence of the rental value of the property. But, '[since] the action is not upon contract, but for recovery of possession and, incidentally, for the damages occasioned by the unlawful detainer, such rental value may be greater or less than the rent provided for in the lease.' " (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 9 [177 Cal.Rptr. 96], internal citations and footnote omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 771

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 12.27–12.30, 13.19

2 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 26.5–26.12

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.94 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.27

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.13 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.22

(Matthew Bender)
Miller & Starr, California Real Estate 4th § 19:208 (Thomson Reuters)

4341. Statutory Damages on Showing of Malice (Code Civ. Proc., § 1174(b))

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*/it] is entitled to statutory damages in addition to actual damages. To recover statutory damages, [*name of plaintiff*] must prove that [*name of defendant*] acted with malice.

A tenant acts with malice if the tenant willfully continues to occupy the property with knowledge that the tenant no longer has the right to do so.

You must determine how much, if any, statutory damages should be awarded, up to a maximum of $600. You should not award any statutory damages if you find that [*name of defendant*] had a good-faith and a reasonable belief in [his/her/*nonbinary pronoun*/its] right to continue to occupy the premises.

New August 2007; Revised May 2020

Sources and Authority

- Statutory Damages on Showing of Malice. Code of Civil Procedure section 1174(b).
- "The rule appears to be well established in California that a lessee of real property who wilfully, deliberately, intentionally and obstinately withholds possession of the property, with knowledge of the termination of his lease and against the will of the landlord, is liable for [statutory] damages." (*Erbe Corp. v. W & B Realty Co.* (1967) 255 Cal.App.2d 773, 780 [63 Cal.Rptr. 462].)
- "Authorities . . . do not hold that the [penalty should be imposed] where the conduct of the tenant is characterized by good faith and a reasonable belief in his right to remain . . . ." (*Board of Public Service Comm'rs v. Spear* (1924) 65 Cal.App. 214, 217–218 [223 P.423], internal citations omitted, overruled, other grounds, *Richard v. Degen & Brody, Inc.* (1960) 181 Cal.App.2d 289, 302–304, 5 Cal.Rptr. 263.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 738

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 12.32–12.34

2 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 26.13

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.95 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.27

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant:*

Eviction Actions, § 333.13 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.22 (Matthew Bender)

Miller & Starr, California Real Estate, Ch. 19, *Landlord-Tenant*, § 19:208 (Thomson Reuters)

4342. Reduced Rent for Breach of Habitability

If you find that there has been a substantial breach of habitability, then you must find the reasonable reduced rental value of the property based on the uninhabitable conditions. To find this value, take the amount of monthly rent required by the [lease/rental agreement/sublease] and reduce it by the [dollar amount/ [or] percent] that you consider to reflect the uninhabitable conditions. Apply this reduction for the period of time, up to present, that the conditions were present. [You may make different reductions for different months if the conditions did not affect habitability uniformly over that period of time.]

New December 2014

Directions for Use

Give this instruction if the court decides that the jury should determine the reduced rental value of the premises based on a breach of the warranty of habitability. The court may instruct the jury to find a dollar reduction or a percent reduction, or may leave it up to the jury as to which approach to use. In this latter case, include both bracketed options.

Give the optional last sentence if the condition would not cause uniform hardship throughout the period. For example, the hardship caused by a broken furnace or air conditioner would vary according to the weather.

Code of Civil Procedure section 1174.2(a) provides that *the court* is to determine the reasonable rental value of the premises in its untenantable state up to the date of trial. But whether this determination is to be made by the court or the jury is unsettled. Section 1174.2(d) provides that nothing in this section is intended to deny the tenant the right to a trial by jury. Subsection (d) could be interpreted to mean that in a jury trial, wherever the statute says "the court," it should be read as "the jury." But the statute also provides that the court may order the landlord to make repairs and correct the conditions of uninhabitability, which would not be a jury function.

Sources and Authority

- Breach of Warranty of Habitability. Code of Civil Procedure section 1174.2.
- "The second method suggested by *Green* [*Green v. Superior Court* (1974) 10 Cal.3d 616] is to first recognize the agreed contract rent as something the two parties have agreed to as proper for the premises as impliedly warranted. Then the court should take testimony and find on the percentage reduction of habitability (or usability) by the tenant by reason of the subsequently ascertained defects. Then reduce the agreed rent by this percentage, multiply the difference by the number of months of occupancy and voila!—the tenant's damages." (*Cazares v. Ortiz* (1980) 109 Cal.App.3d Supp. 23, 29 [168 Cal.Rptr. 108].)

Secondary Sources

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 3-D, Tenant Remedies, ¶ 3:82 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 3-E, Tenant Remedies, ¶ 3:138 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.95A (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer, 5.33, 5.36

4343–4399. Reserved for Future Use

VF-4300. Termination Due to Failure to Pay Rent

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] fail to make at least one rental payment to [*name of plaintiff*] as required by the [lease/rental agreement/sublease]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] properly give [*name of defendant*] a written notice to pay the rent or vacate the property at least three days before [*date on which action was filed*]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the amount due stated in the notice no more than the amount that [*name of defendant*] actually owed?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of defendant*] pay [or attempt to pay] the amount stated in the notice within three days after service or receipt of the notice?**

   _____ Yes _____ No

   If your answer to question 4 is no, then answer questions 5 and 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What is the amount of unpaid rent owed to [*name of plaintiff*]?**

   Include all amounts owed and unpaid from [*due date of first missed payment*] through [*date*], the date of expiration of the three-day notice.

   Total Unpaid Rent: $ _____]

6. **What are [*name of plaintiff*]'s damages?**

Determine the reasonable rental value of the property from [*date*], the date of expiration of the three-day notice, through [*date of verdict*].

Total Damages: $ _____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2007; Revised December 2010, June 2013, December 2013, November 2019, May 2024

Directions for Use

This verdict form is based on CACI No. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements*. See also the Directions for Use for that instruction. Questions 2 and 3 incorporate the notice requirements set forth in CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

In question 4, include "or attempt to pay" if the tenant alleges that the landlord refused to accept the rent when tendered. (See CACI No. 4327, *Affirmative Defense—Landlord's Refusal of Rent*.)

If the day of receipt is at issue and any of the three days after the alleged date of receipt falls on a Saturday, Sunday, or judicial holiday, modify questions 2 and 4 to allow the tenant three days excluding weekends and judicial holidays to cure the default. (See Code Civ. Proc., § 1161(2).)

VF-4301. Termination Due to Failure to Pay Rent—Affirmative Defense—Breach of Implied Warranty of Habitability

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We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] fail to make at least one rental payment to [*name of plaintiff*] as required by the [lease/rental agreement/sublease]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of plaintiff*] properly give [*name of defendant*] a written notice to pay the rent or vacate the property at least three days before [*date on which action was filed*]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was the amount due stated in the notice no more than the amount that [*name of defendant*] actually owed under the [lease/rental agreement/sublease]?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of defendant*] pay [or attempt to pay] the amount stated in the notice within three days after service or receipt of the notice?**

   _____ Yes _____ No

   If your answer to question 4 is no, then answer questions 5 and 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What is the amount of unpaid rent that [*name of defendant*] would owe to [*name of plaintiff*] if the property was in a habitable condition?**

   Include all amounts owed and unpaid from [*due date of first missed payment*] through [*date*], the date of expiration of the

three-day notice.

Total Unpaid Rent: $ _____]

6. **Did the [*name of plaintiff*] fail to provide substantially habitable premises during the time period for which [*name of defendant*] failed to pay the rent that was due?**

   _____ Yes _____ No

   If your answer to question 6 is yes, then answer question 7. If you answered no, answer question 8.

7. **Did [*name of defendant*] contribute substantially to the uninhabitable conditions or interfere substantially with [*name of plaintiff*]'s ability to make necessary repairs?**

   _____ Yes _____ No

   If your answer to question 7 is yes, then answer question 8. If you answered no, [stop here, answer no further questions, and have the presiding juror sign and date this form. The court will determine the amount by which the rent due found in question 5 should be reduced because of uninhabitable conditions/skip question 8 and answer question 9].

8. **What are [*name of plaintiff*]'s damages?**

   Determine the reasonable rental value of the property from [*date*], the date of expiration of the three-day notice, through [*date of verdict*].

   Total Damages: $ _____

[9. What is the amount of reduced monthly rent that represents the reasonable rental value of the property in its uninhabitable condition?

$ _____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2007; Revised December 2010, June 2013, December 2013, November 2019, May 2024

Directions for Use

This verdict form is based on CACI No. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements*, and CACI No. 4320, *Affirmative Defense—Implied Warranty of Habitability*. See also the Directions for Use for those instructions.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If the existence of a landlord-tenant relationship is at issue, additional preliminary questions will be needed based on elements 1 and 2 of CACI No. 4302. Questions 2 and 3 incorporate the notice requirements set forth in CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*.

In question 4, include "or attempt to pay" if there is evidence that the landlord refused to accept the rent when tendered. (See CACI No. 4327, *Affirmative Defense—Landlord's Refusal of Rent*.)

If the day of receipt is at issue and any of the three days after the alleged date of receipt falls on a Saturday, Sunday, or judicial holiday, modify questions 2 and 4 to allow the tenant three days excluding weekends and judicial holidays to cure the default.

Code of Civil Procedure section 1174.2(a) provides that the court is to determine the reasonable rental value of the premises in its untenantable state to the date of trial. But whether this determination is to be made by the court or the jury is unsettled. Section 1174.2(d) provides that nothing in this section is intended to deny the tenant the right to a trial by jury. Subsection (d) could be interpreted to mean that in a jury trial, wherever the statute says "the court," it should be read as "the jury." But the statute also provides that the court may order the landlord to make repairs and correct the conditions of uninhabitability, which would not be a jury function. If the court decides to present this issue to the jury, select "skip question 8 and answer question 9" in the transitional language following question 7, and include question 9.

As noted above, if a breach of habitability is found, the court may order the landlord to make repairs and correct the conditions that constitute a breach. (Code Civ. Proc., § 1174.2(a).) The court might include a special interrogatory asking the jury to identify those conditions that it found to create uninhabitability and the dates on which the conditions existed.

VF-4302. Termination Due to Violation of Terms of Lease/Agreement

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] fail to [***insert description of alleged failure to perform***] as required by the [lease/rental agreement/sublease]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of defendant***]'s failure to [***insert description of alleged failure to perform***] a substantial breach of [an] important obligation[s] under the [lease/rental agreement/sublease]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] properly give [***name of defendant***] a written notice to [either [***describe action to correct failure to perform***] or] vacate the property at least three days before [***date on which action was filed***]?**

   _____ **Yes** _____ **No**

   [If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[4. Did [*name of defendant***] [***describe action to correct failure to perform***] within three days after service or receipt of the notice?]**

_____ **Yes** _____ **No**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2007; Revised December 2010, June 2013, November 2019, May 2024

Directions for Use

This verdict form is based on CACI No. 4304, *Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements*. See also the Directions for Use for that instruction. Question 3 incorporates the notice requirements set forth in CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Include question 4 if the breach can be cured.

If the day of receipt is at issue and any of the three days after the alleged date of receipt falls on a Saturday, Sunday, or judicial holiday, modify questions 3 and 4 to allow the tenant three days excluding weekends and judicial holidays to cure the default.

VF-4303–VF-4327. Reserved for Future Use

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] receive documentation or other evidence of abuse or violence against [[***name of defendant***]/ [or] [***name of defendant***]'s immediate family member/ [or] [***name of defendant***]'s household member]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of plaintiff***] file this lawsuit to evict [***name of defendant***] because of the act[s] of abuse or violence committed against [[him/her/***nonbinary pronoun***]/ [or] [***name of defendant***]'s immediate family member/ [or] [***name of defendant***]'s household member]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Does the person who committed the act[s] of abuse or violence reside as a tenant in the same living unit as [[***name of defendant***]/ [or] [***name of defendant***]'s immediate family member/ [or] [***name of defendant***]'s household member]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, skip question 4 and answer question 5.

4. **Name the person who committed the abuse or violence against [***name of defendant***]/ [or] [***name of defendant***]'s immediate family member/ [or] [***name of defendant***]'s household member]:**

   _____

   Answer question 5.

[5. **Did the person who committed the abuse or violence also threaten, by words or by actions, the physical safety of other tenants, guests, invitees, or licensees?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have

the presiding juror sign and date this form.

6. **Did [*name of plaintiff*] give a three-day notice to [*name of defendant*] requiring [him/her/*nonbinary pronoun*] not to voluntarily permit or consent to the presence on the property of the person who committed the abuse or violence?**

   _____ Yes _____ No

   If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. **After the three-day notice given by [*name of plaintiff*] expired, did [*name of defendant*] voluntarily permit or consent to the presence on the property of the person who committed the abuse or violence?**

   _____ Yes _____ No

   Regardless of your answer to question 7, answer question 8 unless your answer to question 3 above is no. If you answered no to question 3 above, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[8. Does the case involve a residential premises?

_____ Yes _____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[9. Has [*name of defendant*] been found guilty of an unlawful detainer on any grounds other than the act[s] of abuse or violence committed against [him/her/*nonbinary pronoun*]?

_____ Yes _____ No]

Signed: _____
Presiding Juror

Dated: _____

After this verdict form has/After all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New November 2024

Directions for Use

This verdict form is based on CACI No. 4328, *Affirmative Defense—Victim of Abuse*

or Violence, which is based on Code of Civil Procedure section 1161.3. This verdict form also includes questions relevant to a partial eviction remedy under Code of Civil Procedure section 1174.27.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Include the bracketed language in question 1 if the defendant is relying on other forms of "documentation or evidence that reasonably verifies that the abuse or violence occurred" under section 1161.3(a)(2)(D).

Questions 5 through 7 are optional; they should be included only if the exception to the affirmative defense under section 1161.3(b)(2)(B) is at issue. Omit questions 5 through 7 and renumber the questions that follow if it is undisputed that the perpetrator of abuse or violence is a tenant in residence of the same dwelling unit as the tenant, the tenant's immediate family member, or the tenant's household member. If residency of the perpetrator and victim in the same dwelling is disputed, modify the directions after questions 5 through 7 to direct the jury to answer question 8 even if they have answered no to those questions.

Questions 8 and 9 are based on section 1174.27. (See Code Civ. Proc., § 1174.27(a)(1), (e).) Omit questions 8 and 9 if the case does not potentially involve a partial eviction procedure under section 1174.27 unless question 9 applies for an independent reason.

Question 9 may need to be expanded to ask any factual questions underlying the alternative unlawful detainer theory asserted against the defendant. This verdict form is designed to assist the court in determining whether the affirmative defense has been proved by the defendant raising the affirmative defense and whether there is a basis for issuing a partial eviction of the perpetrator-defendant. If the court does not find the defendant raising the affirmative defense guilty of an unlawful detainer on any other grounds but finds another defendant was the perpetrator of the abuse or violence on which the affirmative defense was based and is guilty of an unlawful detainer, then the court must follow the procedures under section 1174.27 for issuing a partial eviction of the perpetrator of abuse or violence.

Section 1174.27(c) provides that *the court* is to "determine whether there is documentation evidencing abuse or violence against the tenant, the tenant's immediate family member, or the tenant's household member." Whether this determination is to be made by the court or the jury is unsettled. The statute also provides that the court shall deny the affirmative defense if the court determines there is not documentation evidencing abuse or violence and shall issue a partial eviction if certain conditions are met, both of which would not be jury functions.

VF-4329–VF-4399. Reserved for Future Use

TRADE SECRETS

4400. Misappropriation of Trade Secrets—Introduction

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/it] [is/was] the [owner/licensee] of [***insert general description of alleged trade secret[s]***].**

[*Name of plaintiff***] claims that [this/these] [***select short term to describe, e.g., information***] [is/are] [a] trade secret[s] and that [***name of defendant***] misappropriated [it/them]. "Misappropriation" means the improper [acquisition/use/ [or] disclosure] of the trade secret[s].**

[*Name of plaintiff***] also claims that [***name of defendant***]'s misappropriation caused [[him/her/***nonbinary pronoun***/it] harm/ [or] [***name of defendant***] to be unjustly enriched].**

[*Name of defendant***] denies [***insert denial of any of the above claims***].**

[[*Name of defendant***] also claims [***insert affirmative defenses***].]**

New December 2007; Revised December 2010

Directions for Use

This instruction is designed to introduce the jury to the issues involved in a case involving the misappropriation of trade secrets under the California Uniform Trade Secrets Act. (See Civ. Code, § 3426.1 et seq.) It should be read before the instructions on the substantive law.

In the first sentence, provide only a general description of the alleged trade secrets. Then in the second sentence, select a short term to identify the items, such as "information," "customer lists," or "computer code." The items that are alleged to be trade secrets will be described with more specificity in CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements*.

Select the appropriate term, "owner" or "licensee," to indicate the plaintiff's interest in the alleged trade secrets. No reported California state court decision has addressed whether a licensee has a sufficient interest to assert a claim of trade secret misappropriation. These instructions take no position on this issue. The court should make a determination whether the plaintiff has the right as a matter of substantive law to maintain a cause of action for misappropriation of trade secrets if that issue is disputed.

Civil Code section 3426.1(b)(1) defines "misappropriation" as improper "[a]cquisition" of a trade secret, and subsection (b)(2) defines it as improper "[d]isclosure or use" of a trade secret. In some cases, the mere acquisition of a trade secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should be instructed only on matters relevant to damage claims, do not select "acquiring" in the second paragraph unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.

To avoid confusion, instruct the jury only on the particular theory of misappropriation applicable under the facts of the case. For example, the jury should not be instructed on misappropriation through "use" if the plaintiff does not assert that the defendant improperly used the trade secrets. Nor should the jury be instructed on a particular type of "use" if that type of "use" is not asserted and supported by the evidence.

In the third paragraph, select the nature of the recovery sought, either damages for harm to the plaintiff or for the defendant's unjust enrichment, or both.

Include the last paragraph if the defendant asserts any affirmative defenses.

Sources and Authority

- Uniform Trade Secrets Act: Definitions. Civil Code section 3426.1.
- "[W]e agree with the federal cases applying California law, which hold that section 3426.7, subdivision (b), preempts common law claims that are 'based on the same nucleus of facts as the misappropriation of trade secrets claim for relief.' Depending on the particular facts pleaded, the statute can operate to preempt the specific common claims asserted here: breach of confidence, interference with contract, and unfair competition." (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 958–959 [90 Cal.Rptr.3d 247], internal citation omitted.)
- " ' "Trade secret law promotes the sharing of knowledge, and the efficient operation of industry; it permits the individual inventor to reap the rewards of his labor by contracting with a company large enough to develop and exploit it." [Citation.]' 'Trade secret law also helps maintain "standards of commercial ethics . . . ." [Citation.] . . . By sanctioning the acquisition, use, and disclosure of another's valuable, proprietary information by improper means, trade secret law minimizes "the inevitable cost to the basic decency of society when one . . . steals from another." [Citation.] In doing so, it recognizes that " 'good faith and honest, fair dealing, is the very life and spirit of the commercial world.' " ' " (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 42 [171 Cal.Rptr.3d 714], internal citations omitted.)
- "[W]e find no support for [a current-ownership] rule in the text of the CUTSA, cases applying it, or legislative history. Nor do we find any evidence of such a rule in patent or copyright law, which defendants have cited by analogy. Defendants have offered no persuasive argument from policy for our adoption of such a rule." (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 986 [103 Cal.Rptr.3d 426].)
- "[T]he only California authority [defendant] cited for the asserted requirement [that a trade-secrets plaintiff must own the trade secret when the action is filed] was the official California pattern jury instructions—whose 'first element,' [defendant] asserted, 'requires the plaintiff to be either the owner or the licensee of the trade secret. See CACI Nos. 4400, 4401.' [Defendant] did not quote the cited instructions—for good reason. The most that can be said in favor of its

reading is that the broader and less specific of the two instructions uses the present tense to refer to the requirement of ownership. That instruction, whose avowed purpose is 'to introduce the jury to the issues involved' in a trade secrets case (Directions for Use for CACI No. 4400), describes the plaintiff as claiming that he 'is' the owner/licensee of the trade secrets underlying the suit. (CACI No. 4400.) The second instruction, which enumerates the actual *elements* of the plaintiff's cause of action, dispels whatever weak whiff of relevance this use of the present tense might have. It requires the plaintiff to prove that he 'own*ed*' or 'was a licensee of' the trade secrets at issue. (CACI No. 4401, italics added.) Given only these instructions to go on, one would suppose that past ownership—i.e., ownership at the time of the alleged misappropriation—is sufficient to establish this element." (*Jasmine Networks, Inc.*, *supra*, 180 Cal.App.4th at p. 997, original italics.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 83

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 10(II)-A ¶ 10:250 (The Rutter Group)

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, § 1.01 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.50 et seq. (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103 (Matthew Bender)

1 Zamore, Business Torts, Ch. 17, *Trade Secrets*, § 17.05 et seq. (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Chs. 1, 2, 6, 12

4401. Misappropriation of Trade Secrets—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] has misappropriated a trade secret. To succeed on this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/was a licensee of] [the following:][***describe each item claimed to be a trade secret that is subject to the misappropriation claim***];**
2. **That [this/these] [***select short term to describe, e.g., information***] [was/were] [a] trade secret[s] at the time of the misappropriation;**
3. **That [***name of defendant***] improperly [acquired/used/ [or] disclosed] the trade secret[s];**
4. **That [[***name of plaintiff***] was harmed/ [or] [***name of defendant***] was unjustly enriched]; and**
5. **That [***name of defendant***]'s [acquisition/use/ [or] disclosure] was a substantial factor in causing [[***name of plaintiff***]'s harm/ [or] [***name of defendant***] to be unjustly enriched].**

New December 2007; Revised December 2010, December 2014

Directions for Use

In element 1, specifically describe all items that are alleged to be the trade secrets that were misappropriated. (See *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 43 [171 Cal.Rptr.3d 714].) If more than one item is alleged, include "the following" and present the items as a list. Then in element 2, select a short term to identify the items, such as "information," "customer lists," or "computer code."

In element 1, select the appropriate term, "owned" or "was a licensee of," to indicate the plaintiff's interest in the alleged trade secrets. No reported California state court decision has addressed whether a licensee has a sufficient interest to assert a claim of trade secret misappropriation. These instructions take no position on this issue. The court should make a determination whether the plaintiff has the right as a matter of substantive law to maintain a cause of action for misappropriation of trade secrets if that issue is disputed.

Read also CACI No. 4402, *"Trade Secret" Defined,* to give the jury guidance on element 2.

Civil Code section 3426.1(b)(1) defines "misappropriation" as improper "[a]cquisition" of a trade secret, and subsection (b)(2) defines it as improper "[d]isclosure or use" of a trade secret. In some cases, the mere acquisition of a trade

secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should be instructed only on matters relevant to damage claims, do not select "acquired" in element 3 or "acquisition" in element 5 unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.

To avoid confusion, instruct the jury only on the particular theory of misappropriation applicable under the facts of the case. For example, the jury should not be instructed on misappropriation through "use" if the plaintiff does not assert that the defendant improperly used the trade secrets. Nor should the jury be instructed on a particular type of "use" if that type of "use" is not asserted and supported by the evidence.

Give also CACI No. 4409, *Remedies for Misappropriation of Trade Secret.*

Sources and Authority

- Uniform Trade Secrets Act: Definitions. Civil Code section 3426.1.
- Trade Secrets Must Be Identified With Reasonable Particularity. Code of Civil Procedure section 2019.210.
- "A trade secret is misappropriated if a person (1) acquires a trade secret knowing or having reason to know that the trade secret has been acquired by 'improper means,' (2) discloses or uses a trade secret the person has acquired by 'improper means' or in violation of a nondisclosure obligation, (3) discloses or uses a trade secret the person knew or should have known was derived from another who had acquired it by improper means or who had a nondisclosure obligation or (4) discloses or uses a trade secret after learning that it is a trade secret but before a material change of position." (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 66 [37 Cal.Rptr.3d 221].)
- "A cause of action for monetary relief under CUTSA may be said to consist of the following elements: (1) possession by the plaintiff of a trade secret; (2) the defendant's misappropriation of the trade secret, meaning its wrongful acquisition, disclosure, or use; and (3) resulting or threatened injury to the plaintiff. The first of these elements is typically the most important, in the sense that until the content and nature of the claimed secret is ascertained, it will likely be impossible to intelligibly analyze the remaining issues." (*Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 220 [109 Cal.Rptr.3d 27], internal citations omitted.)
- "A cause of action for misappropriation of trade secrets requires a plaintiff to show the plaintiff owned the trade secret; at the time of misappropriation, the information was a trade secret; the defendant improperly acquired, used, or disclosed the trade secret; the plaintiff was harmed; and the defendant's acquisition, use, or disclosure of the trade secret was a substantial factor in causing the plaintiff harm." (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* (2018) 28 Cal.App.5th 923, 942 [239 Cal.Rptr.3d 577] [citing CACI].)
- "It is critical to any [UTSA] cause of action—and any defense—that the

information claimed to have been misappropriated be clearly identified. Accordingly, a California trade secrets plaintiff must, prior to commencing discovery, 'identify the trade secret with reasonable particularity.' " (*Altavion, Inc.*, *supra*, 226 Cal.App.4th at p. 43.)

- "We find the trade secret situation more analogous to employment discrimination cases. In those cases, as we have seen, information of the employer's intent is in the hands of the employer, but discovery affords the employee the means to present sufficient evidence to raise an inference of discriminatory intent. The burden of proof remains with the plaintiff, but the defendant must then bear the burden of producing evidence once a prima facie case for the plaintiff is made. [¶] We conclude that the trial court correctly refused the proposed instruction that would have shifted the burden of proof." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1674 [3 Cal.Rptr.3d 279], internal citation omitted.)
- "[W]e find no support for [a current-ownership] rule in the text of the CUTSA, cases applying it, or legislative history. Nor do we find any evidence of such a rule in patent or copyright law, which defendants have cited by analogy. Defendants have offered no persuasive argument from policy for our adoption of such a rule." (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 986 [103 Cal.Rptr.3d 426].)
- "[T]he only California authority [defendant] cited for the asserted requirement [that a trade-secrets plaintiff must own the trade secret when the action is filed] was the official California pattern jury instructions—whose 'first element,' [defendant] asserted, 'requires the plaintiff to be either the owner or the licensee of the trade secret. See CACI Nos. 4400, 4401.' [Defendant] did not quote the cited instructions—for good reason. The most that can be said in favor of its reading is that the broader and less specific of the two instructions uses the present tense to refer to the requirement of ownership. That instruction, whose avowed purpose is 'to introduce the jury to the issues involved' in a trade secrets case (Directions for Use for CACI No. 4400), describes the plaintiff as claiming that he 'is' the owner/licensee of the trade secrets underlying the suit. (CACI No. 4400.) The second instruction, which enumerates the actual *elements* of the plaintiff's cause of action, dispels whatever weak whiff of relevance this use of the present tense might have. It requires the plaintiff to prove that he 'own*ed*' or 'was a licensee of' the trade secrets at issue. (CACI No. 4401, italics added.) Given only these instructions to go on, one would suppose that past ownership—i.e., ownership at the time of the alleged misappropriation—is sufficient to establish this element." (*Jasmine Networks, Inc.*, *supra*, 180 Cal.App.4th at p. 997, original italics.)

Secondary Sources

Gaab and Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 10(II)-A ¶ 10:250 (The Rutter Group)

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, § 1.01 (Matthew Bender)

Zamore, Business Torts, Ch. 17, *Trade Secrets*, § 17.05 et seq. (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.51 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Chs. 1, 2, 6, 10, 11, 12

4402. "Trade Secret" Defined

To prove that the [*select short term to describe, e.g., information***] [was/were] [a] trade secret[s], [***name of plaintiff***] must prove all of the following:**

1. **That the [***e.g., information***] [was/were] secret;**
2. **That the [***e.g., information***] had actual or potential independent economic value because [it was/they were] secret; and**
3. **That [***name of plaintiff***] made reasonable efforts to keep the [***e.g., information***] secret.**

New December 2007; Revised April 2008

Directions for Use

Give also CACI No. 4403, *Secrecy Requirement*, if more explanation of element 1 is needed. Give CACI No. 4412, *"Independent Economic Value" Explained*, if more explanation of element 2 is needed. Give CACI No. 4404, *Reasonable Efforts to Protect Secrecy*, if more explanation of element 3 is needed.

Sources and Authority

- "Trade Secret" Defined. Civil Code section 3426.1(d).
- " 'Trade secrets are a peculiar kind of property. Their only value consists in their being kept private.' Thus, 'the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.' " (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 881 [4 Cal.Rptr.3d 69, 75 P.3d 1], internal citations omitted.)
- "The 'test for a trade secret is whether the matter sought to be protected is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret. [Citation.] . . . [I]n order to qualify as a trade secret, the information "must be secret, and must not be of public knowledge or of a general knowledge in the trade or business." ' " (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* (2018) 28 Cal.App.5th 923, 943 [239 Cal.Rptr.3d 577].)
- "[A]ny information (such as price concessions, trade discounts and rebate incentives) disclosed to [cross-complainant's] customers cannot be considered trade secret or confidential." (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1455 [125 Cal.Rptr.2d 277].)
- " '[A] trade secret . . . has an intrinsic value which is based upon, or at least preserved by, being safeguarded from disclosure.' Public disclosure, that is the

absence of secrecy, is fatal to the existence of a trade secret. 'If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.' A person or entity claiming a trade secret is also required to make 'efforts that are reasonable under the circumstances to maintain its secrecy.' " (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 304 [116 Cal.Rptr.2d 833], internal citations omitted.)

- "The requirement that a customer list must have economic value to qualify as a trade secret has been interpreted to mean that the secrecy of this information provides a business with a 'substantial business advantage.' In this respect, a customer list can be found to have economic value because its disclosure would allow a competitor to direct its sales efforts to those customers who have already shown a willingness to use a unique type of service or product as opposed to a list of people who only might be interested." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1522 [66 Cal.Rptr.2d 731], internal citations omitted.)
- "The sine qua non of a trade secret, then, is the plaintiff's possession of information of a type that can, at the possessor's option, be made known to others, or withheld from them, i.e., kept secret. This is the fundamental difference between a trade secret and a patent. A patent protects an *idea*, i.e., an invention, against appropriation by others. Trade secret law does not protect ideas as such. Indeed a trade secret may consist of something we would not ordinarily consider an *idea* (a conceptual datum) at all, but more a *fact* (an empirical datum), such as a customer's preferences, or the location of a mineral deposit. In either case, the trade secret is not the idea or fact itself, but *information* tending to communicate (disclose) the idea or fact to another. Trade secret law, in short, protects only *the right to control the dissemination of information*." (*Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 220–221 [109 Cal.Rptr.3d 27], original italics.)
- "[I]f a patentable idea is kept secret, the idea itself can constitute information protectable by trade secret law. In that situation, trade secret law protects the inventor's '*right to control the dissemination of information*'—the information being the idea itself—rather than the subsequent use of the novel technology, which is protected by patent law. In other words, trade secret law may be used to sanction the misappropriation of an idea the plaintiff kept secret." (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 55–56 [171 Cal.Rptr.3d 714], original italics, internal citations omitted.)
- "[T]he doctrine has been established that a trade secret can include a system where the elements are in the public domain, but there has been accomplished an effective, successful and valuable integration of the public domain elements and the trade secret gave the claimant a competitive advantage which is protected from misappropriation." (*Altavion, Inc.*, *supra*, 226 Cal.App.4th at p. 48.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, §§ 89, 90

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 10(II)-A ¶ 10:250 (The Rutter Group)

Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.8–4.10

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, § 1.01 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.52 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4][a] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Ch. 1

4403. Secrecy Requirement

The secrecy required to prove that something is a trade secret does not have to be absolute in the sense that no one else in the world possesses the information. It may be disclosed to employees involved in [*name of plaintiff*]'s use of the trade secret as long as they are instructed to keep the information secret. It may also be disclosed to nonemployees if they are obligated to keep the information secret. However, it must not have been generally known to the public or to people who could obtain value from knowing it.

New December 2007

Directions for Use

Read this instruction with CACI No. 4402, *"Trade Secret" Defined,* to give the jury additional guidance on the secrecy requirement of element 1 of that instruction.

Sources and Authority

- " 'Trade secrets are a peculiar kind of property. Their only value consists in their being kept private.' Thus, 'the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.' " (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 881 [4 Cal.Rptr.3d 69, 75 P.3d 1], internal citations omitted.)
- "[T]he test for a trade secret is whether the matter sought to be protected is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret. . . . [I]n order to qualify as a trade secret, the information 'must be secret, and must not be of public knowledge or of a general knowledge in the trade or business.' " (*DVD Copy Control Assn., Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 251 [10 Cal.Rptr.3d 185], internal citations omitted.)
- "The secrecy requirement is generally treated as a relative concept and requires a fact-intensive analysis. Widespread, anonymous publication of the information over the Internet may destroy its status as a trade secret. The concern is whether the information has retained its value to the creator in spite of the publication." (*DVD Copy Control Assn., Inc., supra,* 116 Cal.App.4th at p. 251, internal citations omitted.)
- "[A]ny information (such as price concessions, trade discounts and rebate incentives) disclosed to [cross-complainant's] customers cannot be considered trade secret or confidential." (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1455 [125 Cal.Rptr.2d 277].)
- " '[A] trade secret . . . has an intrinsic value which is based upon, or at least

preserved by, being safeguarded from disclosure.' Public disclosure, that is the absence of secrecy, is fatal to the existence of a trade secret. 'If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.' A person or entity claiming a trade secret is also required to make 'efforts that are reasonable under the circumstances to maintain its secrecy.' " (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 304 [116 Cal.Rptr.2d 833], internal citations omitted.)

- " '[R]easonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on 'need to know basis,' and controlling plant access.' " (*Courtesy Temporary Service, Inc. v. Camacho* (1990) 222 Cal.App.3d 1278, 1288 [272 Cal.Rptr. 352].)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, §§ 89, 90

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 10(II)-A ¶ 10:250 (The Rutter Group)

Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.2–4.10

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, § 1.03 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.52 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) § 1.03(3), (4)

4404. Reasonable Efforts to Protect Secrecy

To establish that the [*select short term to describe, e.g., information***] [is/are] [a] trade secret[s], [***name of plaintiff***] must prove that [he/she/***nonbinary pronoun***/it] made reasonable efforts under the circumstances to keep it secret. "Reasonable efforts" are the efforts that would be made by a reasonable [person/business] in the same situation and having the same knowledge and resources as [***name of plaintiff***], exercising due care to protect important information of the same kind. [This requirement applies separately to each item that [***name of plaintiff***] claims to be a trade secret.]**

In determining whether or not [*name of plaintiff***] made reasonable efforts to keep the [***e.g., information***] secret, you should consider all of the facts and circumstances. Among the factors you may consider are the following:**

[a. Whether documents or computer files containing the [*e.g., information***] were marked with confidentiality warnings;]**

[b. Whether [*name of plaintiff***] instructed [his/her/***nonbinary pronoun***/its] employees to treat the [***e.g., information***] as confidential;]**

[c. Whether [*name of plaintiff***] restricted access to the [***e.g., information***] to persons who had a business reason to know the information;]**

[d. Whether [*name of plaintiff***] kept the [***e.g., information***] in a restricted or secured area;]**

[e. Whether [*name of plaintiff***] required employees or others with access to the [***e.g., information***] to sign confidentiality or nondisclosure agreements;]**

[f. Whether [*name of plaintiff***] took any action to protect the specific [***e.g., information***], or whether it relied on general measures taken to protect its business information or assets;]**

[g. The extent to which any general measures taken by [*name of plaintiff***] would prevent the unauthorized disclosure of the [***e.g., information***];]**

[h. Whether there were other reasonable measures available to [*name of plaintiff***] that [he/she/***nonbinary pronoun***/it] did not take;]**

[i. *Specify other factor(s).***]**

The presence or absence of any one or more of these factors is not necessarily determinative.

New December 2007

Directions for Use

Give this instruction with CACI No. 4402, *"Trade Secret" Defined*, to guide the jury with regard to element 3 of that instruction, that the plaintiff made reasonable efforts to keep the information secret. Read only the factors supported by the evidence in the case. Use factor i to present additional factors.

Sources and Authority

- "Reasonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on 'need to know basis,' and controlling plant access. [¶] . . . Requiring employees to sign confidentiality agreements is a reasonable step to ensure secrecy." (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1454 [125 Cal.Rptr.2d 277, internal citations omitted.)
- "A person or entity claiming a trade secret is also required to make 'efforts that are reasonable under the circumstances to maintain its secrecy.' A leading treatise has collected the cases of successful and unsuccessful claims of secrecy protection; among the factors repeatedly noted are restricting access and physical segregation of the information, confidentiality agreements with employees, and marking documents with warnings or reminders of confidentiality." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 304 [116 Cal.Rptr.2d 833], referring to Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.9–4.10.)
- "In addition to possessing actual or potential economic value, the other part of the definition of a trade secret is that the information must have been protected by 'efforts that are reasonable under the circumstances to maintain its secrecy.' [W]hether a party claiming a trade secret undertook reasonable efforts to maintain secrecy is a question of fact, and it may be implicit in a determination that the information does not qualify as a trade secret, also a question of fact." (*In re Providian Credit Card Cases, supra,* 96 Cal.App.4th at p. 306, internal citations omitted.)

Secondary Sources

Advising California Employers and Employees (Cont.Ed.Bar) Ch. 11, Reasonable Effort to Maintain Secrecy, § 11.6

Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.9–4.10

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, §§ 1.03–1.05 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.52 (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) § 1.03(4)

4405. Misappropriation by Acquisition

[*Name of defendant***] misappropriated [***name of plaintiff***]'s trade secret[s] by acquisition if [***name of defendant***] acquired the trade secret[s] and knew or had reason to know that [he/she/***nonbinary pronoun***/it/[***name of third party***]] used improper means to acquire [it/them].**

New December 2007

Directions for Use

Read this instruction with CACI No. 4401*, Misappropriation of Trade Secrets—Essential Factual Elements,* if the plaintiff claims that the defendant's acquisition of the information alleged to be a trade secret is a misappropriation. Give also CACI No. 4408, *Improper Means of Acquiring Trade Secret*.

Civil Code section 3426.1(b)(1) defines "misappropriation" as improper "[a]cquisition" of a trade secret, and subsection (b)(2) defines it as improper "[d]isclosure or use" of a trade secret. In some cases, the mere acquisition of a trade secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should only be instructed on matters relevant to damage claims, this instruction should not be given unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.

Sources and Authority

- "Misappropriation" Defined. Civil Code section 3426.1(b)(1).
- "Defendants . . . obtained these secrets improperly. Their tortious acts resulted from a breach of confidence by [defendant] in copying or stealing plans, designs and other documents related to [plaintiff]'s products which defendants themselves wanted to produce in competition with [plaintiff]. The protection which is extended to trade secrets fundamentally rests upon the theory that they are improperly acquired by a defendant, usually through theft or a breach of confidence." (*Vacco Indus. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 50 [6 Cal.Rptr.2d 602].)
- "One does not ordinarily 'acquire' a thing inadvertently; the term implies conduct directed to that objective. The choice of that term over 'receive' suggests that inadvertently coming into possession of a trade secret will not constitute acquisition. Thus one who passively receives a trade secret, but neither discloses nor uses it, would not be guilty of misappropriation. We need not decide the outer limits of acquisition as contemplated by CUTSA, however, for there is no suggestion here of acquisition even in the broadest sense, i.e., that [defendant] ever came into possession of the source code constituting the claimed trade secrets. Indeed [plaintiff] does not directly argue that [defendant] acquired the trade secrets at issue but only that, under the terms of the statute, it

could have done so without itself having 'knowledge' of them. We doubt the soundness of this suggestion, but assuming it is correct, it remains beside the point unless [defendant] came into possession of the secret. Since there is no basis to find that it did, the mental state required for actionable acquisition appears to be academic." (*Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 223 [109 Cal.Rptr.3d 27], internal citations omitted.)

Secondary Sources

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.53[1][a] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4][c] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Chs. 2, 6, 12

4406. Misappropriation by Disclosure

[*Name of defendant***] misappropriated [***name of plaintiff***]'s trade secret[s] by disclosure if [***name of defendant***]**

1. **disclosed [it/them] without [***name of plaintiff***]'s consent; and**
2. **[did any of the following:]**

   [*insert one or more of the following:***]**

   [acquired knowledge of the trade secret[s] by improper means][./; or]

   [at the time of disclosure, knew or had reason to know that [his/her/*nonbinary pronoun***/its] knowledge of [***name of plaintiff***]'s trade secret[s] came from or through [***name of third party***], and that [***name of third party***] had previously acquired the trade secret[s] by improper means][./; or]**

   [at the time of disclosure, knew or had reason to know that [his/her/*nonbinary pronoun***/its] knowledge of [***name of plaintiff***]'s trade secret[s] was acquired [***insert circumstances giving rise to duty to maintain secrecy***], which created a duty to keep the [***select short term to describe, e.g., information***] secret][./; or]**

   [at the time of disclosure, knew or had reason to know that [his/her/*nonbinary pronoun***/its] knowledge of [***name of plaintiff***]'s trade secret[s] came from or through [***name of third party***], and that [***name of third party***] had a duty to [***name of plaintiff***] to keep the [***e.g., information***] secret][./; or]**

   [before a material change of [his/her/*nonbinary pronoun***/its] position, knew or had reason to know that [it was/they were] [a] trade secret[s] and that knowledge of [it/them] had been acquired by accident or mistake.]**

New December 2007; Revised December 2010

Directions for Use

Read this instruction with CACI No. 4401*, Misappropriation of Trade Secrets—Essential Factual Elements,* if the plaintiff claims that the defendant's disclosure of the information alleged to be a trade secret is a misappropriation.

If consent is at issue, CACI No. 1302, *Consent Explained,* and CACI No. 1303, *Invalid Consent,* may also be given.

In element 2, select the applicable statutory act(s) alleged to constitute misappropriation by disclosure. (See Civ. Code, § 3624.1(b)(2).) If only one act is

selected, omit the words "did any of the following."

If either of the first two acts constituting misappropriation by disclosure is alleged, give also CACI No. 4408, *Improper Means of Acquiring Trade Secret*.

Sources and Authority

- "Misappropriation" Defined. Civil Code section 3426.1(b)(2).
- Constructive Notice. Civil Code section 19.
- "The fact that [defendant]'s postings were not of the 'entire secret,' and included only portions of courses, does not mean that [defendant]'s disclosures are not misappropriations. While previous partial disclosures arguably made public only those parts disclosed, [defendant]'s partial disclosures of non-public portions of the secrets may themselves be actionable because they constitute 'disclosure . . . without . . . consent by a person who . . . knew or had reason to know that his . . . knowledge of the trade secret was . . . [either] derived from or through a person who had utilized improper means to acquire it [or] acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.' " (*Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.* (N.D. Cal. 1995) 923 F.Supp. 1231, 1257, fn. 31.)
- "Under the UTSA, simple disclosure or use may suffice to create liability. It is no longer necessary, if it ever was, to prove that the purpose to which the acquired information is put is outweighed by the interests of the trade secret holder or that use of a trade secret cannot be prohibited if it is infeasible to do so." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1527 [66 Cal.Rptr.2d 731].)
- "[N]othing in the UTSA requires that the defendant gain any advantage from the disclosure; it is sufficient to show 'use' by disclosure of a trade secret with actual or constructive knowledge that the secret was acquired under circumstances giving rise to a duty to maintain its secrecy." (*Religious Tech. Ctr., supra,* 923 F.Supp. at p. 1257, fn. 31.)
- "Liability under CUTSA is not dependent on the defendant's 'comprehension' of the trade secret but does require 'knowledge' of it." (*Silvaco Data Systems v. Intel Corp*. (2010) 184 Cal.App.4th 210, 229 [109 Cal.Rptr.3d 27].)
- " 'Knowledge,' of course, is '[t]he fact or condition of knowing,' . . . and in this context, '[t]he fact of knowing a thing, state, etc. . . .' (8 Oxford English Dict., *supra*, p. 517.) To 'know' a thing is to have information of that thing at one's command, in one's possession, subject to study, disclosure, and exploitation. To say that one 'knows' a fact is also to say that one *possesses information* of that fact. Thus, although the Restatement Third of Unfair Competition does not identify knowledge of the trade secret as an element of a trade secrets cause of action, the accompanying comments make it clear that liability presupposes the defendant's 'possession' of misappropriated information." (*Silvaco*, *supra*, 184 Cal.App.4th at pp. 225–226, original italics.)
- "The record contains no evidence that [defendant] ever possessed or had

knowledge of any source code connected with either [software product]. So far as the record shows, [defendant] never had access to that code, could not disclose any part of it to anyone else, and had no way of using it to write or improve code of its own. [Defendant] appears to have been in substantially the same position as the customer in the pie shop who is accused of stealing the secret recipe because he bought a pie with knowledge that a rival baker had accused the seller of using the rival's stolen recipe. The customer does not, by buying or eating the pie, gain knowledge of the recipe used to make it." (*Silvaco*, *supra*, 184 Cal.App.4th at p. 226.)

- "When a competitor hires a former employee of plaintiff who is likely to disclose trade secrets, '[i]t is a question of fact whether the competitor had constructive notice of the plaintiff's right in the secret.' " (*Ralph Andrews Productions, Inc. v. Paramount Pictures Corp.* (1990) 222 Cal.App.3d 676, 682–683 [271 Cal.Rptr. 797], internal citation omitted.)

Secondary Sources

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.53[1][b] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4][c] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Chs. 2, 6, 12

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 10(II)-A ¶ 10:250 (The Rutter Group)

4407. Misappropriation by Use

[*Name of defendant***] misappropriated [***name of plaintiff***]'s trade secret[s] by use if [***name of defendant***]**

1. **used [it/them] without [***name of plaintiff***]'s consent; and**
2. **[did any of the following:]**

   [*insert one or more of the following:***]**

   [acquired knowledge of the trade secret[s] by improper means][./; or]

   [at the time of use, knew or had reason to know that [his/her/ *nonbinary pronoun***/its] knowledge of [***name of plaintiff***]'s trade secret[s] came from or through [***name of third party***], and that [***name of third party***] had previously acquired the trade secret[s] by improper means][./; or]**

   [at the time of use, knew or had reason to know that [his/her/ *nonbinary pronoun***/its] knowledge of [***name of plaintiff***]'s trade secret[s] was acquired under circumstances creating a legal obligation to limit use of the [***select short term to describe, e.g., information***]][./; or]**

   [at the time of use, knew or had reason to know that [his/her/ *nonbinary pronoun***/its] knowledge of [***name of plaintiff***]'s trade secret[s] came from or through [***name of third party***], and that [***name of third party***] had a duty to [***name of plaintiff***] to limit use of the [***e.g., information***]][./; or]**

   [before a material change of [his/her/*nonbinary pronoun***/its] position, knew or had reason to know that [it was/they were] [a] trade secret[s] and that knowledge of [it/them] had been acquired by accident or mistake.]**

New December 2007; Revised December 2010

Directions for Use

Read this instruction with CACI No. 4401*, Misappropriation of Trade Secrets—Essential Factual Elements,* if the plaintiff claims that the defendant's use of the information alleged to be a trade secret is a misappropriation.

If consent is at issue, CACI No. 1302, *Consent Explained,* and CACI No. 1303, *Invalid Consent,* may also be given.

In element 2, select the applicable statutory act(s) alleged to constitute misappropriation by use. (See Civ. Code, § 3624.1(b)(2).) If only one act is selected,

omit the words "did any of the following."

If either of the first two acts constituting misappropriation by disclosure is alleged, give also CACI No. 4408, *Improper Means of Acquiring Trade Secret*.

Sources and Authority

- "Misapproriation" Defined. Civil Code section 3426.1(b)(2).
- Constructive Notice. Civil Code section 19.
- "Under the plain terms of the Uniform Trade Secrets Act, defendants may be personally liable if: they used, through the corporation, [plaintiff]'s trade secrets; at the time of the use of the confidential information they knew or had reason to know that knowledge of the trade secrets was derived from or through a person who had improperly acquired the knowledge, or the secrets were obtained by a person who owed a duty to plaintiffs to maintain the secrecy. Employing the confidential information in manufacturing, production, research or development, marketing goods that embody the trade secret, or soliciting customers through the use of trade secret information, all constitute use. Use of a trade secret without knowledge it was acquired by improper means does not subject a person to liability unless the person receives notice that its use of the information is wrongful." (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1383 [93 Cal.Rptr.2d 663], internal citations omitted.)
- "Under the UTSA, simple disclosure or use may suffice to create liability. It is no longer necessary, if it ever was, to prove that the purpose to which the acquired information is put is outweighed by the interests of the trade secret holder or that use of a trade secret cannot be prohibited if it is infeasible to do so." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1527 [66 Cal.Rptr.2d 731].)
- "One clearly engages in the 'use' of a secret, in the ordinary sense, when one directly exploits it for his own advantage, e.g., by incorporating it into his own manufacturing technique or product. But 'use' in the ordinary sense is not present when the conduct consists entirely of possessing, and taking advantage of, something that was made using the secret. One who bakes a pie from a recipe certainly engages in the 'use' of the latter; but one who eats the pie does not, by virtue of that act alone, make 'use' of the recipe in any ordinary sense, and this is true even if the baker is accused of stealing the recipe from a competitor, and the diner knows of that accusation. Yet this is substantially the same situation as when one runs software that was compiled from allegedly stolen source code. The source code is the recipe from which the pie (executable program) is baked (compiled). Nor is the analogy weakened by the fact that a diner is not ordinarily said to make 'use' of something he eats. His metabolism may be said to do so, or the analogy may be adjusted to replace the pie with an instrument, such as a stopwatch. A coach who employs the latter to time a race certainly makes 'use' of it, but only a sophist could bring himself to say that coach 'uses' trade secrets involved in the manufacture of the watch." (*Silvaco*

Data Systems v. Intel Corp. (2010) 184 Cal.App.4th 210, 224 [109 Cal.Rptr.3d 27].)

- "Liability under CUTSA is not dependent on the defendant's 'comprehension' of the trade secret but does require 'knowledge' of it. So far as the record shows, [defendant] did not know and had no way to get the information constituting the trade secret. It therefore could not, within the contemplation of the act, 'use' that information." (*Silvaco Data Systems*, *supra*, 184 Cal.App.4th at p. 229.)
- " 'Knowledge,' of course, is '[t]he fact or condition of knowing,' . . . and in this context, '[t]he fact of knowing a thing, state, etc. . . .' (8 Oxford English Dict., *supra*, p. 517.) To 'know' a thing is to have information of that thing at one's command, in one's possession, subject to study, disclosure, and exploitation. To say that one 'knows' a fact is also to say that one *possesses information* of that fact. Thus, although the Restatement Third of Unfair Competition does not identify knowledge of the trade secret as an element of a trade secrets cause of action, the accompanying comments make it clear that liability presupposes the defendant's 'possession' of misappropriated information." (*Silvaco Data Systems*, *supra*, 184 Cal.App.4th at pp. 225–226, original italics.)
- "When a competitor hires a former employee of plaintiff who is likely to disclose trade secrets, '[i]t is a question of fact whether the competitor had constructive notice of the plaintiff's right in the secret.' " (*Ralph Andrews Productions, Inc. v. Paramount Pictures Corp.* (1990) 222 Cal.App.3d 676, 682–683 [271 Cal.Rptr. 797], internal citation omitted.)
- "Our Supreme Court has previously distinguished solicitation—which is actionable—from announcing a job change—which is not: 'Merely informing customers of one's former employer of a change of employment, without more, is not solicitation. Neither does the willingness to discuss business upon invitation of another party constitute solicitation on the part of the invitee. Equity will not enjoin a former employee from receiving business from the customers of his former employer, even though the circumstances be such that he should be prohibited from soliciting such business.' " (*Hilb v. Robb* (1995) 33 Cal.App.4th 1812, 1821 [39 Cal.Rptr. 2d 887], internal citation omitted; but see *Morlife, Inc., supra,* 56 Cal.App.4th at p. 1527, fn. 8 ["we need not decide whether the 'professional announcement' exception . . . has continued vitality in light of the expansive definition of misappropriation under the UTSA"].)
- "[T]o prove misappropriation of a trade secret under the UTSA, a plaintiff must establish (among other things) that the defendant improperly 'used' the plaintiff's trade secret. Thus, under Evidence Code sections 500 and 520, the plaintiff bears the burden of proof on that issue, both at the outset and during trial." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1668 [3 Cal.Rptr.3d 279], internal citation omitted.)
- "[I]nformation relative to customers (e.g., their identities, locations, and individual preferences), obtained by a former employee in his contacts with them during his employment, may amount to 'trade secrets' which will warrant his

being enjoined from exploitation or disclosure after leaving the employment. [¶] It is equally clear, however, that the proscriptions inhibiting the ex-employee reach only his use of such information, not to his mere possession or knowledge of it." (*Golden State Linen Service, Inc. v. Vidalin* (1977) 69 Cal.App.3d 1, 7–8 [137 Cal.Rptr. 807], internal citations omitted.)

- "Since these 'Marks' likely encompass any trade secrets, it is reasonable to conclude that one party's use of the trade secrets that affects the other party's rights in the mark would constitute the misappropriation of the trade secrets 'of another.' " (*Morton v. Rank Am., Inc.* (C.D. Cal. 1993) 812 F.Supp. 1062, 1074 [one can misappropriate trade secret jointly owned with another].)

Secondary Sources

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.53[1][b] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4][c] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Chs. 2, 6, 12

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 10(II)-A ¶ 10:250 (The Rutter Group)

4408. Improper Means of Acquiring Trade Secret

Improper means of acquiring a trade secret or knowledge of a trade secret include, but are not limited to, [theft/bribery/misrepresentation/ breach or inducing a breach of a duty to maintain secrecy/ [or] wiretapping, electronic eavesdropping, [or] [*insert other means of espionage***]].**

[However, it is not improper to acquire a trade secret or knowledge of the trade secret by [any of the following]:

[1. Independent efforts to invent or discover the information;]

[2. Reverse engineering; that is, examining or testing a product to determine how it works, by a person who has a right to possess the product;]

[3. Obtaining the information as a result of a license agreement with the owner of the information;]

[4. Observing the information in public use or on public display;] [or]

[5. Obtaining the information from published literature, such as trade journals, reference books, the Internet, or other publicly available sources.]]

New December 2007

Directions for Use

In the first paragraph, include only those statutory examples of "improper means" supported by the evidence. (See Civ. Code, § 3426.1(a).) The option for "wiretapping, eavesdropping, [or] [*insert other means of espionage*]" expresses the statutory term "espionage."

Include the optional last paragraph if any of those methods of obtaining the information are supported by the evidence. Omit any methods that are not at issue. If only one is at issue, omit "any of the following."

Sources and Authority

- "Improper Means" Defined. Civil Code section 3426.1(a).
- Electronic Eavesdropping. Penal Code section 630.
- "The Restatement of Torts, Section 757, Comment (f), notes: 'A complete catalogue of improper means is not possible,' but Section 1(1) includes a partial listing. Proper means include: 1. Discovery by independent invention; 2. Discovery by "reverse engineering," that is, by starting with the known product and working backward to find the method by which it was developed. The

acquisition of the known product must of course, also be by a fair and honest means, such as purchase of the item on the open market for reverse engineering to be lawful; 3. Discovery under a license from the owner of the trade secret; 4. Observation of the item in public use or on public display; 5. Obtaining the trade secret from published literature. . . . [T]he assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation. Information is readily ascertainable if it is available in trade journals, reference books, or published materials." (Civ. Code, § 3426.1, Legis. Comm. Comment (Senate), 1984 Addition.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 83

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 10(II)-A ¶ 10:250 (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.53[1][b] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4][b] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) § 2.01(D)

4409. Remedies for Misappropriation of Trade Secret

If [*name of plaintiff*] proves that [*name of defendant*] misappropriated [his/her/*nonbinary pronoun*/its] trade secret[s], then [*name of plaintiff*] is entitled to recover damages if the misappropriation caused [[*name of plaintiff*] to suffer an actual loss/ [or] [*name of defendant*] to be unjustly enriched].

[If [*name of defendant*]'s misappropriation did not cause [[*name of plaintiff*] to suffer an actual loss/ [or] [*name of defendant*] to be unjustly enriched], [*name of plaintiff*] may still be entitled to a reasonable royalty for no longer than the period of time the use could have been prohibited. However, I will calculate the amount of any royalty.]

New December 2007

Directions for Use

Give this instruction with CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements*, in all cases.

Select the nature of the recovery sought; either for the plaintiff's actual loss or for the defendant's unjust enrichment, or both. If the plaintiff's claim of actual injury or loss is based on lost profits, give CACI No. 3903N, *Lost Profits (Economic Damage)*. If unjust enrichment is alleged, give CACI No. 4410, *Unjust Enrichment*.

If neither actual loss nor unjust enrichment is provable, Civil Code section 3426.3(b) provides for a third, alternate remedy: a reasonable royalty for no longer than the period of time the use could have been prohibited. Both the statute and case law indicate that the question of a reasonable royalty should not be presented to the jury. (See Civ. Code, § 3426.3(b) [*the court* may order the payment of a reasonable royalty]; *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 628 [12 Cal.Rptr.2d 741]; see also Civ. Code, § 3426.2(b) [court may issue an injunction that conditions future of a trade secret on payment of a reasonable royalty].) However, no reported California state court case has directly held that "reasonable royalty" issues should not be presented to the jury. (But see *Unilogic, Inc., supra,* 10 Cal.App.4th at p. 627.) Include the optional second paragraph if the court wants to advise the jury that even if it finds that the plaintiff suffered no actual loss and that the defendant was not unjustly enriched, the plaintiff may still be entitled to some recovery.

For simplicity, this instruction uses the term "damages" to refer to both actual loss and unjust enrichment, even though, strictly speaking, unjust enrichment may be considered a form of restitution rather than damages.

Sources and Authority

- Remedies for Misappropriation of Trade Secret. Civil Code section 3426.3.

- "Under subdivision (a), a complainant may recover damages for the actual loss caused by misappropriation, as well as for any unjust enrichment not taken into account in computing actual loss damages. Subdivision (b) provides for an alternative remedy of the payment of royalties from future profits where 'neither damages nor unjust enrichment caused by misappropriation [is] provable.' " (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 61 [37 Cal.Rptr.3d 221].)
- "[B]ased on the plain language of the statute, the Court—not the jury—determines if and in what amount a royalty should be awarded. See Cal. Civ. Code section 3416.3(b) ('the Court may order payment of a reasonable royalty')." (*FAS Techs. v. Dainippon Screen Mfg.* (N.D. Cal. 2001) 2001 U.S. Dist. LEXIS 15444, **9–10.)
- "To adopt a reasonable royalty as the measure of damages is to adopt and interpret, as well as may be, the fiction that a license was to be granted at the time of beginning the infringement, and then to determine what the license price should have been. In effect, the court assumes the existence *ab initio* of, and declares the *equitable* terms of, a supposititious license, and does this *nunc pro tunc*; it creates and applies retrospectively a compulsory license." (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 68 [171 Cal.Rptr.3d 714], original italics.)
- "Nor was it necessary to submit the liability issue to the jury in order to allow the trial court thereafter to determine a reasonable royalty or to impose an injunction. Just as [cross complainant] presented no evidence of the degree of [cross defendant]'s enrichment, [cross complainant] likewise presented no evidence that would allow the court to determine what royalty, if any, would be reasonable under the circumstances." (*Unilogic, Inc. supra,* 10 Cal.App.4th at p. 628.)
- "It is settled that, in fashioning a pecuniary remedy under the CUTSA for past use of a misappropriated trade secret, the trial court may order a reasonable royalty only where 'neither actual damages to the holder of the trade secret nor unjust enrichment to the user is provable.' 'California law differs on this point from both the [Uniform Act] and Federal patent law, neither of which require[s] actual damages and unjust enrichment to be unprovable before a reasonable royalty may be imposed.' " (*Ajaxo Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1308 [115 Cal.Rptr.3d 168], internal citations omitted.)
- "[W]here a defendant has not realized a profit or other calculable benefit as a result of his or her misappropriation of a trade secret, unjust enrichment is not provable within the meaning of section 3426.3, subdivision (b), whether the lack of benefit is determined as a matter of law or as a matter of fact. To hold otherwise would place the risk of loss on the wronged plaintiff, thereby discouraging innovation and potentially encouraging corporate thievery where anticipated profits might be minimal but other valuable but nonmeasureable benefits could accrue." (*Ajaxo Inc.*, *supra*, 187 Cal.App.4th at p. 1313 [jury's finding that defendant did not profit from its misappropriation of trade secrets

means that unjust enrichment is not "provable" within the meaning of section 3426.3(b)].)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, §§ 92–93

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 10(II)-E ¶¶ 10:370–10:372 (The Rutter Group)

1 Milgrim on Trade Secrets, Ch. 15, *Trial Considerations*, § 15.02 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.54 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[6], [7] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Ch. 11

4410. Unjust Enrichment

[*Name of defendant*] was unjustly enriched if [his/her/*nonbinary pronoun*/its] misappropriation of [*name of plaintiff*]'s trade secret[s] caused [*name of defendant*] to receive a benefit that [he/she/*nonbinary pronoun*/it] otherwise would not have achieved.

To decide the amount of any unjust enrichment, first determine the value of [*name of defendant*]'s benefit that would not have been achieved except for [his/her/*nonbinary pronoun*/its] misappropriation. Then subtract from that amount [*name of defendant*]'s reasonable expenses[, including the value of the [*specify categories of expenses in evidence, such as labor, materials, rents, interest on invested capital*]]. [In calculating the amount of any unjust enrichment, do not take into account any amount that you included in determining any amount of damages for [*name of plaintiff*]'s actual loss.]

New December 2007

Directions for Use

Give this instruction with CACI No. 4409, *Remedies for Misappropriation of Trade Secrets*, if unjust enrichment is alleged and supported by the evidence. If it would be helpful to the jury, specify the categories of expenses to be allowed to the defendant. Include the last sentence if both actual loss and unjust enrichment are alleged.

Sources and Authority

- Remedies for Misappropriation of Trade Secret. Civil Code section 3426.3.
- "In general, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.' (Rest., Restitution, § 1.) 'Ordinarily the benefit to the one and the loss to the other are co-extensive, and the result . . . is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered.' [¶] 'In other situations, a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched.' " (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 627–628 [12 Cal.Rptr.2d 741].)
- "A defendant's unjust enrichment is typically measured by the defendant's profits flowing from the misappropriation. A defendant's profits often represent profits the plaintiff would otherwise have earned. Where the plaintiff's loss does not correlate directly with the misappropriator's benefit, . . . the problem becomes

more complex. There is no standard formula to measure it. A defendant's unjust enrichment might be calculated based upon cost savings or increased productivity resulting from use of the secret. Increased market share is another way to measure the benefit to the defendant. Recovery is not prohibited just because the benefit cannot be precisely measured. But like any other pecuniary remedy, there must be some reasonable basis for the computation." (*Ajaxo Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1305 [115 Cal.Rptr.3d 168], footnote and internal citations omitted.)

- "[W]here a defendant has not realized a profit or other calculable benefit as a result of his or her misappropriation of a trade secret, unjust enrichment is not provable within the meaning of section 3426.3, subdivision (b), whether the lack of benefit is determined as a matter of law or as a matter of fact." (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 66 [171 Cal.Rptr.3d 714].)
- "Another crucial point is that unjust enrichment, as the phrase is used here, is, in effect, synonymous with restitution. ' " 'The phrase "unjust enrichment" is used in law to characterize the result or effect of a failure to make restitution of or for property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor.' " ' " (*Ajaxo Inc.*, *supra*, 187 Cal.App.4th at p. 1305, internal citations omitted.)
- Restatement of Restitution, section 1, comment a, states: "A person is enriched if he has received a benefit (see Comment b). A person is unjustly enriched if the retention of the benefit would be unjust (see Comment c)."
- Restatement of Restitution, section 1, comment b, states: "*What constitutes a benefit*. A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word 'benefit,' therefore, denotes any form of advantage. The advantage for which a person ordinarily must pay is pecuniary advantage; it is not, however, necessarily so limited, as where a physician attends an insensible person who is saved subsequent pain or who receives thereby a greater chance of living."
- Restatement of Restitution, section 1, comment c, states: "*Unjust retention of benefit*. Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor. Thus, one who improves his own land ordinarily benefits his neighbors to some extent, and one who makes a gift or voluntarily pays money which he knows he does not owe confers a benefit; in neither case is he entitled to restitution. The Restatement of this Subject states the rules by which it is determined whether or not it is considered to be just to require restitution."

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 93

1 Milgrim on Trade Secrets, Ch. 13, *Issues Prior to Commencement of Action*, § 13.03[2][a] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.54[4] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[7][b] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) § 11.03

4411. Punitive Damages for Willful and Malicious Misappropriation

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If you decide that [*name of defendant*]'s misappropriation caused [*name of plaintiff*] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed [*name of plaintiff*] and to discourage similar conduct in the future.

In order to recover punitive damages, [*name of plaintiff*] must prove [by clear and convincing evidence] that [*name of defendant*] acted willfully and maliciously. You must determine whether [*name of defendant*] acted willfully and maliciously, but you will not be asked to determine the amount of any punitive damages. I will calculate the amount later.

"Willfully" means that [*name of defendant*] acted with a purpose or willingness to commit the act or engage in the conduct in question, and the conduct was not reasonable under the circumstances at the time and was not undertaken in good faith.

"Maliciously" means that [*name of defendant*] acted with an intent to cause injury, or that [*name of defendant*]'s conduct was despicable and was done with a willful and knowing disregard for the rights of others. "Despicable conduct" is conduct so vile, base, or wretched that it would be looked down on and despised by ordinary decent people. [*Name of defendant*] acted with knowing disregard if [he/she/*nonbinary pronoun*/it] was aware of the probable consequences of [his/her/*nonbinary pronoun*/its] conduct and deliberately failed to avoid those consequences.

New December 2007

Directions for Use

Give this instruction if there is evidence that the defendant acted willfully and maliciously, so as to support an award of punitive damages. (See Civ. Code, § 3426.3(c).)

No reported California state court case has addressed whether the jury or the court should decide whether any misappropriation was "willful and malicious," and if so, whether the finding must be made by clear and convincing evidence rather than a preponderance of the evidence. In *Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 66 [37 Cal.Rptr.3d 221], the court affirmed a jury's finding by clear and convincing evidence that the defendant's misappropriation was willful and malicious. If the court decides to require the "clear and convincing" standard, include the bracketed language in the first paragraph and also give CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Once the jury finds "willful and malicious" conduct, it appears that the court should

decide the amount of punitive damages. (See *Robert L. Cloud & Assocs. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1151, fn. 8 [82 Cal.Rptr.2d 143].). This would be consistent with the Uniform Trade Secrets Act, on which the California Uniform Trade Secrets Act is based. (See Uniform Trade Secrets Act § 3, 2005 com. ["This provision follows federal patent law in leaving discretionary trebling to the judge even though there may be a jury, compare 35 U.S.C. Section 284 (1976)"].)

Sources and Authority

- Exemplary Damages for Willful and Malicious Misappropriation. Civil Code section 3426.3(c).
- Attorney Fees and Costs. Civil Code section 3426.4.
- "The court instructed the jury that 'willful' means 'a purpose or willingness to commit the act or engage in the conduct in question, and the conduct was not reasonable under the circumstances then present and was not undertaken in good faith.' Further, the court instructed the jury that 'malice' means 'conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights of others when the defendant is aware [of] the probable consequences of its conduct and willfully and deliberately fails to avoid those consequences. Despicable conduct is conduct which is so vile and wretched that it would be looked down upon and despised by ordinary decent people.' In addition, the court instructed the jury that a finding of willful and malicious misappropriation must be supported by clear and convincing evidence. [¶] Our Supreme Court has recognized that malice may be proven either expressly by direct evidence probative of the existence of hatred or ill will, or by implication from indirect evidence from which the jury may draw inferences." (*Ajaxo Inc., supra,* 135 Cal.App.4th at pp. 66–67, internal citations and footnote omitted.)
- "The limitation on punitive damages under the UTSA to twice the compensatory damages does not create an equivalency between an award of punitive damages under the UTSA and an award of treble damages under another statutory scheme. . . . While an award of treble damages is equally punitive in its effect, the computation of the penalty is strictly mechanical. In contrast, an award of punitive damages under the UTSA is subject to no fixed standard; the statute merely sets a cap on the amount of the award. The trial court retains wide discretion to set the amount anywhere between zero and two times the actual loss. (§ 3426.3, subd. (c).) Thus, evidence of the defendant's financial condition remains essential for evaluating whether the amount of punitive damages actually awarded is appropriate." (*Robert L. Cloud & Assocs. supra,* 69 Cal.App.4th at p. 1151, fn. 8.)
- "In order to justify [attorney] fees under Civil Code section 3426.4, the court must find that a 'willful and malicious misappropriation' occurred. That requirement is satisfied, in our view, by the jury's determination, upon clear and convincing evidence, that defendants' acts of misappropriation were done with malice. This finding was necessary to the award of punitive damages which was

made by the jury." (*Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 54 [6 Cal.Rptr.2d 602].)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 93

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 10(II)-E ¶¶ 10:385–10:388 (The Rutter Group)

1 Milgrim on Trade Secrets, Ch. 15, *Trial Considerations*, § 15.02[3][i] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.54[5] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[7][c] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) § 11.05

4412. "Independent Economic Value" Explained

[*Select short term to describe, e.g., Information***] has independent economic value if it gives the owner an actual or potential business advantage over others who do not know the [***e.g., information***] and who could obtain economic value from its disclosure or use.**

In determining whether [*e.g., information***] had actual or potential independent economic value because it was secret, you may consider the following:**

(a) The extent to which [*name of plaintiff***] obtained or could obtain economic value from the [***e.g., information***] in keeping [it/them] secret;**

(b) The extent to which others could obtain economic value from the [*e.g., information***] if [it were/they were] not secret;**

(c) The amount of time, money, or labor that [*name of plaintiff***] expended in developing the [***e.g.***, *information*];**

(d) The amount of time, money, or labor that [would be/was] saved by a competitor who used the [*e.g.***, *information*];**

[(e) [*Insert other applicable factors***].]**

The presence or absence of any one or more of these factors is not necessarily determinative.

New April 2008

Directions for Use

Give this instruction to further explain element 2 of CACI No. 4402, *"Trade Secret" Defined.* Inapplicable factors may be omitted.

Sources and Authority

- "Trade Secret" Defined. Civil Code section 3426.1(d).
- "[I]t is not true that evidence of 'some' helpfulness or usefulness, if credited, would compel a finding of independent economic value. The Restatement defines trade secret as business or technical information 'that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.' (Rest.3d, Unfair Competition, § 39.) The advantage 'need not be great,' but must be 'more than trivial.' (Rest.3d, Unfair Competition, § 39, com. e, p. 430.) Merely stating that information was helpful or useful to another person in carrying out a specific activity, or that information of that type may save someone time, does not compel a factfinder to conclude that the particular information at issue was 'sufficiently valuable . . . to afford an . . . economic advantage over others.'

(Rest.3d, Unfair Competition, § 39.) The factfinder is entitled to expect evidence from which it can form some solid sense of *how* useful the information is, e.g., *how much* time, money, or labor it would save, or at least that these savings would be 'more than trivial.' (Rest.3d., Unfair Competition, § 39, com. e.)" (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 564–565 [66 Cal.Rptr.3d 1], original italics.)

- "[T]he focus of the inquiry regarding the independent economic value element is 'on whether the information is generally known to or readily ascertainable by business competitors or others to whom the information would have some economic value. [Citations.] Information that is readily ascertainable by a business competitor derives no independent value from not being generally known. [Citation.]' " (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 62 [171 Cal.Rptr.3d 714].)
- "Moreover, it seems inherent in the requirement of value, as codified, that it is relevant to ask to *whom* the information may be valuable. The statute does not speak of value in the abstract, but of the value that is '[d]eriv[ed] . . . *from not being generally known to the public or to other persons who can obtain economic value* from its disclosure or use . . . .' In other words, the core inquiry is the value to the owner in *keeping the information secret* from persons who could *exploit it to the relative disadvantage of the original owner."* (*Yield Dynamics, Inc., supra,* 154 Cal.App.4th at p. 568, original italics, internal citation omitted.)
- " '[C]ourts are reluctant to protect customer lists to the extent they embody information which is "readily ascertainable" through public sources, such as business directories. . . . . On the other hand, where the employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit former employees from using this information to capture a share of the market. Such lists are to be distinguished from mere identities and locations of customers where anyone could easily identify the entities as potential customers. . . . . As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret.' " (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1539–1540 [67 Cal.Rptr.3d 54], internal citation omitted.)
- "The requirement that a customer list must have economic value to qualify as a trade secret has been interpreted to mean that the secrecy of this information provides a business with a 'substantial business advantage.' In this respect, a customer list can be found to have economic value because its disclosure would allow a competitor to direct its sales efforts to those customers who have already shown a willingness to use a unique type of service or product as opposed to a list of people who only might be interested." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1522 [66 Cal.Rptr. 2d 731], internal citations omitted.)
- " 'The value of information claimed as a trade secret may be established by direct or circumstantial evidence. Direct evidence relating to the content of the

secret and its impact on business operations is clearly relevant. Circumstantial evidence of value is also relevant, including the amount of resources invested by the plaintiff in the production of the information, the precautions taken by the plaintiff to protect the secrecy of the information . . . , and the willingness of others to pay for access to the information.' " (Altavion, Inc., supra, 226 Cal.App.4th at p. 62.)

Secondary Sources

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, § 1.01 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, §§ 565.103–565.105 (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Ch. 1

4413–4419. Reserved for Future Use

4420. Affirmative Defense—Information Was Readily Ascertainable by Proper Means

[*Name of defendant*] did not misappropriate [*name of plaintiff*]'s trade secret[s] if [*name of defendant*] proves that the [*select short term to describe, e.g., information*] [was/were] readily ascertainable by proper means at the time of the alleged [acquisition/use/ [or] disclosure].

There is no fixed standard for determining what is "readily ascertainable by proper means." In general, information is readily ascertainable if it can be obtained, discovered, developed, or compiled without significant difficulty, effort, or expense. For example, information is readily ascertainable if it is available in trade journals, reference books, or published materials. On the other hand, the more difficult information is to obtain, and the more time and resources that must be expended in gathering it, the less likely it is that the information is readily ascertainable by proper means.

New December 2007; Revised December 2009

Directions for Use

Give also CACI No. 4408, *Improper Means of Acquiring Trade Secret*.

One case has suggested in a footnote that in order for the defense to apply, the defendant must have actually obtained plaintiff's secrets through readily ascertainable means rather than improperly. (See *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 21–22, fn. 9 [286 Cal.Rptr. 518].) Such a requirement would not constitute an affirmative defense but rather would be a denial of the improper-means element of the plaintiff's claim. (See 5 Witkin, California Procedure (4th ed. 1996) Pleadings, § 1081 [affirmative defense admits the truth of the essential allegations of the complaint].) Because the advisory committee believes that this is an affirmative defense, no such requirement has been included in this instruction. (See *San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1542–1543 [67 Cal.Rptr.3d 54] [triable issue of fact as to whether information was readily ascertainable, that is, whether defendant *could have* replicated it within short period of time].)

Sources and Authority

- "Trade Secret" Defined. Civil Code section 3426.1(d)(1).
- "The Legislative Committee Comment [to Civ. Code, § 3426.1] further explains the original draft defined a trade secret in part as 'not being readily ascertainable by proper means' and that 'the assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation. Information is readily ascertainable if it is available in trade journals, reference

books, or published materials.' " (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 899], conc. opn. of Werdegar, J.; see Legis. Comm. Comment (Senate), 1984 Addition.)

- "The focus of the first part of the statutory definition is on whether the information is generally known to or readily ascertainable by business competitors or others to whom the information would have some economic value. Information that is readily ascertainable by a business competitor derives no independent value from not being generally known." (*Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1172 [42 Cal.Rptr.3d 191], internal citations omitted.)
- "With respect to the general availability of customer information, courts are reluctant to protect customer lists to the extent they embody information which is 'readily ascertainable' through public sources, such as business directories. On the other hand, where the employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit former employees from using this information to capture a share of the market. Such lists are to be distinguished from mere identities and locations of customers where anyone could easily identify the entities as potential customers. As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1521–1522 [66 Cal.Rptr.2d 731], internal citations omitted.)
- "[Defendant] argues that even if reverse engineering . . . did not actually occur, the binder contents were not trade secrets because they could have been reverse engineered—that is, they were readily ascertainable. . . . Considering the length of time that each proposal took to create and finalize and the urgency with which four of the project owners impressed upon the prospective contractors to begin the work, we cannot overlook the possibility that the information was not readily ascertainable in the circumstances presented. . . . Thus, a triable issue of fact exists as to whether the entire proposal for each project was indeed readily ascertainable—that is, whether [defendant] could have replicated each offer within the short period it claimed to have needed." (*San Jose Construction, Inc., supra,* 155 Cal.App.4th at pp. 1542–1543, footnote omitted.)
- "While ease of ascertainability is irrelevant to the definition of a trade secret, 'the assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation.' Therefore, if the defendants can convince the finder of fact at trial (1) that 'it is a virtual certainty that anyone who manufactures' certain types of products uses rubber rollers, (2) that the manufacturers of those products are easily identifiable, and (3) that the defendants' knowledge of the plaintiff's customers resulted from that identification process and not from the plaintiff's records, then the defendants may establish a defense to the misappropriation claim. That defense, however, will be based upon an absence of misappropriation, rather than the absence of a

trade secret." (*ABBA Rubber Co., supra,* 235 Cal.App.3d at pp. 21–22, fn. 9, internal citations omitted.)

- "[T]he evidence established that [plaintiff]'s customer list and related information was the product of a substantial amount of time, expense and effort on the part of [plaintiff]. Moreover, the nature and character of the subject customer information, i.e., billing rates, key contacts, specialized requirements and markup rates, is sophisticated information and irrefutably of commercial value and not readily ascertainable to other competitors. Thus, [plaintiff's] customer list and related proprietary information satisfy the first prong of the definition of 'trade secret' under section 3426.1." (*Courtesy Temporary Serv., Inc. v. Camacho* (1990) 222 Cal.App.3d 1278, 1288 [272 Cal.Rptr. 352].)
- "In viewing the evidence presented in the light most favorable to the prevailing party, it is difficult to find a protectable trade secret as that term exists under Civil Code section 3426.1, subdivision (d). While the information sought to be protected here, that is lists of customers who operate manufacturing concerns and who need shipping supplies to ship their products to market, may not be generally known to the public, they certainly would be known or readily ascertainable to other persons in the shipping business. The compilation process in this case is neither sophisticated nor difficult nor particularly time consuming. The evidence presented shows that the shipping business is very competitive and that manufacturers will often deal with more than one company at a time. There is no evidence that all of appellant's competition comes from respondents' new employer. Obviously, all the competitors have secured the same information that appellant claims and, in all likelihood, did so in the same manner as appellant—a process described herein by respondents." (*American Paper & Packaging Prods., Inc. v. Kirgan* (1986) 183 Cal.App.3d 1318, 1326 [228 Cal.Rptr. 713].)

Secondary Sources

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, § 1.07[1] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.51, 40.52 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4][a] (Matthew Bender)

4421. Affirmative Defense—Statute of Limitations—Three-Year Limit (Civ. Code, § 3426.6)

[*Name of defendant***] claims that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that the claimed misappropriation of [***name of plaintiff***]'s trade secrets occurred before [***insert date three years before date of filing***].**

However, the lawsuit was still filed on time if [*name of plaintiff***] proves that before [***insert date three years before date of filing***], [he/she/***nonbinary pronoun***/it] did not discover, nor with reasonable diligence should have discovered, facts that would have caused a reasonable person to suspect that [***name of defendant***] had misappropriated [***name of plaintiff***]'s [***select short term to describe, e.g., information***].**

New April 2009

Directions for Use

Give this instruction if the California Uniform Trade Secrets Act statute of limitations is at issue. (See Civ. Code, § 3426.6.) In an action in which the defendant is or was a customer of the initial misappropriator, modifications may be required. (See *Cypress Semiconductor Corp. v. Superior Court* (2008) 163 Cal.App.4th 575 [77 Cal.Rptr.3d 685].)

It is not necessary that the plaintiff know the identity of the defendant in order to trigger the duty to discover. (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 587.) Therefore, "[*name of defendant*]" in the last sentence will need to be modified if inquiry notice may have been triggered against an actual, but unidentified, misappropriator. (See *Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 585.)

This instruction places the burden on the plaintiff to prove that it did not know nor have any reason to suspect the misappropriation earlier than three years before filing. (See Civ. Code, § 3426.6.) This is the rule for the burden of proof under the nonstatutory delayed-discovery rule. (See *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1030 [98 Cal.Rptr.2d 661]; CACI No. 455, *Statute of Limitations—Delayed Discovery*.) Certain statutes that have their own delayed discovery language (as does Civil Code section 3426.6) have been construed to place the burden on the defendant to prove that the plaintiff knew or should have suspected the facts giving rise to the cause of action earlier than the limitation date. (See, e.g., *Samuels v. Mix* (1999) 22 Cal.4th 1, 8–10 [91 Cal.Rptr.2d 273, 989 P.2d 701] [construing Code Civ. Proc., § 340.6 on legal malpractice]; CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*.) No court has construed Civil Code section 3426.6 to transfer the burden of

proof on delayed discovery to the defendant, so presumably the burden of proof remains with the plaintiff under the nonstatutory rule.

Sources and Authority

- Statute of Limitations. Civil Code section 3426.6.
- "The unanimous conclusion of courts considering the issue—i.e., from federal courts construing section 3426.6—is that it is the first discovered (or discoverable) misappropriation of a trade secret which commences the limitation period." (*Glue-Fold, Inc., supra,* 82 Cal.App.4th at p. 1026.)
- "The statute is triggered when the plaintiff knows or has reason to know the third party has knowingly acquired, used, or disclosed its trade secrets." (*Cypress Semiconductor Corp., supra*, 163 Cal.App.4th 585.)
- "[T]he misappropriation that triggers the running of the statute is that which the plaintiff suspects, not that which may or may not actually exist." (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 587.)
- "[A] plaintiff may have more than one *claim* for misappropriation, each with its own statute of limitations, when more than one defendant is involved. This is different from saying that each *misappropriation* gives rise to a separate claim, which is what section 3426.6 precludes." (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 583, original italics.)
- "A *misappropriation* within the meaning of the UTSA occurs not only at the time of the initial acquisition of the trade secret by wrongful means, but also with each misuse or wrongful disclosure of the secret. But a *claim* for misappropriation of a trade secret arises for a given plaintiff against a given defendant only once, at the time of the initial misappropriation, subject to the discovery rule provided in section 3426.6. Each new misuse or wrongful disclosure is viewed as augmenting a single claim of continuing misappropriation rather than as giving rise to a separate claim." (*Cadence Design Systems, Inc. v. Avant! Corp.* (2002) 29 Cal.4th 215, 223 [127 Cal.Rptr.2d 169, 57 P.3d 647], original italics.)
- "It [is appropriate] to construe section 3426.6 as meaning that a cause of action for misappropriation against a third party defendant accrues with the plaintiff's discovery of that defendant's misappropriation. Any continuing misappropriation by that defendant constitutes a single claim." (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 583.)
- "If someone steals a trade secret and then sells it to a third party, when does the statute of limitations begin to run on any misappropriation claim the trade secret owner might have against the third party? . . . We conclude that with respect to the element of knowledge, the statute of limitations on a cause of action for misappropriation begins to run when the *plaintiff* has any reason to suspect that the third party knows or reasonably should know that the information is a trade secret. The third party's actual state of mind does not affect the running of the statute." (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 579, original italics.)

- "We conclude that the trial court erred in ruling, under the stipulated facts, that the statute of limitations did not begin to run until August 2003, when [defendant] actually learned that the DynaSpice program contained [plaintiff]'s trade secrets. Rather, the question is: When did [plaintiff] first have any reason to suspect that a . . . customer [of the initial misappropriator] had obtained or used DynaSpice knowing, *or with reason to know,* that the software contained [plaintiff]'s trade secrets?" (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 588, original italics.)
- "[I]t is not necessary that the plaintiff be able to identify the person or persons causing the harm. Since the identity of the defendant is not an element of a cause of action, the failure to discover the identity of the defendant does not postpone accrual of the cause of action. ' "Although never fully articulated, the rationale for distinguishing between ignorance" of the defendant and "ignorance" of the cause of action itself "appears to be premised on the commonsense assumption that once the plaintiff is aware of" the latter, he "normally" has "sufficient opportunity," within the "applicable limitations period," "to discover the identity" of the former.' In this case, therefore, the statute began to run when [plaintiff] had any reason to suspect that the CSI customers knew or should have known that they had acquired [plaintiff]'s trade secrets." (*Cypress Semiconductor Corp., supra,* 163 Cal.App.4th at p. 587, internal citations omitted.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 91

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 11(I)-D ¶¶ 11:250–11:252 (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.55 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.274 (Matthew Bender)

Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 8, *Trade Secrets*, 8.28

4422–4499. Reserved for Future Use

VF-4400. Misappropriation of Trade Secrets

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [the owner/a licensee] of [***insert general description of alleged trade secret[s] subject to the misappropriation claim***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[Was this/Were these] [***select short term to describe, e.g., information***] secret at the time of the alleged misappropriation?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [this/these] [***e.g., information***] have actual or potential independent economic value because [it was/they were] secret?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of plaintiff***] make reasonable efforts under the circumstances to keep the [***e.g., information***] secret?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] [acquire/use [or] disclose] the trade secret[s] by improper means?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [***name of defendant***]'s improper [acquisition/use/ [or] disclosure] of the [***e.g., information***] a substantial factor in causing**

[[*name of plaintiff*] harm/ [or] [*name of defendant*] to be unjustly enriched]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2015; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements*, CACI No. 4402, *"Trade Secret" Defined*, CACI No. 4403, *Secrecy Requirement*, CACI No. 4404, *Reasonable Efforts to Protect Secrecy*, and CACI No. 4412, "*Independent Economic Value" Explained*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

In question 1, briefly describe the material alleged to be a trade secret that is set

forth in detail in element1 of CACI No. 4401. Then in question 2, select a short term to describe the material.

Additional questions may be added depending on whether misappropriation is claimed in question 5 by acquisition, disclosure, or use. See CACI No. 4405, *Misappropriation by Acquisition*, CACI No. 4406, *Misappropriation by Disclosure*, and CACI No. 4407, *Misappropriation by Use*, for additional elements that the jury should find in each kind of case.

Modify the claimed damages in question 7 as appropriate depending on the circumstances. (See CACI No. 4409, *Remedies for Misappropriation of Trade Secret*.) If unjust enrichment is alleged, additional questions on the value of the benefit to the defendant and the defendant's reasonable expenses should be included. (See CACI No. 4410, *Unjust Enrichment*.)

In cases involving more than one trade secret, the jury must answer all of the questions in the verdict form separately for each trade secret at issue.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-4401–VF-4499. Reserved for Future Use

CONSTRUCTION LAW

4500. Breach of Implied Warranty of Correctness of Plans and Specifications—Essential Factual Elements

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[*Name of plaintiff*] **claims that** [*name of defendant*] **provided plans and specifications for the** [**project**/*describe construction project, e.g., kitchen remodeling*] **that were not correct. To establish this claim,** [*name of plaintiff*] **must prove all of the following:**

1. **That** [*name of defendant*] **provided** [*name of plaintiff*] **with plans and specifications for** [*name of defendant*]**'s** [*short name for project, e.g., remodeling*] **project;**
2. **That** [*name of plaintiff*] **was required to follow the plans and specifications provided by** [*name of defendant*] **in** [**bidding on/ [and] constructing**] **the** [*e.g., remodeling*] **project;**
3. **That** [*name of plaintiff*] **reasonably relied on the plans and specifications for the** [*e.g., remodeling*] **project;**
4. **That the plans and/or specifications provided by** [*name of defendant*] **were not correct; and**
5. **That** [*name of plaintiff*] **was harmed because the plans or specifications were not correct**.

New December 2010; Revised June 2011

Directions for Use

This instruction should be given when a contractor makes a claim for breach of the implied warranty of correctness on the grounds that the plans and specifications provided by the owner for its construction project were not correct. Also give CACI No. 303, *Breach of Contract—Essential Factual Elements*, for other contested elements of a breach-of-contract claim.

The word "project" may be used if the meaning will be clear to the jury. Alternatively, describe the project in the first paragraph, and then select a shorter term for use thereafter.

This implied warranty also applies to a general contractor who is responsible for the correctness of plans and specifications that are provided to subcontractors. (See *Healy v. Brewster* (1967) 251 Cal.App.2d 541, 550 [59 Cal.Rptr. 752].)

An implied-warranty claim can arise when the contractor is required to rely on the owner's plans and specifications in preparing a fixed price bid for a project. A claim can also arise when the contractor must follow the owner's plans and specifications and, as a result, encounters difficulty in constructing the project. In either case, the contractor may assert a claim for breach of the implied warranty if the contractor is damaged by incorrect plans or specifications.

A breach of the implied warranty can also be asserted as an affirmative defense to an owner's claim for nonperformance (see CACI No. 4511, *Affirmative Defense—Contractor Followed Plans and Specifications*) if the contractor's alleged breach was caused by the owner's incorrect plans and specifications.

The implied warranty applies in particular to plans and specifications provided by public owners, who are required by statute to prepare accurate and complete plans and specification for public works projects. (See Public Contract Code, §§ 1104, 10120.) It can also apply to private construction projects if the owner requires the contractor to follow plans and specifications that turn out to be incorrect. (See, e.g., *Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 404 [55 Cal.Rptr. 1, 420 P.2d 713].)

An owner's obligation to provide correct plans and specifications cannot be disclaimed by general language requiring the contractor to examine the plans and specifications for errors and omissions. (See *Warner Constr. Corp. v. L.A.* (1970) 2 Cal.3d 285, 292 [85 Cal.Rptr. 444, 466 P.2d 996].)

Sources and Authority

- Architectural or Engineering Plans and Specifications on Public Works Projects. Public Contract Code section 1104 (applicable to state agencies).
- Plans and Specifications on State Agency Projects. Public Contract Code section 10120 (applicable to state agencies).
- "[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work . . . ." (*United States v. Spearin* (1918) 248 U.S. 132, 136 [39 S.Ct. 59, 63 L.Ed. 166], internal citations omitted.)
- "A contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a contract action for extra work or expenses necessitated by the conditions being other than as represented. This rule is mainly based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness. The fact that a breach is fraudulent does not make the rule inapplicable." (*Souza & McCue Constr. Co. v. Superior Court of San Benito County* (1962) 57 Cal.2d 508, 510–511 [20 Cal.Rptr. 634, 370 P.2d 338], internal citations omitted.)
- "We have long recognized that '[a] contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a contract action for extra work or expenses necessitated by the conditions being other than as

represented.' " (*Los Angeles Unified School District v. Great American Ins. Co.* (2010) 49 Cal.4th 739, 744 [112 Cal.Rptr.3d 230, 234 P.3d 490].)

- "The responsibility of a governmental agency for positive representations it is deemed to have made through defective plans and specifications 'is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work . . . .' " (*E. H. Morrill Co. v. State* (1967) 65 Cal.2d 787, 792–793 [56 Cal.Rptr. 479, 423 P.2d 551], internal citations omitted.)
- "If a contractor makes a misinformed bid because a public entity issued incorrect plans and specifications, precedent establishes that the contractor can sue for breach of the implied warranty that the plans and specifications are correct. The contractor may recover 'for extra work or expenses necessitated by the conditions being other than as represented.' " (*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1401, fn. 5 [106 Cal.Rptr.3d 691].)
- "Courts have recognized a cause of action in contract against a public entity based upon the theory that 'the furnishing of misleading plans and specifications by the public body constitutes a breach of implied warranty of their correctness.' " (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 551 [66 Cal.Rptr.3d 175].)
- "Second, [private owner] breached its contract by providing [contractor] with plans that were both erroneous and extremely late in issuance. Although construction started on May 1, 1976, lengthy drawing reviews became necessary and final drawings were still being furnished as late as July through September 1977. The furnishing of misleading plans and specifications by an owner is a breach of an implied warranty of their correctness." (*C. Norman Peterson Co. v. Container Corp. of Am.* (1985) 172 Cal.App.3d 628, 643 [218 Cal.Rptr. 592], internal citations omitted.)
- "The trial court . . . read the section 158 disclaimer to the jury, but instructed them that 'if a public agency makes a positive and material representation as to a condition presumably within the knowledge of the agency and upon which the plaintiff had a right to rely, the agency is deemed to have warranted such facts despite a general provision requiring an on-site inspection by the contractor.' In submitting the issue of the effect of the section 158 disclaimer to the jury, and its instructions to the jury, the trial court complied with our decision in *Morrill*, and the verdict must be taken as resolving that issue against defendant." (*Warner Constr. Corp.*, *supra*, 2 Cal.3d at p. 292, fn. 2].)
- "Since the plans and specifications were prepared by the owners' architect and not by the subcontractor, and since the subcontractor undertook to do the work in accordance with his specific proposal, we cannot reasonably conclude that the subcontractor assumed responsibility for the adequacy of the plans and specifications . . . . The language upon which the plaintiff relies constituted a statement of the purpose sought to be achieved by means of the owners' plans and specifications rather than an undertaking on the part of the subcontractor of

responsibility for the adequacy of such plans and specifications as the design of a system capable of producing the desired result." (*Kurland v. United Pacific Ins. Co.* (1967) 251 Cal.App.2d 112, 117 [59 Cal.Rptr. 258].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 1035

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, §§ 6.73–6.76

5 Stein, Construction Law, Ch. 18, *Warranties*, ¶ 18.02 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 440, *Construction Contract Remedies*, § 440.14 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.24 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 481, *Public Works*, § 481.311 (Matthew Bender)

Miller & Starr, California Real Estate 4th, §§ 27:63–27:64 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) § 7:78 (Thomson Reuters)

Bruner & O'Connor on Construction Law, §§ 9:78, 9:84 (Thomson Reuters)

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 4, *Breach of Contract by Owner*, §§ 4.06, 4.07

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 13, *Everything You Ever Wanted to Know About Extra Work and the Changes Clause*, pp. 99–100

4501. Owner's Liability for Failing to Disclose Important Information Regarding a Construction Project—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/it] was harmed because [***name of defendant***] failed to disclose important information regarding [***specify information that defendant failed to disclose or concealed, e.g., tidal conditions at the project site***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] submitted [his/her/***nonbinary pronoun***/its] bid or agreed to perform without information regarding [***e.g., tidal conditions***] that materially affected performance costs;**
2. **That [***name of defendant***] had this information, and was aware that [***name of plaintiff***] did not know it and had no reason to obtain it;**
3. **That [***name of defendant***] failed to provide this information;**
4. **That the contract plans and specifications or other information furnished by [***name of defendant***] to [***name of plaintiff***] misled [***name of plaintiff***] or did not put [him/her/***nonbinary pronoun***/it] on notice to investigate further;**
5. **That [***name of plaintiff***] was harmed because of [***name of defendant***]'s failure to disclose the information.**

[*Name of plaintiff***] does not have to prove that [***name of defendant***] intended to conceal the information.**

New December 2010; Revised June 2011

Directions for Use

Give this instruction if a contractor claims that the owner had important information regarding the project that it failed to disclose, and as a result, the contractor incurred greater costs than anticipated. Also give CACI No. 303, *Breach of Contract—Essential Factual Elements*, for other contested elements of a breach-of-contract claim.

With regard to undisclosed information, there is liability only if the failure to disclose materially affected the cost of performance and actually and justifiably misled the contractor in bidding on the contract. It is not necessary to show a fraudulent intent to conceal. (See *Los Angeles Unified School Dist. v. Great American Ins. Co.* (2010) 49 Cal.4th 739, 745 [112 Cal.Rptr.3d 230, 234 P.3d 490].)

This instruction applies principally to public owners awarding fixed price construction contracts to contractors required to submit bids based on information

provided by the public owner. Government Code section 818.8 relieves public owners from tort liability for concealment and similar tortious conduct. However, public owners remain liable in contract. (See *Warner Constr. Corp. v. L.A.* (1970) 2 Cal.3d 285, 294 [85 Cal.Rptr. 444, 466 P.2d 996].) Private owners remain liable in tort for concealment of important facts. (See CACI No. 1901, *Concealment*.)

Sources and Authority

- "[A] contractor need not prove an affirmative fraudulent intent to conceal. Rather . . . a public entity may be required to provide extra compensation if it knew, but failed to disclose, material facts that would affect the contractor's bid or performance. Because public entities do not insure contractors against their own negligence, relief for nondisclosure is appropriate only when (1) the contractor submitted its bid or undertook to perform without material information that affected performance costs; (2) the public entity was in possession of the information and was aware the contractor had no knowledge of, nor any reason to obtain, such information; (3) any contract specifications or other information furnished by the public entity to the contractor misled the contractor or did not put it on notice to inquire; and (4) the public entity failed to provide the relevant information." (*Los Angeles Unified School Dist.*, *supra*, 49 Cal.4th at p. 745.)
- "The circumstances affecting recovery may include, but are not limited to, positive warranties or disclaimers made by either party, the information provided by the plans and specifications and related documents, the difficulty of detecting the condition in question, any time constraints the public entity imposed on proposed bidders, and any unwarranted assumptions made by the contractor. The public entity may not be held liable for failing to disclose information a reasonable contractor in like circumstances would or should have discovered on its own, but may be found liable when the totality of the circumstances is such that the public entity knows, or has reason to know, a responsible contractor acting diligently would be unlikely to discover the condition that materially increased the cost of performance." (*Los Angeles Unified School Dist.*, *supra*, 49 Cal.4th at p. 754.)
- "[E]stablished law provides public entities substantial protection against careless bidding practices by contractors and forecloses the possibility that a public entity will be held liable when a contractor's own lack of diligence prevented it from fully appreciating the costs of performance. This being so, protection against careless bidding practices does not require that we allow contractors damaged by a public entity's misleading nondisclosure to recover only on a showing the public entity harbored a fraudulent intent." (*Los Angeles Unified School Dist.*, *supra*, 49 Cal.4th at p. 752.)
- "Nondisclosure is actionable . . . only if the information at issue materially affects the cost of performance . . . ." (*Los Angeles Unified School Dist.*, *supra*, 49 Cal.4th at p. 753.)
- "In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three

instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff." (*Warner Constr. Corp.*, *supra*, 2 Cal.3d at p. 294, footnotes omitted.)

- "But this does not mean . . . that City could be liable simply by failing to supply complete plans and specifications. It does mean that careless failure to disclose information may form the basis for an implied warranty claim if the defendant possesses superior knowledge inaccessible to the contractor or where that which was disclosed is likely to mislead in the absence of the undisclosed information . . . . Thus, . . . the general rule [is] that silence alone is not actionable." (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 552 [66 Cal.Rptr.3d 175], internal citations omitted.)
- "It would be inequitable to permit defendant to enforce the literal terms of the contract which called for the excavation of 'all materials' necessary to complete the job when plaintiffs were induced by defendant's misrepresentation to submit a bid which was much lower than was warranted by the true facts. If instead of stating in the specifications that [contractor] would excavate to rough grade, defendant had stated the true facts of which it had knowledge—that [contractor] was obligated by contract to excavate no lower than five feet above grade—the present situation would not have arisen. Having failed to impart this knowledge to plaintiffs and having willfully or carelessly misrepresented the true situation, defendant is obligated to plaintiffs for the additional work occasioned." (*Gogo v. Los Angeles County Flood Control Dist.* (1941) 45 Cal.App.2d 334, 341–342 [114 P.2d 65].)
- "It is the general rule that by failing to impart its knowledge of difficulties to be encountered in a project, the owner will be liable for misrepresentation if the contractor is unable to perform according to the contract provisions. [¶] In a factually similar case, the contractor encountered 'unusual quantities of quicksand and extensive subsoil water conditions which had not been shown on the plans or specifications . . . information as to which, although known to it, had been withheld by the city.' An award of damages was affirmed because . . . '[t]he withholding by the city of its knowledge . . . resulting in excessive cost of construction, forms actionable basis for plaintiff's claim for damages.' " (*Salinas v. Souza & McCue Constr. Co.* (1967) 66 Cal.2d 217, 222–223 [57 Cal.Rptr. 337, 424 P.2d 921], internal citations omitted.)
- "Here, the city argues that provisions in the contract specifications requiring that the bidders 'examine carefully the site of the work,' and stating that it is 'mutually agreed that the submission of a proposal shall be considered prima facie evidence that the bidder has made such examination,' prevents a holding that the city is liable for the consequences of its fraudulent representation. However, even if the language had specifically directed the bidders to examine *subsoil* conditions, which it did not, it is clear that such general provisions

cannot excuse a governmental agency for its active concealment of conditions." (*Salinas*, *supra*, 66 Cal.2d at p. 223, internal citations omitted.)

- "A fraudulent concealment often composes the basis for an action in tort, but tort actions for misrepresentation against public agencies are barred by Government Code section 818.8. Plaintiff retains, however, a cause of action in contract. 'It is the general rule that by failing to impart its knowledge of difficulties to be encountered in a project, the owner will be liable for misrepresentation if the contractor is unable to perform according to the contract provisions.' As explained in *Souza & McCue Construction Co. v. Superior Court*, . . . : 'This rule is mainly based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness. The fact that a breach is fraudulent does not make the rule inapplicable.' " (*Warner Constr. Corp.*, *supra*, 2 Cal.3d at pp. 293–294, internal citations omitted.)
- "Under general principles of contract and tort law, a party who conceals or fails to disclose material information to another is liable for fraud. In the public construction contract context, however, the conduct of a public agency which would otherwise amount to a tortuous [sic] misrepresentation is treated as a breach of contract. The underlying theory is that providing misleading plans and specifications constitutes a breach of the implied warranty of correctness. (*Howard Contracting, Inc. v. G. A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 55 [83 Cal.Rptr.2d 590].)
- "When there is no misrepresentation of factual matters within the state's knowledge or withholding of material information, and when both parties have equal access to information as to the nature of the tests which resulted in the state's findings, the contractor may not claim in the face of a pertinent disclaimer that the presentation of the information, or a reasonable summary thereof, amounts to a warranty of the conditions that will actually be found." (*Wunderlich v. State* (1967) 65 Cal.2d 777, 786–787 [56 Cal.Rptr. 473, 423 P.2d 545].)
- "Thus, [contractor]'s entitlement to recover for extra work performed in connection with the fire alarm contract does not turn upon the issuance of written change orders. Because the extra work on the fire alarm contract was necessitated by incorrect plans and specifications furnished by the District, under settled law [contractor] was entitled to recover for said work." (*G. Voskanian Construction, Inc. v. Alhambra Unified School Dist.* (2012) 204 Cal.App.4th 981, 992 [139 Cal.Rptr.3d 286].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 1035

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, §§ 6.73–6.76

5 Stein, Construction Law, Ch. 18, *Warranties*, ¶ 18.02 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 440, *Construction Contract*

Remedies, § 440.15 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.24 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 481, *Public Works*, § 481.311 (Matthew Bender)

Miller & Starr, California Real Estate 4th, §§ 27:63–27:64 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) § 7:12 (Thomson Reuters)

Bruner & O'Connor on Construction Law, § 9:92 (Thomson Reuters)

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 4, *Breach of Contract by Owner*, § 4.06

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 13, *Everything You Ever Wanted to Know About Extra Work and the Changes Clause*, pp. 99–100

4502. Breach of Implied Covenant to Provide Necessary Items Within Owner's Control—Essential Factual Elements

In every construction contract, it is understood that the owner will provide access to the project site and do those things within the owner's control that are necessary for the contractor to reasonably and timely perform its work. [*Name of plaintiff***] claims that [***name of defendant***] breached the contract by [***specify what owner failed to do, e.g., failing to procure a disposal permit for hazardous materials***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] could not reasonably or timely perform [his/her/***nonbinary pronoun***/its] work without [***insert short name for item, e.g., a disposal permit***];**
2. **That [***name of defendant***] knew or reasonably should have known that [***e.g., a disposal permit***] was necessary for [***name of plaintiff***] to reasonably and timely perform the work;**
3. **That [***name of defendant***] had the ability to [***e.g., procure a disposal permit***];**
4. **That [***name of plaintiff***] could not [***e.g., obtain a disposal permit***] without [***name of defendant***]'s assistance;**
5. **That [***name of defendant***] failed to [***e.g., procure a disposal permit***] in a timely manner; and**
6. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s failure.**

New December 2010; Revised June 2011

Directions for Use

This instruction should be used when a contractor claims the owner breached an implied covenant to provide necessary access to the project site, easements, permits, or other things uniquely within the owner's control in order for the contractor to reasonably and timely perform the contract. Also give CACI No. 303, *Breach of Contract—Essential Factual Elements*, for other contested elements of a breach-of-contract claim.

This implied covenant can arise in both private and public contracts unless it is expressly precluded by the contract documents. (See *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 82 [268 P.2d 12] [covenant is implied in every construction contract]; see also *Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 613 [220 P.2d 729] [covenant implied in private contract].) This instruction may also be used when the contractor claims the owner breached a general duty of cooperation

by failing to control and/or coordinate third parties, such as other contractors on the project site.

This instruction is based on CACI 325, *Breach of Covenant of Good Faith and Fair Dealing—Essential Factual Elements*.

Sources and Authority

- Implied Stipulations to Make Contract Reasonable. Civil Code section 1655.
- Implied Contract Terms. Civil Code section 1656.
- "In every building contract which contains no express covenants on the subjects there are implied covenants to the effect that the contractor shall be permitted to proceed with the construction of the building in accordance with the other terms of the contract without interference by the owner and that he shall be given such possession of the premises as will enable him to adequately carry on the construction and complete the work agreed upon. Such terms are necessarily implied from the very nature of the contract and a failure to observe them not consented to by the contractor constitutes a breach of contract on the part of the owner entitling the contractor to rescind, although it may not amount to a technical prevention of performance." (*Gray v. Bekins* (1921) 186 Cal. 389, 395 [199 P. 767], internal citations omitted.)
- "Under the contract as thus construed, there was an implied covenant that plaintiffs would be given possession of the premises for the agreed purpose at a reasonable time to be chosen by them. Defendant's conduct in forbidding plaintiffs to enter, therefore, was sufficient not only to excuse their performance but also to constitute a breach or anticipatory breach of the contract." (*Bomberger, supra,* 35 Cal.2d at p. 613, internal citations omitted.)
- "The rule is plain that in every construction contract the law implies a covenant, where necessary, that the owner will furnish the selected site of operations to the contractor in order to enable him 'to adequately carry on the construction and complete the work agreed upon.' The rule applies with equal force to construction contracts entered into by a municipality." (*Hensler*, *supra*, 124 Cal.App.2d at p. 83, internal citations omitted.)
- "In general, where plans, specifications and conditions of contract do not otherwise provide, there is an implied covenant that the owner of the project is required to furnish whatever easements, permits or other documentation are reasonably required for the construction to proceed in an orderly manner." (*COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal.App.3d 916, 920 [136 Cal.Rptr. 890].)
- "The rule is well settled that in every construction contract the law implies a covenant that the owner will provide the contractor timely access to the project site to facilitate performance of work. When necessary permits relating to the project are not available or access to the site is limited by the owner, the implied covenant is breached. The trial court found the delays were caused by the [defendant]'s breaches of contract and implied covenant in failing to disclose

known restrictions on project performance, to obtain necessary permits, and to provide timely access to perform the work." (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 50 [83 Cal.Rptr.2d 590], internal citations omitted.)

- "[A] contract includes not only the terms that have been expressly stated but those implied provisions indispensable to effectuate the intention of the parties. . . . [¶] Clearly an implied term of the contract herein was that once the notice to proceed was issued, the dredge would be available for work on the project . . . . [¶] [Plaintiff], acting as a reasonable public works contractor, was misled by this incorrect implied representation in its submission of a bid. [Plaintiff] justifiably relied on this representation in determining the cost of constructing the seawall. Accordingly, it did not include in its bid the cost of maintaining the seawall for an indefinite period of time while awaiting the arrival of the dredge. As the [defendant] impliedly warranted the correctness of these representations, it is liable for the cost of extra work which was necessitated by the dredge's failure to arrive." (*Tonkin Constr. Co. v. County of Humboldt* (1987) 188 Cal.App.3d 828, 832 [233 Cal.Rptr. 587], internal citations omitted.)
- " '[T]he covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.' " (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031–1032 [14 Cal.Rptr.2d 335], original italics.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 827

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, § 6.84, 6.85

5 Stein, Construction Law, Ch. 18, *Warranties*, ¶ 18.02 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 140, *Contracts*, § 140.45 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.24 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.242 (Matthew Bender)

Acret, California Construction Law Manual (6th ed.) §§ 1:80, 1:82 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) §§ 7:48, 7:77 (Thomson Reuters)

Bruner & O'Connor on Construction Law, § 9:99 (Thomson Reuters)

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) p. 10

4503–4509. Reserved for Future Use

4510. Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] failed to [perform the work for the [project/***describe construction project, e.g., kitchen remodeling***] competently/ [or] use the proper materials for the [project/** *e.g., kitchen remodeling***]]. To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That [***name of defendant***] failed to [perform [his/her/***nonbinary pronoun***/its] work competently/ [or] provide the proper materials] by [***describe alleged breach, e.g., failing to apply sufficient coats of paint or failing to complete the project in substantial conformity with the plans and specifications***]; and**
2. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s failure.**

New December 2010; Revised June 2011, December 2014

Directions for Use

This instruction is for use if an owner claims that the contractor breached the contract by failing to perform the work on the project competently so that the result did not meet what was expected under the contract. This is sometimes referred to as the implied covenant that the work performed will be fit and proper for its intended use. (See *Kuitems v. Covell* (1951) 104 Cal.App.2d 482, 485 [231 P.2d 552].) The implied covenant encompasses the quality of both the work and materials. (See *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 582–583 [12 Cal.Rptr. 257, 360 P.2d 897].)

Also give CACI No. 303, *Breach of Contract—Essential Factual Elements*.

The word "project" may be used if the meaning will be clear to the jury. Alternatively, describe the project in the first paragraph, and then select a shorter term for use thereafter.

This instruction is based on CACI No. 325, *Breach of Covenant of Good Faith and Fair Dealing—Essential Factual Elements*. It should be given in conjunction with CACI No. 4530, *Owner's Damages for Breach of Construction Contract—Work Does Not Conform to Contract*, which provides the proper measure of damages recoverable for a breach of the implied covenant to perform work fit for its intended use.

This instruction may be adapted for use with a claim by a homeowner who purchased the property from the developer-owner against the contractor for construction defects. The claim would be based on the homeowner's status as a third-party beneficiary of the builder-developer contract. (See *Burch v. Superior*

Court (2014) 223 Cal.App.4th 1411, 1422–1423 [168 Cal.Rptr.3d 81], disapproved on other grounds in *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 258 [227 Cal.Rptr.3d 191, 408 P.3d 797]; see also *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, 69–70, 145 Cal.Rptr. 448 [homeowner can be beneficiary of contractor-subcontractor contract].)

Sources and Authority

- "[A]lthough [general contractor] . . . had a contractual relationship with the City, it also had a duty of care to perform in a competent manner." (*Willdan v. Sialic Contractors Corp.* (2007) 158 Cal.App.4th 47, 57 [69 Cal.Rptr.3d 633].)
- "The defect complained of and the alleged breach of the warranty relate solely to fabrication and workmanship—the seams opened and the edges raveled. The failure of the carpet to last for the period warranted was occasioned by the defective sewing of the seams and binding of the edges, constituting a breach of the warranty as it related to good workmanship in assembling and installing it, but not as to the quality of the carpet itself." (*Southern California Enterprises, Inc. v. D. N. & E. Walter & Co.* (1947) 78 Cal.App.2d 750, 753–754 [178 P.2d 785], superseded by statute as stated in *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 132 [87 Cal. Rptr. 3d 5].)
- "[Subcontractor] agreed to perform the waterproofing and drainage work on the retaining walls built by [contractor] and had the duty to perform those tasks in a good and workmanlike manner." (*Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 749 [50 Cal.Rptr.3d 709].)
- " 'Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of the contract.' The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement." (*Kuitems*, *supra*, 104 Cal.App.2d at p. 485.)
- "Obviously, the statement in the written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed 'shall be fit and proper for its said intended use' . . . ." (*Kuitems*, *supra*, 104 Cal.App.2d at p. 485.)
- "[N]o warranty other than that of good workmanship can be implied where the contractor faithfully complies with plans and specifications supplied by the owner . . . ." (*Sunbeam Constr. Co. v. Fisci* (1969) 2 Cal.App.3d 181, 186 [82 Cal.Rptr. 446], internal citations omitted.)
- "[T]here is implied in a sales contract for newly constructed real property a warranty of quality and fitness. . . . '[T]he builder or seller of new construction—not unlike the manufacturer or merchandiser of personalty—makes

implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building.' . . . '[W]e conclude builders and sellers of new construction should be held to what is impliedly represented—that the completed structure was designed and constructed in a reasonably workmanlike manner.' " (*Burch*, *supra*, 223 Cal.App.4th at p. 1422, disapproved on other grounds in *McMillin Albany LLC*, *supra*, 4 Cal.5th at p. 258, internal citations omitted.)

- "[A] contract to build an entire building is essentially a contract for material and labor, and there is an implied warranty protecting the owner from defective construction. Clearly, it would be anomalous to imply a warranty of quality when construction is pursuant to a contract with the owner—but fail to recognize a similar warranty when the sale follows completion of construction." (*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 378–379 [115 Cal.Rptr. 648, 525 P.2d 88], internal citations omitted.)
- Several cases dealing with construction contracts and other contracts for labor and material show that ordinarily such contracts give rise to an implied warranty that the product will be fit for its intended use both as to workmanship and materials. These cases support the proposition that although the provisions of the Uniform Sales Act with respect to implied warranty (Civ. Code, §§ 1734–1736) apply only to sales, similar warranties may be implied in other contracts not governed by such statutory provisions when the contracts are of such a nature that the implication is justified. . . . [¶] The reference in the stipulation to merchantability, a term generally used in connection with sales, does not preclude reliance on breach of warranty although the contract is one for labor and material. With respect to sales, merchantability requires among other things that the substance sold be reasonably suitable for the ordinary uses it was manufactured to meet. The defect of which [plaintiff] complains is that the tubing was not reasonably suitable for its ordinary use, and his cause of action may properly be considered as one for breach of a warranty of merchantability. There is no justification for refusing to imply a warranty of suitability for ordinary uses merely because an article is furnished in connection with a construction contract rather than one of sale. The evidence, if taken in the light most favorable to [plaintiff], would support a determination that there was an implied warranty of merchantability." (*Aced*, *supra*, 55 Cal.2d at p. 583, internal citations omitted.)
- "[P]ublic policy imposes on contractors in various circumstances the duty to finish a project with diligence and to avoid injury to the person or property of third parties." (*Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1450 [37 Cal.Rptr.2d 790].)

Secondary Sources

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, § 9.93

2 Stein, Construction Law, Ch. 5B, *Contractor's and Construction Manager's Rights*

and Duties, ¶ 5B.01[2][b] (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.42 (Matthew Bender)

29 California Legal Forms, Ch. 89, *Home Improvement and Specialty Contracts*, § 89.14 (Matthew Bender)

Miller & Starr, California Real Estate 4th, § 29:5 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) § 5:39 (Thomson Reuters)

Bruner & O'Connor on Construction Law, §§ 9:67–9:70 (Thomson Reuters)

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 5, *Breach of Contract by Contractor*, § 5.01

4511. Affirmative Defense—Contractor Followed Plans and Specifications

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[*Name of plaintiff***] claims that [***name of defendant***] failed to [perform the work for the [project/***describe construction project, e.g., kitchen remodeling***] competently/ [or] use the proper materials for the [project/** *e.g., kitchen remodeling***]]. [***Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] followed the plans and specifications and that [***specify alleged defect in the work or materials***] was because of the plans and specifications that [***name of plaintiff***] provided to [***name of defendant***] for the project.**

To succeed on this defense, [*name of defendant***] must prove all the following:**

1. **That [***name of plaintiff***] provided [***name of defendant***] with the plans and specifications for the project;**
2. **That [***name of plaintiff***] required [***name of defendant***] to follow the plans and specifications in constructing the project;**
3. **That [***name of defendant***] substantially complied with the plans and specifications that [***name of plaintiff***] provided for the project; and**
4. **That [***specify alleged defect in the work and/or deficiency in performance***] was because of [***name of defendant***]'s use of the plans and specifications.**

New December 2010

Directions for Use

This instruction is a contractor's affirmative defense to the owner's claims that there is a defect in the work or deficiency in the contractor's performance. (See CACI No. 4510, *Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Essential Factual Elements*.) The contractor asserts that any alleged defect or deficient performance was caused by following the plans and specifications that were provided by the owner because the plans and specifications were inaccurate or incomplete. This instruction may be modified for use in the contractor's action for compensation from the owner if the owner alleges poor quality work as a defense to payment.

Sources and Authority

- "[T]he authorities hold that where the plans and specifications were prepared by the owner's architect and not by the subcontractor, and since the subcontractor undertook to do the work in accordance with the specific proposal, it cannot reasonably be concluded that the subcontractor assumed responsibility for the

adequacy of the plans and specifications to meet the purpose of the owner, and where the contractor faithfully performs the work as specified, there cannot be an implied warranty that the contractor will supplement the inadequacy of the plans." (*Sunbeam Construction Co. v. Fisci* (1969) 2 Cal.App.3d 181, 184–185 [82 Cal.Rptr. 446].)

- "There is no basis for an implied warranty of fitness of the installation since the work was done in accordance with the plans and specifications supplied by the owner. . . . 'In other words, as to the refrigerating plant, defendants got precisely what they contracted for, and there was no implied warranty that the machine would answer the particular purpose for which the buyers intended to use it.' " (*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Cavanaugh* (1963) 217 Cal.App.2d 492, 508–509 [32 Cal.Rptr. 144].)
- "[T]he contractor's responsibility for any completed portion of the work, so done under the direction and to the satisfaction of the engineers, relieves him from responsibility for such an accident as that which befell. . . ." (*McConnell v. Corona City Water Co.* (1906) 149 Cal. 60, 63 [85 P. 929].)

Secondary Sources

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, §§ 5.97, 5.98

3 Stein, Construction Law, Ch. 11, *Remedies and Damages*, ¶ 11.02 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.42, 104.254 (Matthew Bender)

Miller & Starr, California Real Estate 4th, §§ 27:99, 29:3 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) § 1:79 (Thomson Reuters)

Bruner & O'Connor on Construction Law, § 9:83 (Thomson Reuters)

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 5, *Breach of Contract by Contractor*, § 5.01

4512–4519. Reserved for Future Use

4520. Contractor's Claim for Changed or Extra Work

[*Name of plaintiff***] claims that [***name of defendant***] required [him/her/***nonbinary pronoun***/it] to perform [changed/ [or] extra] work beyond that required by the contract. [***Name of plaintiff***] claims that [[he/she/***nonbinary pronoun***/it] should be compensated/ [and] should have been given a time extension] [under the contract].**

To succeed on this claim, [*name of plaintiff***] must prove all of the following:**

1. **That the [changed/ [or] extra] work was [not included in/ [or] in addition to that required under] the original contract;**
2. **That [***name of defendant***] directed [***name of plaintiff***] to perform the [changed/ [or] extra] work;**
3. **That [***name of plaintiff***] performed the [changed/ [or] extra] work; and**
4. **That [***name of plaintiff***] was harmed because [***name of defendant***] required the [changed/ [or] extra] work.**

New December 2010

Directions for Use

This instruction may be used for claims for changed or extra work by the contractor against the owner, or for analogous claims asserted by a subcontractor against the general contractor.

Most construction contracts allow the owner to direct changes in the work and provide that the contractor will be paid and sometimes receive a time extension for performing the changed or extra work. Under certain circumstances, extra or changed work may be priced in the contract (e.g., by unit price or agreed labor rates and material costs). If so, include "under the contract" in the opening paragraph.

This instruction is based on CACI No. 303, *Breach of Contract—Essential Factual Elements*, and CACI No. 350, *Introduction to Contract Damages*. If the claim is based on an implied contract for the work, also give CACI No. 305, *Implied-in-Fact Contract*.

Sources and Authority

- "Extra work as used in connection with a building contract means work arising outside of and entirely independent of the contract—something not required in its performance, not contemplated by the parties, and not controlled by the contract." (*C.F. Bolster Co. v. J.C. Boespflug Constr. Co.* (1959) 167 Cal.App.2d 143, 151 [334 P.2d 247].)
- "Where the extra work and materials furnished are of the same character as the

work and materials named in the contract, the general rule is that they are to be paid for according to the schedule of prices fixed by the contract." (*Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council* (1954) 128 Cal.App.2d 676, 684 [276 P.2d 52].)

- "Where the extras are of a different character from the work called for in the contract and no price is agreed on for extra work, their reasonable value may be recovered." (*C.F. Bolster Co.*, *supra*, 167 Cal.App.2d at p. 151.)
- "What *Coleman* [*Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396 [55 Cal.Rptr. 1, 420 P.2d 713]] does not expressly address is whether a contractor faced with a substantial change in its originally contracted scope of work, who is unable to successfully negotiate a price for that additional work, may elect to continue to work and reserve its right to subsequently obtain a judicial determination as to the value of the changes. The trial court concluded that it may and we agree. So long as the other contracting party continues to demand performance of the increased scope of work, and in the absence of any conflicting provision of the contract, the contractor may continue to work after unsuccessful negotiations and subsequently recover the value of that work. To hold otherwise would compel a contractor to walk off the job in the face of what it believes to be major changes in the scope of work required of it, with significant consequences if its judgment is later proven wrong, or alternatively forfeit any right to seek compensation for that work, regardless of the extent of the additional burdens imposed. . . . The interpretation urged by [defendant] is also impractical and economically inefficient. Construction projects pose complex time management challenges, requiring multiple contractors and subcontractors to coordinate their efforts as numerous design revisions and change orders inevitably arise. To complete these projects efficiently, the parties must be able to continue working despite contract disputes with reasonable assurances of the ability to ultimately obtain a fair resolution of those disputes. (*Ted Jacob Engineering Group, Inc. v. The Ratcliff Architects* (2010) 187 Cal.App.4th 945, 966 [114 Cal.Rptr.3d 644].)

Secondary Sources

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.38 et seq.

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, § 6.62 et seq.

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, § 9.66 et seq.

1 Stein, Construction Law, Ch. 4, *Modification and Termination of Construction Contracts*, ¶ 4.06 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 440, *Construction Contract Remedies*, § 440.14 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.15, 104.215 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.40 (Matthew Bender)

15 California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts*, § 30D.14 (Matthew Bender)

Miller & Starr, California Real Estate 4th, §§ 27:61, 27:69 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) § 7:34 (Thomson Reuters)

Bruner & O'Connor on Construction Law, §§ 4:23, 4:41 (Thomson Reuters)

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 13, *Everything You Ever Wanted to Know About Extra Work and the Changes Clause*

4521. Owner's Claim That Contract Procedures Regarding Change Orders Were Not Followed

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The contract between the parties provided for certain procedures that had to be followed if [*name of plaintiff*] wanted to be paid for changed or additional work that was not required by the contract. These procedures are called "change-order requirements." [The change-order requirements of the contract provide as follows: [*specify*].]

[*Name of plaintiff*] seeks additional compensation beyond that provided for in the contract for [*specify, e.g., fill and grading*] because [*specify, e.g., the soil conditions at the project site were not as represented*]. [*Name of defendant*] claims that [*name of plaintiff*] failed to comply with the contract's change-order requirements, and that therefore [he/she/*nonbinary pronoun*/it] is not entitled to payment for the changed or additional work that [he/she/*nonbinary pronoun*/it] performed.

To obtain additional compensation, [*name of plaintiff*] must prove that [he/she/*nonbinary pronoun*/it] [followed/was excused from having to follow] the change-order requirements.

New December 2010

Directions for Use

This instruction should be given if the owner claims that the contract required the contractor to request a change order for any claimed changed or additional work before performing the work as a condition precedent to being permitted to assert a claim for additional compensation. It is an adaptation of CACI No. 321, *Existence of Condition Precedent Disputed*, and CACI No. 322, *Occurrence of Agreed Condition Precedent*.

The owner's claim for strict compliance with the contract's change-order procedures is potentially subject to several recognized defenses, including waiver (see CACI No. 4522, *Waiver of Written Approval or Notice Requirements for Changed or Additional Work*), estoppel, and oral modification (see CACI No. 313, *Modification*; Civ. Code, § 1698; *Girard v. Ball* (1981) 125 Cal.App.3d 772, 785 [178 Cal.Rptr. 406].) If one of these defenses is asserted, select "was excused from having to follow" in the last paragraph and give the appropriate instruction on the excuse from performance that is at issue.

Sources and Authority

- Modification of Contract. Civil Code section 1698.
- "California courts generally have upheld the necessity of compliance with contractual provisions regarding written 'change orders'." (*Weeshoff Constr. Co.*

v. Los Angeles County Flood Control Dist. (1979) 88 Cal.App.3d 579, 589 [152 Cal.Rptr. 19].)

- "It is frequently provided that change orders for extra work must be in writing. *In the absence of a waiver or modification*, no recovery can be had for alterations or extra work performed without compliance with such a provision." (*G. Voskanian Construction, Inc. v. Alhambra Unified School Dist.* (2012) 204 Cal.App.4th 981, 987 [139 Cal.Rptr.3d 286], original italics.)
- "Compliance with contractual provisions for written orders is indispensible in order to recover for alleged extra work." (*Acoustics, Inc. v. Trepte Construction* (1971) 14 Cal.App.3d 887, 912 [92 Cal.Rptr. 723].)
- "It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance. Similarly, where defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524], internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 155

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.44

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, §§ 6.65, 6.67

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, § 9.68

1 Stein, Construction Law, Ch. 3, *Construction and Design Contracts*, ¶ 3.05 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.15 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.40 (Matthew Bender)

15 California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts*, § 30D.14 (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch.15, *Attacking or Defending Existence of Contract—Failure to Comply With Applicable Formalities*, 15.25

Miller & Starr, California Real Estate 4th, §§ 27:61, 27:65 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) § 7:34 (Thomson Reuters)

Bruner & O'Connor on Construction Law, §§ 4:35–4:47 (Thomson Reuters)

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 13, *Everything You Ever Wanted to Know About Extra Work and the Changes Clause*, pp. 100–103

4522. Waiver of Written Approval or Notice Requirements for Changed or Additional Work

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The contract between the parties required [*name of plaintiff***] [to obtain [***name of defendant***]'s written approval/to give written notice to [***name of defendant***]] in order to be paid for changed or additional work that [he/she/***nonbinary pronoun***/it] performed.**

[*Name of defendant***] claims that [***name of plaintiff***] failed to comply with the contract's [written approval/ notice] requirements, and that therefore [***name of plaintiff***] is not entitled to payment for the changed or additional work that [he/she/***nonbinary pronoun***/it] performed. [***Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/it] was not required to comply with the contract's [written approval/notice] requirement because [***name of defendant***] gave up [his/her/***nonbinary pronoun***/its] right to insist on [written approval/notice]. Giving up a contract right is called a "waiver."**

To succeed on this waiver claim, [*name of plaintiff***] must prove [by clear and convincing evidence] that [***name of defendant***] freely and knowingly gave up [his/her/***nonbinary pronoun***/its] right to require [***name of plaintiff***] to follow the contract's [written approval/notice] requirements.**

A waiver may be oral or written or may arise from conduct that shows [*name of defendant***] clearly gave up that right.**

New December 2010; Revised June 2011

Directions for Use

This instruction is a variation of CACI No. 336, *Affirmative Defense—Waiver*. Use of this instruction is almost certainly limited to private contract disputes. (See *P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1344 [119 Cal.Rptr.3d 253] [public contract change-order requirements not subject to oral modification or modification by conduct]; cf. *Weeshoff Constr. Co. v. Los Angeles County Flood Control Dist.* (1979) 88 Cal.App.3d 579, 589 [152 Cal.Rptr. 19] [public agency may waive written change order requirements].)

When a contractor asserts a claim for compensation for changed or additional work (see CACI No. 4520, *Contractor's Claim for Changed or Extra Work*), the owner may assert that the contractor is not entitled to payment because it failed to obtain the owner's written approval or failed to give written notice before performing the changed or additional work. (See CACI No. 4521, *Owner's Claim That Contract Procedures Regarding Change Orders Were Not Followed*.) The contractor is entitled to counter this defense by showing that the owner expressly or impliedly waived the contract's requirements.

The general rule of contract law is that waiver must be proved by clear and

convincing evidence. (*Ukiah v. Fones* (1966) 64 Cal.2d 104, 107–108 [48 Cal.Rptr. 865, 410 P.2d 369].) Some construction law cases, however, have not mentioned this requirement, though there was no discussion of the burden of proof. (See *Healy v. Brewster* (1967) 251 Cal.App.2d 541, 552 [59 Cal.Rptr. 752]; *Howard J. White, Inc. v. Varian Associates* (1960) 178 Cal.App.2d 348, 353–355 [2 Cal.Rptr. 871].) If the clear-and-convincing-evidence requirement is included, also give CACI No. 201, *Highly Probable—Clear and Convincing Proof*.

Sources and Authority

- Modification of Contract. Civil Code section 1698.
- Enforceability of Change Orders. Business and Professions Code section 7159.6 (applicable to "home improvement contractors" as defined in Business and Professions Code section 7150.1).
- " '[W]aiver is the intentional relinquishment of a known right after knowledge of the facts.' . . . The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.' . . . The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31 [44 Cal.Rptr.2d 370, 900 P.2d 619], internal citations omitted.)
- "It is settled law that the parties may by their conduct waive the requirement of a written contract that no extra work shall be done except upon written order. . . . [¶¶] 'Waiver may be shown by conduct, and it may be the result of an act which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished.' " (*Howard J. White, Inc.*, *supra*, 178 Cal.App.2d at pp. 353–355.)
- "Where the terms of a written contract require that extra work be approved in writing, such provision may be altered or waived by an executed oral modification of the contract." (*Healy*, *supra*, 251 Cal.App.2d at p. 552, internal citations omitted.)
- "[Defendant] places reliance on the provision of the subcontract which provides that any work involving extra compensation shall not be proceeded with unless written authority is given by [defendant]. But under section 1698 of the Civil Code, an executed oral agreement may alter an agreement in writing, even though, as here, the original contract provides that extra work must be approved in writing. The oral request for and approval of extra work by [defendant] was, when fully performed, an oral modification of the written June 8th subcontract. . . . [¶] Whether a written contract has been modified by an executed oral agreement is a question of fact, and the finding, in the instant case, is supported by substantial evidence. . . . [¶] Defendant cannot be heard to say that a written order was not first obtained as required under the subcontract. [Defendant] by its acts and conduct waived and is estopped to rely upon the

subcontract provision requiring its prior written approval before proceeding with work involving extra compensation." (*MacIsaac & Menke Co. v. Cardox Corp.* (1961) 193 Cal.App.2d 661, 669–670 [14 Cal.Rptr. 523], internal citations omitted.)

- "The written contract provided that the defendant should not be charged for 'extras' unless ordered in writing. Upon this basis defendant contends that recovery for the 'extras' furnished by plaintiff is barred. The provision in a building contract that an owner may be charged only for 'extras' which are ordered in writing may be waived or modified by an executed oral agreement. As a consequence, recovery by the contractor for the reasonable value of 'extras' has been upheld where they have been furnished at the request of the owner, became a part of the construction work generally described in the building contract, and are accepted by him, even though the request therefor was oral and the building contract provided that he should be chargeable only for such 'extras' as were requested in writing." (*1st Olympic Corp. v. Hawryluk* (1960) 185 Cal.App.2d 832, 841 [8 Cal.Rptr. 728], internal citations omitted.)
- "Defendants concede that the labor for which payment is sought was actually performed and that the backfill was supplied. They accept the finding that the charges were reasonable, and the record discloses that the benefits of the labor and material have accrued to the premises. Defendants rest their contentions on the provision of the contract requiring written change orders. The parties may, by their conduct, waive such a provision with the result that the subcontractor does extra work without a written order. If the circumstances indicate that the parties intended to waive the provision, the subcontractor will be protected." (*Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council* (1954) 128 Cal.App.2d 676, 682–683 [276 P.2d 52], internal citations omitted.)
- "The record shows that extras were ordered and approved by [cross-defendant] in the amount of $8,097.50. Under the law this amounted to a modification of the written contract. [Cross-defendant] places great reliance on the provision of the contract which provides that alterations must be in writing, and points out here that he only approved one alteration in writing. But under section 1698 of the Civil Code, an executed oral agreement may alter an agreement in writing, even though, as here, the original contract provides that all changes must be approved in writing. This is so because the executed oral agreement may alter or modify that provision of the contract as well as other portions." (*Miller v. Brown* (1955) 136 Cal.App.2d 763, 775 [289 P.2d 572], internal citation omitted.)
- "The evidence showed that the extra work on the building was done with the knowledge and consent of defendant and his agent, and that they waived the written stipulation that a separate written estimate of extra work should be submitted, by orally agreeing to and countenancing the work without written estimates. Had it not been for defendant's consent thus given, the work would not have been thus done. He will not now be permitted to repudiate work done in the manner that he consented to, on any ground that it was not done in

accordance with a previous written agreement." (*Wyman v. Hooker* (1905) 2 Cal.App. 36, 41 [83 P. 79].)

- "Unlike private contracts, public contracts requiring written change orders cannot be modified orally or through the parties' conduct. Thus, even if [plaintiff]'s evidence pertaining to the oral authorizations of a city employee for extra work is fully credited, [plaintiff] cannot prevail." (*P&D Consultants, Inc.*, *supra*, 190 Cal.App.4th at p. 1335.)
- "California courts generally have upheld the necessity of compliance with contractual provisions regarding written 'change orders.' . . . However, California decisions have also established that particular circumstances may provide waivers of written 'change order' requirements. If the parties, by their conduct, clearly assent to a change or addition to the contractor's required performance, a written 'change order' requirement may be waived." (*Weeshoff Constr. Co.*, *supra*, 88 Cal.App.3d at p. 589, internal citations omitted.)
- "In addition to being factually inapposite, the continuing viability of *Weeshoff* is questionable. In pronouncing that 'California decisions have also established that particular circumstances may provide waivers of written "change order" requirements,' and '[i]f the parties, by their conduct, clearly assent to a change or addition to the contractor's required performance, a written "change order" requirement may be waived,' the court cited cases involving private parties, not public agencies . . . . Since its publication 28 years ago, no case has cited *Weeshoff* for this point. This is understandable as it is contrary to the great weight of authority, cited above, to the contrary." (*Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 111 [65 Cal.Rptr.3d 762], internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 1000

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, §§ 5.44–5.47

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, § 9.69

1 Stein, Construction Law, Ch. 3, *Construction and Design Contracts*, § 3.02 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.15 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.522 et seq. (Matthew Bender)

15 California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts*, § 30D.14 (Matthew Bender)

Miller & Starr, California Real Estate 4th, §§ 27:61, 27:65–27:66 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) §§ 1:40–1:47 (Thomson

Reuters)

Acret, California Construction Law Manual (6th ed.) § 7:71 (Thomson Reuters)

Bruner & O'Connor on Construction Law, §§ 4:39–4:40 (Thomson Reuters)

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 13, *Everything You Ever Wanted to Know About Extra Work and the Changes Clause*, pp. 103–106

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 16, *Written Extra Work Order Gotcha*

4523. Contractor's Claim for Additional Compensation—Abandonment of Contract

The contract between the parties provided for certain procedures to be followed if [*name of plaintiff*] wanted to be paid for changed or additional work that was not initially required by the contract. These procedures are called "change-order requirements."

[*Name of plaintiff*] claims that [*name of defendant*] required many changes and that the parties consistently ignored the contract's change-order requirements. Therefore, [*name of plaintiff*] claims that the contract was abandoned and that the change-order requirements no longer applied.

To establish this claim, [*name of plaintiff*] must prove the following:

1. **That the parties through their conduct consistently disregarded the contract's change-order requirements; and**
2. **That the scope of work under the original contract had been altered by the changes so much that the final project was significantly different from the original project.**

New December 2010

Directions for Use

This instruction is a contractor's response if the owner asserts that the contractor is not entitled to additional compensation for changed or additional work. (See CACI No. 4521, *Owner's Claim That Contract Procedures Regarding Change Orders Were Not Followed*.) It should be given if the contractor claims that through their conduct, the parties acted in a manner that indicated that they had entirely abandoned their original contract.

For instructions on damages after it has been established that the contract was abandoned, see CACI No. 4541, *Contractor's Damages for Breach of Construction Contract—Change Orders/Extra Work—Total Cost Recovery*, and CACI No. 4542, *Contractor's Damages for Abandoned Construction Contract—Quantum Meruit Recovery*.

This instruction may not be used against a public entity. A contractor may not claim that a public entity has abandoned the applicable contract change order procedures on a project subject to competitive bidding in such a way as to increase the contract price because doing so would violate the public policy regarding competitive bidding. (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 239 [115 Cal.Rptr.2d 900, 38 P.3d 1120].)

Sources and Authority

- "[T]his court has not generally allowed quantum meruit recovery for extra work

performed beyond the contract requirements." (*Amelco Electric*, *supra*, 27 Cal.4th at p. 234.)

- "[W]hen an owner imposes upon the contractor an excessive number of changes such that it can fairly be said that the scope of the work under the original contract has been altered, an abandonment of contract properly may be found." (*C. Norman Peterson Co. v. Container Corp. of Am.* (1985) 172 Cal.App.3d 628, 640 [218 Cal.Rptr. 592].)
- "Abandonment of a contract may be implied from the acts of the parties. Abandonment of the contract can occur in instances where the scope of the work when undertaken greatly exceeds that called for under the contract. . . . In the instant case the parties consistently ignored the procedures provided by the contract for the doing of extra work." (*Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 156 [92 Cal Rptr. 120], internal citation omitted.)
- "Under the abandonment doctrine, once the parties cease to follow the contract's change order process, and the final project has become materially different from the project contracted for, the entire contract—including its notice, documentation, changes and cost provisions—is deemed inapplicable or abandoned, and the plaintiff may recover the reasonable value for all of its work. Were we to conclude such a theory applied in the public works context, the notion of competitive bidding would become meaningless." (*Amelco Electric*, *supra*, 27 Cal.4th at p. 239.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 1037

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.56

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, § 6.71

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, §§ 9.81–9.87

1 Stein, Construction Law, Ch. 3, *Construction and Design Contracts*, ¶ 3.10 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.15, 104.230 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.470 (Matthew Bender)

Miller & Starr, California Real Estate 4th, §§ 27:66, 27:87 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) § 1:48 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) § 7:72 (Thomson Reuters)

Bruner & O'Connor on Construction Law, § 4:14 (Thomson Reuters)

4524. Contractor's Claim for Compensation Due Under Contract—Substantial Performance

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[*Name of defendant***] claims that [***name of plaintiff***] did not fully perform all of the things that [he/she/***nonbinary pronoun***/it] was required to do under the [terms of the contract/plans and specifications], and therefore [***name of defendant***] did not have to [***specify owner's obligations under the contract, e.g., pay the contract balance***]. [***Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/it] did substantially all of the things required of [him/her/***nonbinary pronoun***/it] under the contract.**

To succeed, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] made a good-faith effort to comply with the terms of the contract and did not willfully depart from them;**
2. **That [***name of plaintiff***] did not omit any essential requirement in the contract; and**
3. **That the [***name of defendant***] received essentially what the contract called for because [***name of plaintiff***]'s failures, if any, were so trivial that they could have been easily fixed.**

If you find that [*name of plaintiff***] substantially performed the contract, the cost of completing unfinished work must be deducted from the contract price.**

New December 2010

Directions for Use

This instruction is a variation of CACI No. 312, *Substantial Performance*. It should be used if the issue is whether the contractor performed all of the requirements of the construction contract, including the plans and specifications. If the owner withholds some or all of the contract price because it claims that the contractor did not perform the work completely or correctly, the contractor may assert that it "substantially performed."

Sources and Authority

- " 'At common law, recovery under a contract for work done was dependent upon complete performance, although hardship might be avoided by permitting recovery in *quantum meruit*. The prevailing doctrine today, which finds its application chiefly in building contracts, is that *substantial performance* is sufficient, and justifies an action on the contract, although the other party is entitled to a reduction in the amount called for by the contract, to compensate for the defects. What constitutes substantial performance is a question of fact, but it is essential that there be no wilful departure from the terms of the contract,

and that the defects be such as may be easily remedied or compensated, so that the promisee may get practically what the contract calls for.' " (*Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 186–187 [14 Cal.Rptr. 297, 363 P.2d 313], original italics, internal citation omitted.)

- " 'Substantial performance means that there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, and that the contractor has in good faith performed all of its substantive terms. If so, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed.' " (*Connell v. Higgins* (1915) 170 Cal. 541, 556 [150 P. 769], internal citation omitted.)
- "What constitutes 'substantial performance' 'is always a question of fact, a matter of degree, a question that must be determined relatively to all the other complex factors that exist in every instance.' " (*Tolstoy Constr. Co. v. Minter* (1978) 78 Cal.App.3d 665, 672 [143 Cal.Rptr. 570], internal citation omitted.)
- " 'Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact.' " (*Connell*, *supra*, 170 Cal. at pp. 556–557, internal citation omitted.)
- " 'The general rule on the subject of [contractual] performance is that "[w]here a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing he agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, or by operation of law, or by the act of God or the public enemy." [Citation.] . . . [I]t is settled, especially in the case of building contracts where the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, that if there has been a substantial performance thereof by the contractor in good faith, where the failure to make full performance can be compensated in damages to be deducted from the price or allowed as a counterclaim, and the omissions and deviations were not willful or fraudulent and do not substantially affect the usefulness of the building for the purposes for which it was intended, the contractor may, in an action upon the contract, recover the amount unpaid of his contract price, less the amount allowed as damages for the failure in strict performance. [Citations.]' " (*Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1291–1292 [71 Cal.Rptr.3d 317].)
- " '[T]here is a substantial performance where the variance from the specifications of the contract does not impair the building or structure as a whole, and where after it is erected the building is actually used for the intended purpose, or where the defects can be remedied without great expenditure and without material damage to other parts of the structure, but that the defects must not run through the whole work so that the object of the owner in having the work done in a particular way is not accomplished, or be such that a new contract is not substituted for the original one, nor be so substantial as not to be capable of a remedy and the allowance out of the contract price will not give the owner

essentially what he contracted for.' " (*Murray's Iron Works, Inc.*, *supra*, 158 Cal.App.4th at p. 1292.)

- "The rule of substantial performance was intended to cover situations where the defects are slight or trivial, or where the imperfections do not affect a substantive part of the work, but it was not intended to cover cases where the departures or deviations from the plans are major, where it takes a major operation to remedy the defects, or where the work as constructed is of no real value." (*Bause v. Anthony Pools, Inc.* (1962) 205 Cal.App.2d 606, 613 [23 Cal.Rptr. 265].)
- "[A]lthough in a few minor and trivial matters the building did not strictly and technically comply with the terms of the contract, the departure was not willful nor intentional on the part of the defendant, and the defects were capable of being easily remedied to conform to the terms of the contract . . . . Thereupon the court concluded that the defendant was entitled to have the contract enforced in his favor, with an abatement . . . on the contract price on account of the defects found to exist . . . ." (*Rischard v. Miller* (1920) 182 Cal. 351, 352–353 [188 P. 50].)
- "[The] performance rendered may be held to be less than substantial by reason of the accumulation of many defects, any one of which standing alone would be minor in character.' " (*Tolstoy Constr. Co.*, *supra*, 78 Cal.App.3d at p. 673, footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 843–844

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.99

13 California Forms of Pleadings and Practice, Ch. 140, *Contracts*, § 140.23 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.30, 50.31 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.08[2], 22.16[2], 22.37, 22.69

Miller & Starr, California Real Estate 4th, §§ 27:103, 29:3 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) § 1:54 (Thomson Reuters)

Bruner & O'Connor on Construction Law, § 18:12 (Thomson Reuters)

4525–4529. Reserved for Future Use

4530. Owner's Damages for Breach of Construction Contract—Work Does Not Conform to Contract

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If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***] claim against [***name of defendant***] for failure to properly build the [project/***describe construction project, e.g., apartment building***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

To recover damages, [*name of plaintiff***] must prove the reasonable cost of repairing the [project/***short term for project, e.g., building***] so that it complies with the terms of the contract, including the plans and specifications, agreed to by the parties.**

If, however, [*name of defendant***] proves that the cost of repair is unreasonable in light of the damage to the property and the property's value after repair, then [***name of plaintiff***] is entitled only to the difference between the value of the [project/***short term for project, e.g., remodeling***] as it was performed by [***name of defendant***] and what it would be worth if it had been completed according to the contract, including the plans and specifications, agreed to by the parties. The cost of repair may be unreasonable if the repair would require the destruction of a substantial part of [***name of defendant***]'s work.**

New December 2010

Directions for Use

This instruction should be used when the owner claims that the contractor has breached the construction contract by failing to meet the requirements of the contract or its plans and specifications. If the owner claims that the contractor breached the contract by failing to complete all work required by the contract, see CACI No. 4531, *Owner's Damages for Breach of Construction Contract—Failure to Complete Work*.

The basic measure of damages is the cost of repair to bring the project into compliance with the contract. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev.* (1977) 66 Cal.App.3d 101, 123–124 [135 Cal.Rptr. 802].) However, the contractor may attempt to prove that the cost of repair is unreasonable in light of the damage to the property and the value of the property after repair. (*Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687 [266 Cal.Rptr. 193]; see *Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 366 [330 P.2d 817] [burden of proof on contractor].) If the cost of repair is unreasonable, the measure of damages is the diminution in the value of the property because of the defective work. (*Shell*, *supra*, 164 Cal.App.2d at pp. 360–361.)

There is no cap, however, at diminution of value. The cost of repair may be

awarded even if greater than diminution in value if the owner has a personal reason for wanting to repair and the costs are not unreasonable in light of the damage to the property and the value after repair (*Orndorff*, *supra*, 217 Cal.App.3d at p. 687.)

For a related instruction on damages for tortious injury to property, see CACI No. 3903F, *Damage to Real Property (Economic Damage)*. For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- Damages for Breach of Contract. Civil Code section 3300.
- Damages Must Be Reasonable. Civil Code section 3359.
- "The available damages for defective construction are limited to the cost of repairing the home, including lost use or relocation expenses, or the diminution in value." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 561 [87 Cal.Rptr.2d 886, 981 P.2d 978].)
- "The proper measure of damages for breach of a contract to construct improvements on real property where the work is to be done on plaintiff's property is ordinarily the reasonable cost to the plaintiff of completing the work and not the difference between the value of the property and its value had the improvements been constructed. A different rule applies, however, where improvements are to be made on property not owned by the injured party. 'In that event the injured party is unable to complete the work himself and, subject to the restrictions of sections 3300 and 3359 of the Civil Code, the proper measure of damages is the difference in value of the property with and without the promised performance, since that is the contractual benefit of which the injured party is deprived.' " (*Glendale Fed. Sav. & Loan Assn.*, *supra*, 66 Cal.App.3d at pp. 123–124, internal citations omitted.)
- "[E]ven where the repair costs are reasonable in relation to the value of the property, those costs must also be reasonable in relation to the harm caused. Here the trial court's finding that fill settlement was likely to continue and the [plaintiff]s' appraiser's opinion the home was worth only $67,500 in its present condition, suggest the damage sustained was indeed significant. Plainly this is not a case where the tortfeasors' conduct improved the value of the real property or only diminished it slightly. Rather we believe where, as here, the damage to a home has deprived it of most of its value, an award of substantial repair costs is appropriate." (*Orndorff*, *supra*, 217 Cal.App.3d at pp. 690–691.)
- "[T]he defendant did not prove, or offer to prove, the other factors of the American Jurisprudence rule, to wit: 'a substantial part of what has been done must be undone.' To the contrary, defendant's expert witness . . . testified that it would not be necessary to undo any of the work. [¶] As quoted, Professor Corbin argues that the burden is on the defendant to affirmatively and convincingly prove that economic waste would result from the replacement of the omissions and defects. In all fairness this would appear proper as it is the defendant who is seeking to prove a situation whereby he will get equitable

relief from a rule of law. The same reasoning would apply as to proof that a substantial part of what has been done must be undone." (*Shell*, *supra*, 164 Cal.App.2d at p. 366.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 937

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.90 et seq.

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, §§ 9.92–9.93

2 Stein, Construction Law, Ch. 5B, *Contractor's and Construction Manager's Rights and Duties*, ¶ 5B.01 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.25 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.47 (Matthew Bender)

Miller & Starr, California Real Estate 4th, §§ 27:99, 29:3, 29:10 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) §§ 1:71, 1:72 (Thomson Reuters)

Bruner & O'Connor on Construction Law, §§ 19:57–19:61 (Thomson Reuters)

4531. Owner's Damages for Breach of Construction Contract—Failure to Complete Work

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If you decide that [*name of plaintiff***] has proved [his/her/***nonbinary pronoun***/its] claim against [***name of defendant***] for failure to complete the [project/***describe construction project, e.g., kitchen remodeling***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the harm. This compensation is called "damages."**

To recover damages, [*name of plaintiff***] must prove the reasonable cost of completing the [project/***short term for project, e.g., remodeling***] so that it complies with the terms of the contract, including the plans and specifications, agreed to by the parties.**

New December 2010

Directions for Use

This instruction should be used when the owner claims that the contractor has breached the construction contract by failing to complete all the work required by the contract. For an instruction for use if the owner claims that the contractor breached the contract by failing to complete the work in conformity with the contract, see CACI No. 4530, *Owner's Damages for Breach of Construction Contract—Work Does Not Conform to Contract.*

The basic measure of damages for failing to complete a construction project is ordinarily the reasonable cost to the owner of completing the work. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 123 [135 Cal.Rptr. 802].) With regard to defective or nonconforming work, the contractor may attempt to prove that the cost or repair is unreasonable in light of the damage to the property and the value of the property after repair. If the cost of repair is unreasonable, the measure of damages is the diminution in the value of the property because of the defective work. (*Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 366 [330 P.2d 817]; see also *Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687 [266 Cal.Rptr. 193] [cost of repair may exceed diminution in value if owner has personal reason for wanting repairs].)

No reported case has been found that applies a reasonableness limitation on the cost of completing a contract, though the Restatement Second of Contracts requires that the cost of completion not be clearly disproportionate to the probable loss in value. (See Rest.2d of Contracts, § 348(2).) The last paragraph of CACI No. 4530 may be adapted to provide for a reasonableness limitation on cost of repair. There may, however, be different concerns regarding the cost of completing a contract as opposed to the cost of repairing construction defects. It might be argued that the owner is entitled to have the work completed as required by the contract, regardless of any unexpected increases in the cost of completion.

For a related instruction on damages for tortious injury to property, see CACI No. 3903F, *Damage to Real Property (Economic Damage)*. For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- Damages for Breach of Contract. Civil Code section 3300.
- Damages Must Be Reasonable. Civil Code section 3359.
- "The measure of damages for breach of contract to construct improvements on real property where the work is to be done on plaintiff's property is the reasonable cost to the plaintiff to finish the work in accordance with the contract." (*Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 993 [149 Cal.Rptr. 119].)
- "Although the defendants inferentially contend to the contrary, the plaintiff was entitled to recover damages from them for their breach of the contract even though [plaintiff] had not completed the work in question." (*Fairlane Estates, Inc. v. Carrico Constr. Co.* (1964) 228 Cal.App.2d 65, 72–73 [39 Cal.Rptr. 35].)
- Restatement Second of Contracts, section 348(2) provides: "If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on: (a) the diminution in the market price of the property caused by the breach, or (b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him."

Secondary Sources

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.96

3 Stein, Construction Law, Ch. 11, *Remedies and Damages*, ¶ 11.02 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.256 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.41 (Matthew Bender)

Miller & Starr, California Real Estate 4th, §§ 27:106, 27:107, 29:10 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed) §§ 1:71, 1:72 (Thomson Reuters)

Bruner & O'Connor on Construction Law, § 19:56 (Thomson Reuters)

4532. Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay

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[*Name of plaintiff***] claims that [***name of defendant***] breached the parties' contract by failing to [substantially] complete the [project/***describe construction project, e.g., apartment building***] by the completion date required by the contract. If you find that [***name of plaintiff***] has proven this claim, the parties' contract calls for damages in the amount of $_____ for each day between [***insert contract completion date***] and the date on which the project was [substantially] completed. You will be asked to find the date on which the project was [substantially] completed. I will then calculate the amount of damages.**

[If you find that [*name of plaintiff***] granted or should have granted time extensions to [***name of defendant***], you will be asked to find the number of days of the time extension and add these days to the completion date set forth in the contract. I will then calculate [***name of plaintiff***]'s total damages.]**

New December 2010; Revised December 2011

Directions for Use

This instruction should be used when the owner seeks to recover liquidated damages against the contractor for delay in completing the project under a provision of the contract. Include the optional second paragraph if there is a dispute over whether the contractor is entitled to an extension of time. Give CACI No. 4520, *Contractor's Claim for Changed or Extra Work,* to guide the jury on how to determine if the contractor is entitled to a time extension for extra work. A special instruction may be required to guide the jury on how to determine if the contractor is entitled to a time extension for excusable or compensable delays.

Include "substantially" throughout if there is a dispute of fact as to when the project should be considered as finished. Unless otherwise defined by the contract to mean actual completion or some other measure of completion (see, e.g., *London Guarantee & Acc. Co. v. Las Lomitas School Dist.* (1961) 191 Cal.App.2d 423, 427 [12 Cal.Rptr. 598]), "completion" for the purpose of determining liquidated damages ordinarily is understood to mean "substantial completion." (See *Vrgora v. L.A. Unified Sch. Dist.* (1984) 152 Cal.App.3d 1178, 1186 [200 Cal.Rptr. 130]; see generally *Perini Corp. v. Greate Bay Hotel & Casino, Inc.* (1992) 129 N.J. 479, 500–501, overruled on other grounds in *Tretina v. Fitzpatrick & Assocs.* (1994) 135 N.J. 349, 358 [discussing standard practices in the construction industry].)

There are few or no general principles set forth in California case law as to what may constitute substantial completion. It would seem to be dependent on the unique facts of each case. (See, e.g., *Continental Illinois Nat'l Bank & Trust Co. v. United*

States (1952) 121 Ct.Cl. 203, 243–244.) The related doctrine of substantial performance, which allows the contractor to obtain payment for its work even if there are some minor or trivial deviations from the contract requirements, may perhaps be looked to for guidance for when a project is substantially complete for purposes of stopping the running of the clock on liquidated damages. (See CACI No. 4524, *Contractor's Claim for Compensation Due Under Contract—Substantial Performance*.) But they are separate doctrines. Substantial performance focuses on *what* was done. Substantial completion focuses on *when* it was done. (See *Hill v. Clark* (1908) 7 Cal.App. 609, 612 [95 P. 382] [only substantial performance, not substantial completion, was at issue].) See also Code Civ. Proc., § 337.15 and CACI No. 4551, *Affirmative Defense—Statute of Limitations—Latent Construction Defect* (limitation period begins to run on substantial completion).

If the liquidated damages provision is found to be unenforceable because its enforcement would constitute a penalty rather than an approximation of actual damages that are difficult to ascertain, the owner may be entitled to recover its general and special damages, as those damages are defined in CACI No. 350, *Introduction to Contract Damages,* and CACI No. 351, *Special Damages*.

Sources and Authority

- Excused Performance of Contract. Civil Code section 1511(1).
- Liquidated Damages. Civil Code section 1671(b).
- Time for Completion: Liquidated Damages. Public Contract Code section 10226.
- "Liquidated damage clauses in public contracts are frequently validated precisely because delay in the completion of projects such as highways 'would cause incalculable inconvenience and damage to the public.' . . . Thus, it is accepted that damage in the nature of inconvenience and loss of use by the public are real but often, as a matter of law, not measurable." (*Westinghouse Electric Corp. v. County of Los Angeles* (1982) 129 Cal.App.3d 771, 782–783 [181 Cal.Rptr. 332], internal citations omitted.)
- "[I]n the absence of a contractual provision for extensions of time, the rule generally followed is that an owner is precluded from obtaining liquidated damages not only for late completion caused entirely by him but also for a delay to which he has contributed, even though the contractor has caused some or most of the delay. . . . Acceptance of the reasoning urged by defendant would mean that, solely because there has been noncompliance with an extension-of-time provision, the position of an owner could be completely changed so that he could withhold liquidated damages for all of the period of late completion even though he alone caused the delay." (*Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist.* (1963) 59 Cal.2d 241, 245 [28 Cal.Rptr. 714, 379 P.2d 18], internal citation omitted.)
- "If the contractor wished to claim it needed an extension of time because of delays caused by the city, the contractor was required to obtain a written change order by mutual consent or submit a claim in writing requesting a formal

decision by the engineer. It did neither. The court was correct to rely on its failure and enforce the terms of the contract. It makes no difference whether [contractor]'s timely performance was possible or impossible under these circumstances. The purpose of contract provisions of the type authorized by the 1965 amendment to Civil Code section 1511, subdivision 1, is to allocate to the contractor the risk of delay costs—even for delays beyond the contractor's control—unless the contractor follows the required procedures for notifying the owner of its intent to claim a right to an extension." (*Greg Opinski Construction, Inc. v. City of Oakdale* (2011) 199 Cal.App.4th 1107, 1117–1118 [132 Cal.Rptr.3d 170].)

- "[A]cceptance may not be arbitrarily delayed to the prejudice of a contractor, and work should be viewed as accepted when it is finished even though a governmental body specifies a later date." (*Peter Kiewit Sons' Co.*, *supra*, 59 Cal.2d at p. 246.)
- "Lacking any authority, appellant asserts 'that something is wrong here' and '[it] does not make sense to compensate the owner for the loss of use of something that it is actually using.' For all practical purposes, we perceive appellant as attempting to invoke the equitable doctrine of unjust enrichment and therein seek a setoff. The No. 1 problem with the applicability of said theory is that although [defendant] may have benefitted by using the facility, the fact that the facility had not been fully or even substantially completed suggests that the enrichment obtained is de minimis or is at best undefinable." (*Vrgora*, *supra*, 152 Cal.App.3d at p. 1186, footnote omitted.)
- "Was the contract completed on September 5, 1953? The trial court did not find that the building was completed on that date. It found that it was 'substantially completed.' On September 8, 1953, the uncontradicted evidence shows that some of the class rooms were insufficiently complete to be used; the plumbing was not complete; and the fencing of the playground had not been started. There were workmen in the building and there was grading equipment in the yard area. The salary of the inspector for the school district, who was required by state law, had to be paid until October 22, 1953. The inspector's report made on September 1, 1953, showed that the work was 94 per cent complete as of that time. His report made on September 16, 1953 showed the work to be 96 per cent complete. On September 16 there was admittedly about $ 9,800 worth of work yet to be done. The contract called for a complete building and not a substantially complete one. [¶] The fact that the school district occupied portions of the building on September 8, 1953, does not change the situation. [The contract] provides that occupancy of any portion of the building '. . . shall not constitute an acceptance of any part of the work, unless so stated in writing by the Board of the District.' The board of the district did not so state."(*London Guarantee & Acc. Co.*, *supra*, 191 Cal.App.2d at pp. 426–427.)
- "In *London Guar. & Acc. Co. v. Las Lomitas School Dist.*, *supra*, 191 Cal.App.2d 423, the appellate court reviewed the efficacy of an 'adjusted' liquidated damages award by the trial court on the basis of the date of

'substantial completion' as opposed to 'actual completion.' . . . The appellate court reversed the trial court's judgment, finding no validity to the argument employed at trial, that once the contractor had substantially performed his obligation (96 percent completion of the building), the school district was not entitled to liquidated damages. In effect, the court held that since the parties contracted for 'actual' performance in the form of a '. . . complete building and not a substantially complete one', liquidated damages were appropriate." (*Vrgora*, *supra*, 152 Cal.App.3d at p. 1187, internal citation omitted.)

- "We perceive no error in the action of the court sustaining the objection to a question asked defendant, as follows: 'Can you state to the court how much and to what extent you have been injured by the failure of the plaintiff to complete this work; the question is, can you tell?' The contract provided for a fixed sum as liquidated damages for delay in the completion of the work beyond the time specified in the contract. No issue was presented as to the amount of the liquidated damages, or claim on account thereof, and the question objected to could have no reference thereto; and the court finding that the contract was substantially completed, there was no room for inquiry as to the damages, and no prejudice could result to defendant from such ruling." (*Hill*, *supra*, 7 Cal.App. at p. 612.)
- "Finding 51 shows that the work . . . was 99.6% complete on December 30, as of which day liquidated damages began, and that the only work remaining to be done had to do with the boiler house equipment, and certain 'punch list items' which are usually minor adjustments which recur for an indefinite time after the completion of an extensive building project. The boiler house work would, apparently, not have interfered with the occupancy of the houses by tenants, and tenants in new houses expect to be troubled for a while by adjustments due to tests. Two hundred dollars a day was a severe penalty for so slight an asserted delinquency and our observation of other cases tells us that it is not customary to draw the line so strictly. The refusal, which we hold unjustified, of the Government to accept the project on December 30, 1936, subjected the contractor, not only to the liquidated damages discussed above, but to continued expenditures for coal, light, power and fire insurance in the amount of $2,454.75. The plaintiff may recover this amount." (*Continental Illinois Nat'l Bank & Trust Co.*, *supra*, 121 Ct.Cl. at pp. 243–244.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 507

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.112

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, § 6.91 et seq.

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, §§ 9.103, 9.107

3 Stein, Construction Law, Ch. 11, *Remedies and Damages*, ¶ 11.02 (Matthew

Bender)

12 California Real Estate Law and Practice, Ch. 434, *Government Contracts*, § 434.41 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.27, 104.226 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.211 (Matthew Bender)

15 California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts*, § 30D.224 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.243 (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.05[3]

Miller & Starr, California Real Estate 4th, § 27:81 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) §§ 1:86–1:88, 7:84, 7:85 (Thomson Reuters)

Bruner & O'Connor on Construction Law, §§ 15:15, 15:82 (Thomson Reuters)

Gibbs & Hunt, California Construction Law, Ch. 5, *Breach of Contract by Contractor*, § 5.02 (Aspen Pub. 16th ed. 1999)

4533–4539. Reserved for Future Use

4540. Contractor's Damages for Breach of Construction Contract—Change Orders/Extra Work

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[*Name of plaintiff*] contends that [*name of defendant*] increased or changed the scope of the [project/*describe construction project, e.g., apartment building*] beyond what was required by the parties' contract. If you find that [*name of plaintiff*] is entitled to compensation for this extra work, you may award damages to [*name of plaintiff*] based on [the agreed price provided in the parties' contract for/the reasonable value of] the extra work.

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner for extra work that the owner required and that was not provided for in the contract. In the last sentence, give the first alternative if there was evidence that the parties agreed, in writing or otherwise, on compensation for the extra work. Otherwise give the second option for the reasonable value of the work.

Under very limited circumstances, the contractor may obtain a "total-cost" recovery for extra work, meaning that instead of proving the costs associated with all of the changes, the contractor computes the total cost of the project and subtracts the contract price. For an instruction on total-cost recovery, see CACI No. 4541, *Contractor's Damages for Breach of Construction Contract—Change Orders/Extra Work—Total Cost Recovery*.

Under other circumstances, the contractor may attempt to establish that the contract was mutually abandoned and that the recovery should be in quantum meruit. For an instruction on damages on abandonment, see CACI No. 4542, *Contractor's Damages for Abandoned Construction Contract—Quantum Meruit Recovery*.

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- "Extra work as used in connection with a building contract means work arising outside of and entirely independent of the contract—something not required in its performance, not contemplated by the parties, and not controlled by the contract. Extra work may be performed by the contractor for the owner or by the subcontractor for the general contractor, Where the extras are of a different character from the work called for in the contract and no price is agreed on for extra work, their reasonable value may be recovered." (*C. F. Bolster Co. v. J. C. Boespflug Constr. Co.* (1959) 167 Cal.App.2d 143, 151 [334 P.2d 247], internal citations omitted.)

- "Whether a contractor is entitled to additional compensation for extra work depends generally on the construction of the particular contract and whether it is included in the contract price. The construction placed on the contract by the parties is of great weight, and where they agree on additional compensation for certain work it precludes a claim that the original contract requires the performance of such work." (*Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council* (1954) 128 Cal.App.2d 676, 683 [276 P.2d 52].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 939

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, §§ 5.49–5.50

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, §§ 6.70–6.73

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, §§ 9.70–9.73

1 Stein, Construction Law, Ch. 4, *Modification and Termination of Construction Contracts*, ¶ 4.03 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 440, *Construction Contract Remedies*, § 440.14 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.15 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.40 (Matthew Bender)

Miller & Starr, California Real Estate 4th, §§ 27:61, 27:69 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) § 7:71 (Thomson Reuters)

Bruner & O'Connor on Construction Law, § 4:16 (Thomson Reuters)

4541. Contractor's Damages for Breach of Construction Contract—Change Orders/Extra Work—Total Cost Recovery

[*Name of plaintiff***] claims that [***name of defendant***] breached the parties' contract by increasing or changing the scope of the [project/***describe construction project, e.g., apartment building***] beyond what was required by the contract. [***Name of plaintiff***], therefore, seeks to recover the total cost of all of [his/her/***nonbinary pronoun***/its] work on the [project/***e.g., apartment building***].**

In order to recover the total cost of all of [his/her/*nonbinary pronoun***/its] work, [***name of plaintiff***] must prove all of the following:**

1. **That the scope of work under the original contract had been altered by the changes so much that the final project was significantly different from the original project;**
2. **That because of the scope of the changes, it is not practical to prove the actual additional costs caused by each change demanded by [***name of defendant***];**
3. **That [***name of plaintiff***]'s original bid that was accepted by [***name of defendant***] was reasonable;**
4. **That [***name of plaintiff***]'s actual costs were reasonable; and**
5. **That [***name of plaintiff***] was not responsible for incurring the additional costs.**

If you find that [*name of plaintiff***] has established all of the above, determine [***name of plaintiff***]'s damages by subtracting the contract price from the total cost of [***name of plaintiff***]'s performance of the work.**

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner if the contractor claims that changes demanded by the owner were such that damages must be measured by computing the total cost to the contractor to complete the contract minus the contract price. (Cf. CACI No. 4540, *Contractor's Damages for Breach of Construction Contract—Change Orders/Extra Work*.) The difference is then considered to be the costs associated with all of the changes. For an instruction on quantum meruit recovery under the related but different theory of contract abandonment, see CACI No. 4542, *Contractor's Damages for Abandoned Construction Contract—Quantum Meruit Recovery*.

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- "Under [the total-cost] method, damages are determined by 'subtracting the contract amount from the total cost of performance.' " (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 243 [115 Cal.Rptr.2d 900, 38 P.3d 1120].)
- "Although not favored, the total cost method—along with its subcategory, the modified total cost method—has been recognized in California as an appropriate way of computing damages." (*JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc.* (2015) 243 Cal.App.4th 571, 589 [198 Cal.Rptr.3d 47].)
- "[T]o invoke the total cost method for recovering damages, a contractor must establish '(1) the impracticality of proving actual losses directly; (2) [its] bid was reasonable; (3) its actual costs were reasonable; and (4) it was not responsible for the added costs.' " (*JMR Construction Corp. supra*, 243 Cal.App.4th at p. 589].)
- "If some of the contractor's costs were unreasonable or caused by its own errors or omissions, then those costs are subtracted from the damages to arrive at a modified total cost. 'If prima facie evidence under this test is established, the trier of fact then applies the same test to determine the amount of total cost or modified total cost damages to which the plaintiff is entitled.' " (*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1408 [106 Cal.Rptr.3d 691], internal citations omitted.)
- " 'The total cost method is not a substitute for proof of causation,' and 'should be applied only to the smallest affected portion of the contractual relationship that can be clearly identified.' As the United States Court of Appeals for the Federal Circuit has stated, 'Clearly, the "actual cost method" is preferred because it provides the court . . . with documented underlying expenses, ensuring that the final amount of the equitable adjustment will be just that—equitable—and not a windfall for either the government or the contractor.' " (*Amelco Electric*, *supra*, 27 Cal.4th at p. 244, internal citations omitted.)
- "We conclude [plaintiff] failed to adduce substantial evidence to warrant instructing the jury on the four-part total cost theory of damages. In particular, [plaintiff] failed to adduce evidence to satisfy at least the fourth element of the four-part test, i.e., that it was not responsible for the added expenses. A corollary of this element of the test is that the contractor must demonstrate the defendant, and not anyone else, is responsible for the additional cost." (*Amelco Electric*, *supra*, 27 Cal.4th at p. 245.)
- "[W]e do not determine whether total cost damages are ever appropriate in a breach of public contract case . . . ." (*Amelco Electric*, *supra*, 27 Cal.4th at p. 242.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 939

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.108

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, § 6.72

3 Stein, Construction Law, Ch. 11, *Remedies and Damages*, ¶ 11.02 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 440, *Construction Contract Remedies*, § 440.14 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.14 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 31:70 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) § 7:93 (Thomson Reuters)

Bruner & O'Connor on Construction Law, §§ 19:39, 19:94–19.95 (Thomson Reuters)

4542. Contractor's Damages for Abandoned Construction Contract—Quantum Meruit Recovery

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[*Name of plaintiff*] claims that the parties consistently disregarded the contract's change-order process and that the final project was significantly different from the original project. If you find that the parties abandoned the contract, [*name of plaintiff*] is entitled to recover the reasonable value of all of [his/her/*nonbinary pronoun*/its] work on the project rather than the contract price.

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner if the contractor's claim is that the parties effectively abandoned the contract and that the contractor should therefore receive a quantum meruit measure of damages for the reasonable value of its work. (See CACI No. 4523, *Contractor's Claim for Additional Compensation—Abandonment of Contract*.)

Contract abandonment cannot be alleged with regard to a public works contract. (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 238–239 [115 Cal.Rptr.2d 900, 38 P.3d 1120].)

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- "[O]nce the parties cease to follow the contract's change order process, and the final project is materially different from the project contracted for, the contract is deemed inapplicable or abandoned and is set aside. The plaintiff may then recover the reasonable costs for all of its work." (*Amelco Elec.*, *supra*, 27 Cal.4th at p. 238.)
- "The contractor was . . . entitled, under the factual circumstances of this case [abandonment], to recover the reasonable value of the work it performed on a quantum meruit basis, without being limited by the original contract amount." (*C. Norman Peterson Co. v. Container Corp. of Am.* (1985) 172 Cal.App.3d 628, 639 [218 Cal.Rptr. 592].)
- "In the specific context of construction contracts . . . , it has been held that when an owner imposes upon the contractor an excessive number of changes such that it can fairly be said that the scope of the work under the original contract has been altered, an abandonment of contract properly may be found. In these cases, the contractor, with the full approval and expectation of the owner, may complete the project. Although the *contract* may be abandoned, the *work* is

not." (*C. Norman Peterson Co.*, *supra*, 172 Cal.App.3d at p. 640, original italics, internal citations omitted.)

- "There was a triable issue of fact as to whether these changes for which plaintiff was seeking compensation were required. Moreover, because of the tremendous number of changes, there was an issue as to whether the contract had been abandoned by the parties and they proceeded apart from the contract. There was evidence that the job was completely redesigned after the contract was entered into." (*Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 156 [92 Cal.Rptr. 120].)
- "[A]bandonment requires a finding that *both* parties intended to disregard the contract, and abandonment may be implied from the acts of the parties." (*C. Norman Peterson Co.*, *supra*, 172 Cal.App.3d at p. 643, original italics.)
- " 'Once the plaintiff has established the amount which he has been induced to expend, the defendant must show that the expenses of the party injured have been extravagant and unnecessary for the purpose of carrying out the contract.' " (*C. Norman Peterson Co.*, *supra*, 172 Cal.App.3d at p. 647.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 1037, 1072

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.50

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, §§ 9.85–9.86

3 Stein, Construction Law, Ch. 11, *Remedies and Damages*, ¶ 11.03 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 440, *Construction Contract Remedies*, § 440.12 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.224 (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions*, 9.05 et seq.

Miller & Starr, California Real Estate 4th, § 27:87 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) §§ 1:48, 1:98, 7:72 (Thomson Reuters)

Bruner & O'Connor on Construction Law, § 19:39 (Thomson Reuters)

4543. Contractor's Damages for Breach of Construction Contract—Owner-Caused Delay or Acceleration

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[*Name of plaintiff***] claims that [***name of defendant***] breached the parties' contract by [delaying/accelerating] [***name of plaintiff***]'s work, causing [***name of plaintiff***] harm. If you find that [***name of defendant***] [delayed/accelerated] the work, you may award damages to [***name of plaintiff***] for all harm caused by the [delay/acceleration], including the following:**

1. **Expenditures that** [*name of plaintiff*] **made for labor, services, equipment, or materials that [he/she/***nonbinary pronoun***/it] otherwise would not have made but for the [delay/acceleration];**
2. **Overhead that [***name of plaintiff***] otherwise would not have incurred but for the [delay/acceleration]; and**
3. **Increase in the cost of labor, services, equipment, or materials already required under the contract that resulted from the [delay/acceleration].**

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner for economic loss incurred because the owner either delayed or demanded acceleration of the work.

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series, particularly CACI No. 351, *Special Damages*.

Sources and Authority

- Unreasonable Delay. Public Contract Code section 7102.
- "Delay damages are a common element recoverable by a party aggrieved by the breach of a construction contract." (*JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc.* (2015) 243 Cal.App.4th 571, 585 [198 Cal.Rptr.3d 47].)
- "A subcontractor who is responsible for delaying the progress of a construction project may be held liable for delay damages incurred by the general contractor or by another subcontractor." (*JMR Construction Corp*, *supra*, 243 Cal.App.4th at p. 586.)
- " 'A building contractor whose performance is delayed by the owner may have increased overhead and fixed costs resulting from a delay and may suffer labor and material cost increases or loss of labor productivity due to delays for all of which he or she would be entitled to damages.' Extended home office overhead is one type of delay damages for which a contractor may seek recovery." (*JMR*

Construction Corp, *supra*, 243 Cal.App.4th at p. 586, internal citation omitted.)

- "Overhead expense allocable to the period of delay is allowed to the extent the evidence shows an increase in overhead because of the breach; or where other jobs, but for the delay, would have been obtained to absorb such overhead." (*A. A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 158 [88 Cal.Rptr. 842], internal citations omitted.)
- "We conclude the trial court did not err in applying the *Eichleay* formula as a legally permissible method of determining JMR's home office overhead damages. We base this conclusion upon the expert evidence presented at trial, the general recoverability of extended home office overhead as an element of delay damages, and the federal courts' general acceptance of the *Eichleay* formula." (*JMR Construction Corp*, *supra*, 243 Cal.App.4th at p. 587.)
- "The federal courts have identified three *Eichleay* requirements. '[T]he contractor [must] establish: (1) a government-caused delay; (2) that [the contractor] was on "standby"; and (3) that [the contractor] was unable to take on other work. [Citation.]' " (*JMR Construction Corp*, *supra*, 243 Cal.App.4th at p. 588.)
- "[A] contractor cannot recover on a claim for unabsorbed office overhead where it is able to meet the original contract deadline or finish early despite a government-caused delay. An exception applies where the contractor demonstrates from the outset an intent to complete the work early, a capacity to do so, and a likelihood of early completion but for the government's delay. Application of the three-prong test requirement . . . , however, is required only where the contractor finishes the work by the original specified contract completion date or earlier." (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 54–55, [83 Cal.Rptr.2d 590].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 1036

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.107

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, § 6.86

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, §§ 9.105–9.106

12 California Real Estate Law and Practice, Ch. 434, *Government Contracts*, § 434.90 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 481, *Public Works*, § 481.90 (Matthew Bender)

Miller & Starr California Real Estate 4th, §§ 31:76, 31:85 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) §§ 1:89–1:91 (Thomson Reuters)

Acret, California Construction Law Manual (6th ed.) §§ 7:88–7:90 (Thomson Reuters)

Bruner & O'Connor on Construction Law, § 19:73 (Thomson Reuters)

Gibbs & Hunt, California Construction Law, Ch. 4, *Breach of Contract by Owner*, § 4.10 (Aspen Pub. 16th ed. 1999)

Kamine, Public Works Construction Manual, Ch. 19, *Recovery of Delay Damages When the Owner Prevents Early Completion* (BNI Publications, Inc. 1996)

4544. Contractor's Damages for Breach of Construction Contract—Inefficiency Because of Owner Conduct

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[*Name of plaintiff*] claims that [*name of defendant*] breached the parties' contract by [delaying/disrupting/ [or] interfering with] [*name of plaintiff*]'s work, causing [*name of plaintiff*]'s work to be less efficient than it would have been. If you find that [*name of defendant*] [delayed/disrupted/ [or] interfered with] [*name of plaintiff*]'s work, you may award damages to [*name of plaintiff*] for all harm caused by the [delay/disruption/ [or] interference].

You may also award damages for lost profits that [*name of plaintiff*] would have received from other jobs but for the [delay/disruption/ [or] interference]. To recover damages for lost profits, [*name of plaintiff*] must prove the following:

1. **That it is reasonably certain that [*name of plaintiff*] would have earned those profits but for [*name of defendant*]'s [delay/disruption/ [or] interference]; and**
2. **That it was [actually foreseen/reasonably foreseeable] at the time the parties entered into the contract that [*name of plaintiff*] would have earned those profits.**

The amount of lost profits must be proved to a reasonable certainty. Damages for lost profits that are speculative or remote cannot be recovered.

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner for economic loss incurred because the owner delayed, disrupted, or interfered with the contractor's work in a way that caused the contractor calculable economic loss.

Lost profits from other work that the contractor could have earned but for the owner's breach are special damages, which must have been either actually foreseen or reasonably foreseeable to the parties at the time when the contract was entered into. (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 977 [22 Cal.Rptr.3d 340, 102 P.3d 257].) In element 2, select either "actually foreseen" or "reasonably foreseeable" depending on what was communicated when the contract was signed.

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series. See particularly CACI No. 351, *Special Damages*.

Sources and Authority

- "Lost anticipated profits cannot be recovered if it is uncertain whether any profit would have been derived at all from the proposed undertaking. But lost prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent. It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits." (*S. C. Anderson v. Bank of America* (1994) 24 Cal.App.4th 529, 536 [30 Cal.Rptr.2d 286], internal citations omitted.)
- "Unearned profits can sometimes be used as the measure of general damages for breach of contract. Damages measured by lost profits have been upheld for breach of a construction contract when the breaching party's conduct prevented the other side from undertaking performance. The profits involved in [the cases cited], however, were purely profits unearned on the very contract that was breached." (*Lewis Jorge Construction Management, Inc.*, *supra*, 34 Cal.4th at p. 971, internal citations omitted.)
- "Lost profits, if recoverable, are more commonly special rather than general damages, and subject to various limitations. Not only must such damages be pled with particularity, but they must also be proven to be certain both as to their occurrence and their extent, albeit not with 'mathematical precision.' 'When the contractor's claim is extended to profits allegedly lost on *other* jobs because of the defendant's breach' that 'claim is clearly a claim for special damages.' " (*Lewis Jorge Construction Management, Inc.*, *supra*, 34 Cal.4th at p. 975, original italics, internal citations omitted.)
- "It is indisputable that the [defendant]'s termination of the school construction contract was the first event in a series of misfortunes that culminated in [plaintiff]'s closing down its construction business. Such disastrous consequences, however, are not the natural and necessary result of the breach of every construction contract involving bonding. Therefore, . . . lost profits are not general damages here. Nor were they actually foreseen or foreseeable as reasonably probable to result from the [defendant]'s breach. Thus, they are not special damages in this case." (*Lewis Jorge Construction Management, Inc., supra,* 34 Cal.4th at p. 977.)
- "As to the reasonableness of the assumptions underlying the experts' lost profit analysis, criticisms of an expert's method of calculation is a matter for the jury's consideration in weighing that evidence. 'It is for the trier of fact to accept or reject this evidence, and this evidence not being inherently improbable provides a substantial basis for the trial court's award of lost profits . . . .' " (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 489–490 [54 Cal.Rptr.2d 888], internal citations omitted.)
- "Overhead expense allocable to the period of delay is allowed to the extent the evidence shows an increase in overhead because of the breach; or where other

jobs, but for the delay, would have been obtained to absorb such overhead." (*A. A Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 158 [88 Cal.Rptr. 842], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 907

3 Stein, Construction Law, Ch. 11, *Remedies and Damages*, ¶ 11.02 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.79 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, § 65.21 (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04

Acret, California Construction Law Manual (6th ed.) § 1:82 (Thomson Reuters)

Bruner & O'Connor on Construction Law, §§ 19:87–19:90 (Thomson Reuters)

4545–4549. Reserved for Future Use

4550. Affirmative Defense—Statute of Limitations—Patent Construction Defect (Code Civ. Proc., § 337.1)

[*Name of plaintiff***] claims that [his/her/***nonbinary pronoun***] harm was caused by a defect in the [design/specifications/surveying/planning/supervision/ [or] observation] of [a construction project/a survey of real property/[***specify project, e.g., the roof replacement***]]. [***Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove both of the following:**

1. **That an average person during the course of a reasonable inspection would have discovered the defect; and**
2. **That the date on which the [construction project/survey of real property/[***specify project, e.g., roof replacement***]] was substantially complete was more than four years before [***insert date***], the date on which this action was filed.**

New December 2011; Revised November 2018

Directions for Use

Give this instruction if the defendant asserts the running of the statute of limitations in Code of Civil Procedure section 337.1 as a defense. This section provides a four-year limitation period from the date of substantial completion for harm caused by a patent construction defect. Do not give this instruction if the claim is for injuries to persons or property based on tort principles occurring in the fourth year after substantial completion. (See Code Civ. Proc., § 337.1(b).)

For discussion of substantial completion, see the Directions for Use to CACI No. 4532, *Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay*. See also CACI No. 4524, *Contractor's Claim for Compensation Due Under Contract—Substantial Performance*.

Code of Civil Procedure section 337.1 does not apply to construction defect claims within the Right to Repair Act (Civ. Code, § 895 et seq.). (Civ. Code, § 941(d).) The Act applies to all claims for property damage or economic loss except for breach of contract, fraud, personal injury, or violation of a statute. (Civ. Code, § 943(a); see *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 249 [227 Cal.Rptr.3d 191, 408 P.3d 797]; see also Civ. Code, § 941 [statute of limitations under Right to Repair Act].)

Sources and Authority

- Statute of Limitations for Patent Defects. Code of Civil Procedure section 337.1.
- "The statute of limitations in section 337.1 exists to 'provide a final point of termination, to protect some groups from extended liability.' " (*Delon Hampton*

& Associates, Chartered v. Superior Court (2014) 227 Cal.App.4th 250, 254 [173 Cal.Rptr.3d 407].)

- "[A] patent defect is one that can be discovered by the kind of inspection made in the exercise of ordinary care and prudence. In contrast, a latent defect is hidden, and would not be discovered by a reasonably careful inspection." (*The Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, 35 [108 Cal.Rptr.3d 606].)
- "The test to determine whether a construction defect is patent is an objective test that asks 'whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place.' This test generally presents a question of fact, unless the defect is obvious in the context of common experience; then a determination of patent defect may be made as a matter of law (including on summary judgment)." (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 256 [99 Cal.Rptr.3d 258], internal citations omitted.)
- "[T]he [Right to Repair Act] leaves the common law undisturbed in some areas, expressly preserving actions for breach of contract, fraud, and personal injury. In other areas, however, the Legislature's intent to reshape the rules governing construction defect actions is patent. Where common law principles had foreclosed recovery for defects in the absence of property damage or personal injury the Act supplies a new statutory cause of action for purely economic loss. And, of direct relevance here, even in some areas where the common law had supplied a remedy for construction defects resulting in property damage but not personal injury, the text and legislative history reflect a clear and unequivocal intent to supplant common law negligence and strict product liability actions with a statutory claim under the Act." (*McMillin Albany LLC, supra,* 4 Cal.5th at p. 249, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1303

4 Witkin, California Procedure (6th ed. 2021) Actions, §§ 656–658

12 California Real Estate Law and Practice, Ch. 441, *Consumer's Remedies*, § 441.20 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.25, 104.43, 104.267 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.248 (Matthew Bender)

4551. Affirmative Defense—Statute of Limitations—Latent Construction Defect (Code Civ. Proc., § 337.15)

[*Name of defendant*] contends that [*name of plaintiff*]'s lawsuit was not filed within the time set by law. To succeed on this defense, [*name of defendant*] must prove that the date on which the [construction project/ survey of real property/[*specify project, e.g., roof replacement*]] was substantially complete was more than 10 years before [*insert date*], the date on which this action was filed.

New December 2011; Revised November 2018

Directions for Use

Give this instruction if the defendant asserts the running of the statute of limitations in Code of Civil Procedure section 337.15 as a defense. This section provides a 10-year outside limitation period for harm caused by a latent construction defect regardless of delayed discovery.

The jury may also be instructed on the limitations periods for the particular theories of recovery alleged. (See, e.g., Code Civ. Proc., §§ 338 [three years for injury to real property], 337 [four years for breach of written contract].) However, for latent defects, delayed discovery (see CACI No. 455, *Statute of Limitations—Delayed Discovery*) generally defeats that otherwise applicable statute.

The most likely question of fact for the jury is the date of substantial completion. The statute provides four possible events, the earliest of which may constitute substantial completion of an improvement. (See Code Civ. Proc., § 337.15(g).) The latest date is one year from cessation of all work on the improvement. However, substantial completion of an improvement may occur before any of these dates. (See *Nelson v. Gorian & Assocs.* (1998) 61 Cal.App.4th 93, 97 [71 Cal.Rptr.2d 345].) The statute of limitations may start to run at a later date against the developer if the development includes many improvements. (*Id.* at p. 99; cf. *Schwetz v. Minnerly* (1990) 220 Cal.App.3d 296, 298 [269 Cal.Rptr. 417] ["developer" can be an "improver" and a "development" is a "work of improvement" for purposes of subsection (g)].) For further discussion of substantial completion, see the Directions for Use to CACI No. 4532, *Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay*. See also CACI No. 4524, *Contractor's Claim for Compensation Due Under Contract—Substantial Performance*.

Code of Civil Procedure section 337.15 does not apply to construction defect claims within the Right to Repair Act (Civ. Code, § 895 et seq.). (Civ. Code, § 941(d).) The act applies to all claims for property damage or economic loss except for breach of contract, fraud, personal injury, or violation of a statute. (Civ. Code, § 943(a); see *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 249 [227 Cal.Rptr.3d

191, 408 P.3d 797]; see also Civ. Code, § 941 [statute of limitations under Right to Repair Act].)

Sources and Authority

- Statute of Limitations: Latent Defects. Code of Civil Procedure section 337.15.
- "The purpose of section 337.15 has been stated as 'to protect developers of real estate against liability extending indefinitely into the future.' . . . [We have] noted that '[a] contractor is in the business of constructing improvements and must devote his capital to that end; the need to provide reserves against an uncertain liability extending indefinitely into the future could seriously impinge upon the conduct of his enterprise.' " (*Martinez v. Traubner* (1982) 32 Cal.3d 755, 760 [187 Cal.Rptr. 251, 653 P.2d 1046], internal citations omitted.)
- "A 'latent' construction defect is one that is 'not apparent by reasonable inspection.' As to a latent defect that is alleged in the context of the challenged causes of action here—negligence, breach of warranty, and breach of contract—three statutes of limitations are in play: sections 338, 337 and 337.15. 'The interplay between these [three] statutes sets up a two-step process: (1) actions for a latent defect must be filed within three years (§ 338 [injury to real property]) or four years (§ 337 [breach of written contract]) of discovery, but (2) in any event must be filed within ten years (§ 337.15) of substantial completion.' "(*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 257–258 [99 Cal.Rptr.3d 258], internal citations omitted.)
- "The test to determine whether a construction defect is patent is an objective test that asks 'whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place.' This test generally presents a question of fact, unless the defect is obvious in the context of common experience; then a determination of patent defect may be made as a matter of law (including on summary judgment)." (*Creekridge Townhome Owners Assn., Inc.*, *supra*, 177 Cal.App.4th at p. 256, internal citations omitted.)
- "Our reading of the express words of section 337.15, our giving consideration to its legislative history, and harmonizing that section in the context of the statutory framework as a whole, leads us to conclude that section 337.15 does not limit the time within which direct actions for personal injury damages or wrongful death may be brought against the persons specified in the statute." (*Martinez*, *supra*, 32 Cal.3d at p. 759.)
- "The 10-year period commences to run in respect to a person who has contributed towards 'an improvement' when such improvement has been substantially completed irrespective of whether or not the improvement is part of a development." (*Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 772 [167 Cal.Rptr. 440].)
- "In 1981, the Legislature codified the holding in *Liptak* by adding subdivision

(g) to section 337.15. 'The Senate Committee on Judiciary and the Senate Republican Caucus digests for the bill that became Code of Civil Procedure section 337.15, subdivision (g) state in pertinent part: " 'In [*Liptak*], the [C]ourt of [A]ppeal held that with respect to a developer, the ten-year limitation period does not commence until the development is substantially completed. [¶] With respect to a person who has contributed to an improvement on the developed property, the court held that the period commences when that particular improvement has been substantially completed, regardless of the completion time of the development itself. [¶] AB 605 would codify the *Liptak* holding on these issues.' " [Citation.]' " (*Nelson*, *supra*, 61 Cal.App.4th at pp. 96–97, internal citations omitted.)

- "Turning to the plain meaning of the statute as well as the legislative intent of enactment of section 337.15, subdivision (g), it is clear the intent was to define what event triggered the 10-year period and not what label is used to define the person who performed the work of improvement. The particular development or work of improvement can be one 'improvement' such as grading. It can also be a 'particular development,' i.e., a completed structure or dwelling. When the work of improvement meets one of the four criteria of section 337.15, subdivision (g), the 'improver'—whether an architect, engineer, subcontractor, contractor, or developer—is entitled to raise the provisions of section 337.15, subdivision (g), as a bar to an action which seeks damages for latent defects after the 10-year period has passed." (*Schwetz*, *supra*, 220 Cal.App.3d at p. 308.)
- "Appellants claim that the 10-year period is calculated pursuant to section 337.15, subdivision (g)(1)–(4), which describes four events: (1) a final inspection, (2) the notice of completion, (3) use or occupancy of the property, or (4) termination or cessation of work for one year. Subdivision (g), however, states that the 10-year period '*shall commence upon substantial completion of the improvement*, but not later than' the occurrence of any one of the four events described in subdivision (g)(1) through (g)(4). . . . [¶] The trial court correctly ruled that the notice of completion date (§ 337.15, subd. (g)(2)) did not control if the improvement was substantially completed at an earlier date." (*Nelson*, *supra*, 61 Cal.App.4th at p. 97, original italics.)
- " 'As used in section 337.15 "an improvement" is in the singular and refers separately to each of the individual changes or additions to real property that qualifies as an "improvement" irrespective of whether the change or addition is grading and filling, putting in curbs and streets, laying storm drains or of other nature.' " (*Nelson*, *supra*, 61 Cal.App.4th at p. 97.)
- "The purpose of section 337.15 and its definition of the 'substantial completion' that begins the running of the 10-year period make clear that the statute's protection applies to claims for damage due to defects in how an improvement was designed and constructed, not to claims based on how the improvement was used *after* its construction is complete and independent of the manner in which it was designed and constructed." (*Estuary Owners Assn. v. Shell Oil Co.* (2017) 13 Cal.App.5th 899, 915 [221 Cal.Rptr.3d 190], original italics.)

- "[T]he [Right to Repair Act] leaves the common law undisturbed in some areas, expressly preserving actions for breach of contract, fraud, and personal injury. In other areas, however, the Legislature's intent to reshape the rules governing construction defect actions is patent. Where common law principles had foreclosed recovery for defects in the absence of property damage or personal injury the Act supplies a new statutory cause of action for purely economic loss. And, of direct relevance here, even in some areas where the common law had supplied a remedy for construction defects resulting in property damage but not personal injury, the text and legislative history reflect a clear and unequivocal intent to supplant common law negligence and strict product liability actions with a statutory claim under the Act." (*McMillin Albany LLC, supra,* 4 Cal.5th at p. 249, internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (6th ed. 2019) Actions, §§ 659–667

12 California Real Estate Law and Practice, Ch. 441, *Consumer's Remedies*, § 441.29 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.25[4], 104.43, 104.267 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.248 (Matthew Bender)

4552. Affirmative Defense—Work Completed and Accepted—Patent Defect

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[*Name of plaintiff***] claims that [his/her/***nonbinary pronoun***] harm was caused by a defect in the [design/specifications/surveying/planning/supervision/ [or] observation] of [a construction project/a survey of real property/[***specify project, e.g., the roof replacement***]]. [***Name of defendant***] contends that [he/she/***nonbinary pronoun***/it] is not responsible for the defect because the project was completed and the work was accepted by [***name of owner***]. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] completed all of [his/her/***nonbinary pronoun***/its] work on the project;**
2. **That [***name of owner***] accepted [***name of defendant***]'s work; and**
3. **That an average person during the course of a reasonable inspection would have discovered the defect.**

New December 2013

Directions for Use

Give this instruction to present the affirmative defense of "completed and accepted." Under this defense a party under contract for a construction project is not liable in negligence for injury caused by a patent construction defect once the project has been completed and the owner has accepted the project. See also CACI No. 4550, *Affirmative Defense—Statute of Limitations—Patent Construction Defect*.

The defense applies if the work on the project component that caused the injury has been completed and accepted, even if the contractor continues to work on other components of the project. (See *Jones v. P.S. Development Co., Inc.* (2008) 166 Cal.App.4th 707, 717 [82 Cal.Rptr.3d 882], disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 113 Cal.Rptr.3d 327, 235 P.3d 988].) Modify element 1 if necessary to reflect this situation.

Sources and Authority

- " '[W]hen a contractor completes work that is accepted by the owner, the contractor is not liable to third parties injured as a result of the condition of the work, even if the contractor was negligent in performing the contract, unless the defect in the work was latent or concealed. [Citation.] The rationale for this doctrine is that an owner has a duty to inspect the work and ascertain its safety, and thus the owner's acceptance of the work shifts liability for its safety to the owner, provided that a reasonable inspection would disclose the defect. [Citation.]' Stated another way, 'when the owner has accepted a structure from the contractor, the owner's failure to attempt to remedy an obviously dangerous

defect is an intervening cause for which the contractor is not liable.' The doctrine applies to patent defects, but not latent defects. 'If an owner, fulfilling the duty of inspection, cannot discover the defect, then the owner cannot effectively represent to the world that the construction is sufficient; he lacks adequate information to do so.' " (*Neiman v. Leo A. Daly Co.* (2012) 210 Cal.App.4th 962, 969 [148 Cal.Rptr.3d 818], footnote and internal citations omitted.)

- " 'Parties for whom work contracted for is undertaken, must see to it before acceptance, that the work, as to strength and durability, and all other particulars necessary to the safety of the property and persons of third parties, is subjected to proper tests, and that it is sufficient. By acceptance and subsequent use, the owners assume to the world the responsibility of its sufficiency, and to third parties, the liability of the contractors has ceased, and their own commenced.' In other words, having a duty to inspect the work and ascertain its safety before accepting it, the owner's acceptance represents it to be safe and the owner becomes liable for its safety." (*Sanchez v. Swinerton & Walberg Co.* (1996) 47 Cal.App.4th 1461, 1466 [55 Cal.Rptr.2d 415], internal citation omitted.)
- "The fact the project did not comply with the plans and specifications or [defendant] may not have fulfilled all of its duties to [owner] under the agreement, does not mean the project was not completed." (*Neiman, supra,* 210 Cal.App.4th at p. 970.)
- "As there is no evidence that respondents retained control over the machine [that caused injury], we conclude that they are not liable for [plaintiff]'s injuries." (*Jones, supra,* 166 Cal.App.4th at p. 718.)
- "[A] patent defect is one that can be discovered by the kind of inspection made in the exercise of ordinary care and prudence. In contrast, a latent defect is hidden, and would not be discovered by a reasonably careful inspection." (*The Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, 35 [108 Cal.Rptr.3d 606].)
- "The test to determine whether a construction defect is patent is an objective test that asks 'whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place.' This test generally presents a question of fact, unless the defect is obvious in the context of common experience; then a determination of patent defect may be made as a matter of law (including on summary judgment)." (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 256 [99 Cal.Rptr.3d 258], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 227

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.01 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.25 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.94 (Matthew Bender)

4553–4559. Reserved for Future Use

4560. Recovery of Payments to Unlicensed Contractor—Essential Factual Elements (Bus. & Prof. Code, § 7031(b))

[*Name of plaintiff***] claims that [***name of defendant***] did not have a valid contractor's license during all times when [***name of defendant***] was [performing services/supervising construction] for [***name of plaintiff***]. To establish this claim and recover all compensation paid for these services, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [[engaged/hired]/ [or] contracted with] [***name of defendant***] to perform services for [***name of plaintiff***];**
2. **That a valid contractor's license was required to perform these services; and**
3. **That [***name of plaintiff***] paid [***name of defendant***] for services that [***name of defendant***] performed.**

[[*Name of plaintiff***] is not entitled to recover all compensation paid if [***name of defendant***] proves that at all times while [performing/supervising] these services, [he/she/***nonbinary pronoun***/it] had a valid contractor's license as required by law.]**

New June 2016; Revised November 2020, May 2021

Directions for Use

Give this instruction in a case in which the plaintiff seeks to recover money paid to an unlicensed contractor for service performed for which a license is required. (Bus. & Prof. Code, § 7031(b).) Modify the instruction if the plaintiff claims the defendant did not perform services or supervise construction, but instead agreed to be solely responsible for completion of construction services. (See *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 940 [29 Cal.Rptr.2d 669].) For a case brought by a licensed contractor or an allegedly unlicensed contractor for payment for services performed, give CACI No. 4562, *Payment for Construction Services Rendered—Essential Factual Elements*. (See Bus. & Prof. Code, § 7031(a), (e).)

The burden of proof to establish licensure or proper licensure is on the licensee. Proof must be made by producing a verified certificate of licensure from the Contractors State License Board. When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure is on the contractor. (Bus. & Prof. Code, § 7031(d).) Omit the final bracketed paragraph if the issue of licensure is not contested.

A corporation qualifies for a contractor's license through a responsible managing officer (RMO) or responsible managing employee (RME) who is qualified for the same license classification as the classification being applied for. (Bus. & Prof.

Code, § 7068(b)(3).) The plaintiff may attack a contractor's license by going behind the face of the license and proving that a required RMO or RME is a sham. The burden of proof remains with the contractor to prove a bona fide RMO or RME. (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 385–387 [70 Cal.Rptr.2d 427].) Whether an RMO or RME is a sham can be a question of fact. (*Jeff Tracy, Inc. v. City of Pico Rivera* (2015) 240 Cal.App.4th 510, 518 [192 Cal.Rptr.3d 600].)

Sources and Authority

- Action to Recover Compensation Paid to Unlicensed Contractor. Business and Professions Code section 7031(b).
- Proof of Licensure. Business and Professions Code section 7031(d).
- "Contractor" Defined. Business and Professions Code section 7026.
- "The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services. The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business." (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995 [277 Cal.Rptr. 517, 803 P.2d 370], internal citations omitted.)
- "Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. 'Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties,* and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .' " (*Hydrotech Systems, Ltd., supra,* 52 Cal.3d at p. 995, original italics.)
- "The current legislative requirement that a contractor plaintiff must, in addition to proving the traditional elements of a contract claim, also prove that it was duly licensed at all times during the performance of the contract does not change this historical right to a jury trial." (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518, fn. 2.)
- "[T]he courts may not resort to equitable considerations in defiance of section 7031." (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 152 [308 P.2d 713].)
- "In 2001, the Legislature complemented the shield created by subdivision (a) of section 7031 by adding a sword that allows persons who utilize unlicensed contractors to recover compensation paid to the contractor for performing unlicensed work. Section 7031(b) provides that 'a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract' unless the

substantial compliance doctrine applies." (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 519 [100 Cal.Rptr.3d 434], internal citation omitted.)

- "It appears section 7031(b) was designed to treat persons who have utilized unlicensed contractors consistently, regardless of whether they have paid the contractor for the unlicensed work. In short, those who have not paid are protected from being sued for payment and those who have paid may recover all compensation delivered. Thus, unlicensed contractors are not able to avoid the full measure of the CSLL's civil penalties by (1) requiring prepayment before undertaking the next increment of unlicensed work or (2) retaining progress payments relating to completed phases of the construction." (*White, supra*, 178 Cal.App.4th at p. 520.)
- "In most cases, a contractor can establish valid licensure by simply producing 'a verified certificate of licensure from the Contractors' State License Board which establishes that the individual or entity bringing the action was duly licensed in the proper classification of contractors at all times during the performance of any act or contract covered by the action.' [Contractor] concedes that if this was the only evidence at issue, 'then—perhaps—the issue could be decided by the court without a jury.' But as [contractor] points out, the City was challenging [contractor]'s license by going behind the face of the license to prove that [license holder] was a sham RME or RMO." (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518.)
- "[T]he determination of whether [contractor] held a valid class A license involved questions of fact. '[W]here there is a conflict in the evidence from which either conclusion could be reached as to the status of the parties, the question must be submitted to the jury. [Citations.] This rule is clearly applicable to cases revolving around the disputed right of a party to bring suit under the provisions of Business and Professions Code section 7031.' " (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518.)
- "We conclude the authorization of recovery of '*all* compensation paid to the unlicensed contractor for performance of any act or contract' means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided." (*White, supra*, 178 Cal.App.4th at pp. 520–521, original italics, internal citation omitted.)
- "[A]n unlicensed contractor is subject to forfeiture even if the other contracting party was aware of the contractor's lack of a license, and the other party's bad faith or unjust enrichment cannot be asserted by the contractor as a defense to forfeiture." (*Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 896 [191 Cal.Rptr.3d 714].)
- "Nothing in section 7031 either limits its application to a particular class of homeowners or excludes protection of 'sophisticated' persons. Reading that limitation into the statute would be inconsistent with its purpose of ' "deterring unlicensed persons from engaging in the contracting business." ' " (*Phoenix*

Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp. (2017) 12 Cal.App.5th 842, 849 [219 Cal.Rptr.3d 775].)

- "By entering into the agreements to 'improve the Property' and to be '*solely responsible* for completion of infrastructure improvements—including graded building pads, storm drains, sanitary systems, streets, sidewalks, curbs, gutters, utilities, street lighting, and traffic signals—[the plaintiff] was clearly contracting to provide construction services in exchange for cash payments by [the defendants]. The mere execution of such a contract is an act 'in the capacity of a contractor,' and an unlicensed person is barred by section 7031, subdivision (a), from bringing claims based on the contract. [¶] . . . [¶] . . . Section 7026 plainly states that both the person who provides construction services himself and one who does so 'through others' qualifies as a 'contractor.' The California courts have also long held that those who enter into construction contracts must be licensed, even when they themselves do not do the actual work under the contract." (*Vallejo Development Co., supra,* 24 Cal.App.4th at pp. 940–941, original italics.)
- "[Contractor] has not alleged one contract, but rather a series of agreements for each separate task that it was asked to perform. It may therefore seek compensation under those alleged agreements that apply to tasks for which no license was required." (*Phoenix Mechanical Pipeline, Inc., supra,* 12 Cal.App.5th at p. 853.)
- "A third party's agreement to assume a contractor's duties under a construction contract without a license is akin to the execution of a construction contract without a license, something the California Supreme Court has explained does not trigger section 7031 forfeiture. Such an assumption is neither an act for which the assignee may seek compensation under the contract, nor an act that can be fairly characterized as 'carrying out the contract.' It thus cannot constitute ' "performance of that . . . contract." ' " (*Manela v. Stone* (2021) 66 Cal.App.5th 90, 105–106 [281 Cal.Rptr.3d 28].)
- "Section 7031, subdivision (e) states an exception to the license requirement of subdivision (a). Subdivision (e) provides in part: '[T]he court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) acted promptly and in good faith to remedy the failure to comply with the licensure requirements upon learning of the failure.' " (*C. W. Johnson & Sons, Inc. v. Carpenter* (2020) 53 Cal.App.5th 165, 169 [265 Cal.Rptr.3d 895].)
- "[I]t is clear that the disgorgement provided in section 7031(b) is a penalty. It deprives the contractor of any compensation for labor and materials used in the construction while allowing the plaintiff to retain the benefits of that construction. And, because the plaintiff may bring a section 7031(b) disgorgement action regardless of any fault in the construction by the unlicensed

contractor, it falls within the Supreme Court's definition of a penalty: 'a recovery " 'without reference to the actual damage sustained.' " ' Accordingly, we hold that [Code Civ. Proc., §] 340, subdivision (a), the one-year statute of limitations, applies to disgorgement claims brought under section 7031(b)." (*Eisenberg Village of Los Angeles Jewish Home for the Aging v. Suffolk Construction Company, Inc.* (2020) 53 Cal.App.5th 1201, 1212 [268 Cal.Rptr.3d 334], internal citation and footnote omitted.)

- "[W]e hold that the discovery rule does not apply to section 7031(b) claims. Thus, the ordinary rule of accrual applies, i.e., the claim accrues ' "when the cause of action is complete with all of its elements." ' In the case of a section 7031(b) claim, the cause of action is complete when an unlicensed contractor completes or ceases performance of the act or contract at issue." (*Eisenberg Village of Los Angeles Jewish Home for the Aging, supra,* 53 Cal.App.5th at pp. 1214–1215, internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 491

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors*, § 430.70 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses*, § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors*, § 88.18 (Matthew Bender)

4561. Damages—All Payments Made to Unlicensed Contractor

A person who pays money to an unlicensed contractor may recover all compensation paid to the unlicensed contractor.

If you decide that [*name of plaintiff***] has proved that [he/she/***nonbinary pronoun***/it] paid money to [***name of defendant***] for services and that [***name of defendant***] has failed to prove that [he/she/***nonbinary pronoun***/it] was licensed at all times during performance, then [***name of plaintiff***] is entitled to the return of all amounts paid, not just the amounts paid while [***name of defendant***] was unlicensed. The fact that [***name of plaintiff***] may have received some or all of the benefits of [***name of defendant***]'s performance does not affect [his/her/***nonbinary pronoun***/its] right to the return of all amounts paid.**

New June 2016; Revised May 2021

Directions for Use

Give this instruction to clarify that the plaintiff is entitled to recover all compensation paid to the unlicensed defendant regardless of any seeming injustice to the contractor. (See *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995 [277 Cal.Rptr. 517, 803 P.2d 370].)

Give CACI No. 4562, *Payment for Construction Services Rendered—Essential Factual Elements*, if an allegedly unlicensed contractor brings a claim for payment for services performed. (See Bus. & Prof. Code, § 7031(a), (e).)

Sources and Authority

- Recovery of All Compensation Paid to Unlicensed Contractor. Business and Professions Code section 7031(b).
- "Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. 'Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties,* and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .' " (*Hydrotech Systems, Ltd., supra*, 52 Cal.3d at p. 995, original italics.)
- "[T]he courts may not resort to equitable considerations in defiance of section 7031." (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 152 [308 P.2d 713].)
- "[I]f a contractor is unlicensed for any period of time while delivering construction services, the contractor forfeits all compensation for the work, not merely compensation for the period when the contractor was unlicensed."

(*Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 896 [191 Cal.Rptr.3d 714].)

- "We conclude the authorization of recovery of '*all* compensation paid to the unlicensed contractor for performance of any act or contract' means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided." (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 520–521 [100 Cal.Rptr.3d 434], original italics, internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 491

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors*, § 430.70 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses*, § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors*, § 88.18 (Matthew Bender)

4562. Payment for Construction Services Rendered—Essential Factual Elements (Bus. & Prof. Code, § 7031(a), (e))

[*Name of plaintiff***] claims that [***name of defendant***] owes [***name of plaintiff***] money for construction services rendered. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [[engaged/hired]/ [or] contracted with] [***name of plaintiff***] to [***specify contractor services***];**
2. **That [***name of plaintiff***] had at all times during the performance of construction services a valid contractor's license;**
3. **That [***name of plaintiff***] performed these services;**
4. **That [***name of defendant***] has not paid [***name of plaintiff***] for the construction services that [***name of plaintiff***] provided; and**
5. **The amount of money [***name of defendant***] owes [***name of plaintiff***] for the construction services provided.**

New May 2021

Directions for Use

Give this instruction in a case in which the plaintiff-contractor seeks to recover compensation owed for services performed for which a license is required. (Bus. & Prof. Code, § 7031(a).)

For element 2, licensure requirements may be satisfied by substantial compliance with the licensure requirements. (Bus. & Prof. Code, § 7031(e).) If the court has determined the defendant's substantial compliance, modify element 2 accordingly, and instruct the jury that the court has made the determination.

When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure is on the contractor. (Bus. & Prof. Code, § 7031(d).) Proof must be made by producing a verified certificate of licensure from the Contractors State License Board.

For a case involving recovery of payment for services provided by an allegedly unlicensed contractor, give CACI No. 4560, *Recovery of Payments to Unlicensed Contractor—Essential Factual Elements*.

Sources and Authority

- Proof of Licensure. Business and Professions Code section 7031(d).
- "Contractor" Defined. Business and Professions Code section 7026.
- "[Contractor] has not alleged one contract, but rather a series of agreements for each separate task that it was asked to perform. It may therefore seek compensation under those alleged agreements that apply to tasks for which no

license was required." (*Phoenix Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.* (2017) 12 Cal.App.5th 842, 853 [219 Cal.Rptr.3d 775].)

- "Section 7031, subdivision (e) states an exception to the license requirement of subdivision (a). Subdivision (e) provides in part: '[T]he court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) acted promptly and in good faith to remedy the failure to comply with the licensure requirements upon learning of the failure.' " (*C. W. Johnson & Sons, Inc. v. Carpenter* (2020) 53 Cal.App.5th 165, 169 [265 Cal.Rptr.3d 895].)
- "[S]ection 7031 bars even a licensed general contractor in California from bringing an action for compensation for an act or contract performed by an unlicensed subcontractor where a license is required." (*Kim v. TWA Construction, Inc.* (2022) 78 Cal.App.5th 808, 831 [294 Cal.Rptr.3d 140].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 491

California Civil Practice: Real Property Litigation §§ 10:26–10:38 (Thomson Reuters)

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors*, § 430.70 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses*, § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors*, § 88.18 (Matthew Bender)

Miller & Starr, California Real Estate 4th §§ 32:68–32:84

4563–4569. Reserved for Future Use

4570. Right to Repair Act—Construction Defects—Essential Factual Elements (Civ. Code, § 896)

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] has been harmed because of defects in [***name of defendant***]'s original construction of [***name of plaintiff***]'s home. To establish this claim, [***name of plaintiff***] must prove [one or more of the following:]**

> **[***Specify all defects from Civil Code section 896, e.g., that a defectively constructed door allowed unintended water to pass beyond, around, or through it.***]**

New May 2019

Directions for Use

Give this instruction for a claim under the Right to Repair Act (the Act). (Civ. Code, § 895 et seq.) The Act applies to original construction intended to be sold as an individual dwelling unit. (Civ. Code, § 896.) Section 896 lists all of the construction standards covered by the Act. List all defects within the coverage of section 896.

In order to make a claim for violation of the Act, a homeowner need only show that the home's original construction does not meet the applicable standard. No further showing of causation or damages is required to meet the burden of proof regarding a violation of the Act. (Civ. Code, § 942; see also Civ. Code, § 936 [negligence or breach of contract required in claim against general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals].)

For an instruction on the limited damages recoverable under Civil Code, section 944, see CACI No. 4571, *Right to Repair Act—Damages*. For instructions on various affirmative defenses available to the contractor under Civil Code section 945.5, see CACI Nos. 4572–4574.

Sources and Authority

- Definitions. Civil Code section 895.
- Construction Standards Under the Right to Repair Act. Civil Code section 896.
- Intent of Standards. Civil Code section 897.
- Applicability of Act to Other Entities Involved in Construction. Civil Code section 936.
- Damages and Causation Not Required. Civil Code section 942.
- Exclusive Remedy for Certain Damages. Civil Code section 943.
- Damages Recoverable. Civil Code section 944.
- Affirmative Defenses. Civil Code section 945.5.
- "[T]he Right to Repair Act (the Act) was enacted in 2002. As recently explained

by the Supreme Court, '[t]he Act sets forth detailed statewide standards that the components of a dwelling must satisfy. It also establishes a prelitigation dispute resolution process that affords builders notice of alleged construction defects and the opportunity to cure such defects, while granting homeowners the right to sue for deficiencies even in the absence of property damage or personal injury.' " (*Kohler Co. v. Superior Court* (2018) 29 Cal.App.5th 55, 59 [240 Cal.Rptr.3d 426], internal citation omitted.)

- "To sum up this portion of the statutory scheme: For economic losses, the Legislature intended to supersede *Aas* [*Aas v. Superior Court* (2000) 24 Cal.4th 627, 632] and provide a statutory basis for recovery. For personal injuries, the Legislature preserved the status quo, retaining the common law as an avenue for recovery. And for property damage, the Legislature replaced the common law methods of recovery with the new statutory scheme. The Act, in effect, provides that construction defect claims not involving personal injury will be treated the same procedurally going forward whether or not the underlying defects gave rise to any property damage." (*McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 253 [227 Cal.Rptr.3d 191, 408 P.3d 797].)
- "[A] homeowner alleging that a manufactured product—such as a plumbing fixture—installed in her home is defective may bring a claim under the Act only if the allegedly defective product caused a violation of one of the standards set forth in section 896; otherwise she must bring a common law claim outside of the Act against the manufacturer, and would be limited to the damages allowed under the common law." (*Kohler Co., supra,* 29 Cal.App.5th at p. 63.)
- "Insofar as section 944 allows recovery only for damages resulting from failure 'of the home,' it is clear that 'home' is not limited to the structure where people reside, because section 942 states that, '[i]n order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner need only demonstrate . . . that *the home* does not meet the applicable standard . . . .' As we have seen section 896 covers a multitude of defects not only in the residence but also in improvements such as driveways, landscaping, and damage to the lot, etc." (*Gillotti v. Stewart* (2017) 11 Cal.App.5th 875, 897 [217 Cal.Rptr.3d 860], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1307

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

19 California Points and Authorities, Ch. 66, *Products Liability*, § 190.224 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.60 et seq. (Matthew Bender)

4571. Right to Repair Act—Damages (Civ. Code, § 944)

If [*name of plaintiff***] proves any construction defects, [he/she/***nonbinary pronoun***] is entitled to recover only for the following:**

a. The reasonable value of repairing the defect(s);

b. The reasonable cost of repairing any damage caused by the repair efforts;

c. The reasonable cost of repairing and correcting any damage resulting from the failure of the home to meet the standards;

d. The reasonable cost of removing and replacing any improper repair made by [*name of defendant***];**

e. Reasonable relocation and storage expenses;

f. Lost business income if the home was used as a principal place of a business licensed to be operated from the home;

g. Reasonable investigative costs for each defect proved;

h. (*Specify any other costs or fees recoverable by contract or statute.***)**

[[*Name of plaintiff***]'s right to the reasonable value of repairing any defect is limited to the lesser of the cost of repair or the diminution in current value of the home caused by the defect.]**

New May 2019

Directions for Use

This instruction sets forth the damages recoverable in an action for construction defects under the Right to Repair Act. (Civ. Code, § 944.) Delete those that the plaintiff is not claiming.

Give the optional last paragraph for any claims involving a detached single-family home. The common-law personal use exception is preserved. (Civ. Code, § 943(b).)

Sources and Authority

- Damages Recoverable Under the Right to Repair Act. Civil Code section 944.
- "The provisions of chapter 5 make explicit the intended avenues for recouping economic losses, property damages, and personal injury damages. Section 944 defines the universe of damages that are recoverable in an action under the Act. (§ 944 ['If a claim for damages is made under this title, the homeowner is only entitled to damages for' a series of specified types of losses].) In turn, section 943 makes an action under the Act the exclusive means of recovery for damages identified in section 944 absent an express exception: 'Except as provided in this title, no other cause of action for a claim covered by this title or for damages

recoverable under Section 944 is allowed.' (§ 943, subd. (a).) In other words, section 944 identifies what damages may be recovered in an action under the Act, and section 943 establishes that such damages may only be recovered in an action under the Act, absent an express exception." (*McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 251 [227 Cal.Rptr.3d 191, 408 P.3d 797].)

- "Insofar as section 944 allows recovery only for damages resulting from failure 'of the home,' it is clear that 'home' is not limited to the structure where people reside, because section 942 states that, '[i]n order to make a claim for violation of the standards set forth in Chapter 2 (commencing with Section 896), a homeowner need only demonstrate . . . that *the home* does not meet the applicable standard . . . .' As we have seen section 896 covers a multitude of defects not only in the residence but also in improvements such as driveways, landscaping, and damage to the lot, etc." (*Gillotti v. Stewart* (2017) 11 Cal.App.5th 875, 897 [217 Cal.Rptr.3d 860], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1312

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.11 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.69 (Matthew Bender)

4572. Right to Repair Act—Affirmative Defense—Act of Nature (Civ. Code, § 945.5(a))

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*/it] is not responsible for [*name of plaintiff*]'s harm because it was caused by an unforeseen event. To establish this defense, [*name of defendant*] must prove that the [*specify defect, e.g., door that allowed unintended water to pass through it*] was caused by [*specify, e.g., a landslide*], which was an unforeseen [act of nature/manmade event] that caused the home not to meet the otherwise required standard.

New May 2019

Directions for Use

This instruction sets forth a builder's affirmative defense to a homeowner's construction defect claim under the Right to Repair Act, asserting the construction defect was caused by an unforeseen act of nature. An "unforeseen act of nature" includes unforeseen manmade events such as war, terrorism, or vandalism, in addition to weather conditions and earthquakes. (See Civ. Code, § 945.5(a).)

The unforeseen event must be "in excess of the design criteria expressed by the applicable building codes, regulations, and ordinances in effect at the time of original construction." (Civ. Code, § 945.5(a).) If there is a question of fact with regard to such a situation, modify the instruction accordingly.

Sources and Authority

- Right to Repair Act Affirmative Defense of Unforeseen Act of Nature. Civil Code section 945.5(a).

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1312

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.70 (Matthew Bender)

4573. Right to Repair Act—Affirmative Defense—Unreasonable Failure to Minimize or Prevent Damage (Civ. Code, § 945.5(b))

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] is not responsible for [***name of plaintiff***]'s harm because [***name of plaintiff***] unreasonably failed to minimize or prevent [his/her/***nonbinary pronoun***] damages in a timely manner. To establish this defense, [***name of defendant***] must prove [***select one or more of the following***:]**

[a. [*Name of plaintiff***] failed to allow [***name of defendant***] reasonable and timely access to the home for inspections and repairs.]**

[b. [*Name of plaintiff***] failed to give [***name of defendant***] timely notice after discovery of a construction defect.]**

[c. [*Specify other act or omission of plaintiff that is alleged to constitute failure to minimize or prevent damage.***]]**

[*Name of defendant***] cannot avoid responsibility for damages due to an untimely or inadequate response to [***name of plaintiff***]'s claim.**

New May 2019

Directions for Use

This instruction sets forth a builder's affirmative defense to a homeowner's construction defect claim under the Right to Repair Act, asserting the homeowner's failure to minimize or prevent damages. (See Civ. Code, § 945.5(b).) Select the particular failure to mitigate alleged from a or b, or specify a different failure in c. CACI No. 3931, *Mitigation of Damages (Property Damage)*, may also be given for the general principle of the plaintiff's duty to mitigate damages.

Sources and Authority

- Right to Repair Act Affirmative Defense of Homeowner's Failure to Mitigate. Civil Code section 945.5(b).
- "Although the Act establishes various maximum time periods in which the builder may respond, inspect, offer to repair, and commence repairs, the builder avails itself of the full time allowed by the Act at its peril. The builder is liable for the damages its construction defects cause, and even when a homeowner has acted unreasonably in failing to limit losses, the builder remains liable for 'damages due to the untimely or inadequate response of a builder to the homeowner's claim.' (§ 945.5, subd. (b).) What constitutes a timely response will vary according to the circumstances, and the maximum response periods set forth by the Act do not necessarily insulate a builder from damages when the builder has failed to take remedial action as promptly as is reasonable under the circumstances. The Act's liability provisions thus supply builders and

homeowners clear incentives to move quickly to minimize damages when alerted to emergencies." (*McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 257–258 [227 Cal.Rptr.3d 191, 408 P.3d 797].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1312

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.70 (Matthew Bender)

4574. Right to Repair Act—Affirmative Defense—Plaintiff's Subsequent Acts or Omissions (Civ. Code, § 945.5(d))

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] is not responsible for [***name of plaintiff***]'s harm because it was caused by [***name of plaintiff***]'s later [acts/ [or] omissions]. To establish this defense [***name of defendant***] must prove that the harm was caused by [[***name of plaintiff***]'s later [alterations/ordinary wear and tear/misuse/abuse/[or] neglect]/ [or] the structure's use for something other than its intended purpose].**

New May 2019; Revised May 2020

Directions for Use

This instruction sets forth a builder's affirmative defense to a homeowner's construction defect claim under the Right to Repair Act, asserting that the harm was caused by the homeowner's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose. (Civ. Code, § 945.5(d).)

The homeowner is responsible for any acts or omissions by any of the homeowner's agents or independent third parties. (Civ. Code, § 945.5(d).) Modify the instruction as needed if the harm is alleged to have been caused by the subsequent acts of an agent or third party.

Sources and Authority

- Right to Repair Act Affirmative Defense of Alterations, Ordinary Wear and Tear, Misuse, Abuse, Neglect, or Use for Something Other Than Intended. Civil Code section 945.5(d).

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1312

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.43 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.70 (Matthew Bender)

4575. Right to Repair Act—Affirmative Defense—Failure to Follow Recommendations or to Maintain (Civ. Code, § 945.5(c))

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***/it] is not responsible for [***name of plaintiff***]'s harm because [***name of plaintiff***] failed to properly maintain the home. To establish this defense, [***name of defendant***] must prove [***all/both***] of the following:**

1. **That [***name of plaintiff***] failed to follow [[***name of defendant***]'s/ [or] a manufacturer's] recommendations/ [or] commonly accepted homeowner maintenance obligations];**

[2. That [*name of plaintiff***] had written notice of [***name of defendant***]'s recommended maintenance schedules;**

3. **That the recommendations and schedules were reasonable at the time they were issued;]**

4. **That [***name of plaintiff***]'s harm was caused by [his/her/***nonbinary pronoun***] failure to follow [[***name of defendant***]'s/ [or] a manufacturer's] recommendations/ [or] commonly accepted homeowner maintenance obligations].**

New November 2019; Revised May 2020

Directions for Use

This instruction sets forth a builder's affirmative defense to a homeowner's construction defect claim under the Right to Repair Act, asserting that the homeowner failed to follow the builder's or manufacturer's recommendations, or properly maintain the property. The homeowner is responsible for any maintenance failures by any of the homeowner's agents, employees, general contractors, subcontractors, independent contractors, or consultants. (Civ. Code, § 945.5(c).) Include elements 2 and 3 if the defendant contractor is relying on its own recommended maintenance schedule.

Sources and Authority

- Right to Repair Act Affirmative Defense of Homeowner's Failure to Maintain. Civil Code section 945.5(c).

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1310 et seq.

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.263–104.265 (Matthew Bender)

9 California Legal Forms Transaction Guide, Ch. 23, *Real Property Sales Agreements*, § 23.20A (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.70 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 33:4 (Thomson Reuters)

4576–4599. Reserved for Future Use

VF-4500. Owner's Failure to Disclose Important Information Regarding Construction Project

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] submit [his/her/***nonbinary pronoun***/its] bid or agree to perform without information regarding [***e.g., tidal conditions***] that materially affected performance costs?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] have this information?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***] aware that [***name of plaintiff***] did not know this information and had no reason to obtain it?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] fail to provide this information to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did the contract plans and specifications or other information furnished by [***name of defendant***] to [***name of plaintiff***] either mislead [him/her/***nonbinary pronoun***/it] or fail to put [him/her/***nonbinary pronoun***/it] on notice to investigate further?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of plaintiff*] harmed because of [*name of defendant*]'s failure to disclose the information?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [name of plaintiff]'s **damages? $_____**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2015; Revised May 2024

Directions for Use

This verdict form is based on CACI No. 4501, *Owner's Liability for Failing to Disclose Important Information Regarding a Construction Project—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If different categories or items of damages are claimed, expand question 7 so that the jury can state a separate amount for each category. (See CACI Nos. 4540–4544, Contractor's Damages.) In this way, should a reviewing court determine that a particular item of damages is not recoverable, it can reduce the judgment by the amount awarded for that item rather than have to send the case back for a retrial of damages.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories.*

VF-4501–VF-4509. Reserved for Future Use

VF-4510. Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Affirmative Defense—Contractor Followed Plans and Specifications

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] fail to [***specify alleged defect in the work and/or deficiency in performance***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] harmed by [***name of defendant***]'s failure?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] provide [***name of defendant***] with the plans and specifications for the project?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, skip questions 4, 5, and 6 and answer question 7.

4. **Did [***name of plaintiff***] require [***name of defendant***] to follow the plans and specifications in constructing the project?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, skip questions 5 and 6 and answer question 7.

5. **Did [***name of defendant***] substantially comply with the plans and specifications?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, skip question 6 and answer question 7.

6. **Was [***specify alleged defect in the work and/or deficiency in performance***] because of [***name of defendant***]'s use of the plans and specifications?**

   _____ **Yes** _____ **No**

If your answer to question 6 is yes, stop here, answer no further questions, and have the presiding juror sign and date this form. If you answered no, answer question 7.

7. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2015; Revised May 2024

Directions for Use

This verdict form is based on CACI No. 4510, *Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Essential Factual Elements*, and CACI No. 4511, *Affirmative Defense—Contractor Followed Plans and Specifications*. Questions 3–6 address the affirmative defense.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If different categories or items of damages are claimed, expand question 7 so that the jury can state a separate amount for each category. (See CACI Nos. 4530–4532, Owner's Damages.) In this way, should a reviewing court determine that a particular item of damages is not recoverable, it can reduce the judgment by the amount awarded for that item rather than have to send the case back for a retrial of damages.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

VF-4511–VF-4519. Reserved for Future Use

VF-4520. Contractor's Claim for Changed or Extra Work—Owner's Response That Contract Procedures Not Followed—Contractor's Claim of Waiver

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] perform [changed/ [or] extra] work that was [not included in/ [or] in addition to that required under] the original contract?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] direct [***name of plaintiff***] to perform this [changed/ [or] extra] work?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of plaintiff***] harmed because [***name of defendant***] required this [changed/ [or] extra] work?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of plaintiff***] follow the change-order requirements included in the parties' contract?**

   _____ Yes _____ No

   If your answer to question 4 is yes, skip question 5 and answer question 6. If you answered no, then answer question 5.

5. **Did [***name of defendant***] freely and knowingly give up [his/her/** *nonbinary pronoun***/its] right to require [***name of plaintiff***] to follow the contract's change-order requirements?**

   _____ Yes _____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages? $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2015; Revised May 2024

Directions for Use

This verdict form is based on CACI No. 4520, *Contractor's Claim for Changed or Extra Work*, CACI No. 4521, *Owner's Claim That Contract Procedures Regarding Change Orders Were Not Followed*, and CACI No. 4522, *Waiver of Written Approval or Notice Requirements for Changed or Additional Work*. Question 4 addresses the owner's claim that contract requirements were not followed; question 5 addresses the contractor's response that the owner waived compliance. Waiver may only be asserted in a private contract case. (*See P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1344 [119 Cal.Rptr.3d 253] [public contract change-order requirements not subject to oral modification or modification by conduct].)

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If different categories or items of damages are claimed, expand question 6 so that the jury can state a separate amount for each category. (See CACI Nos. 4540–4544, Contractor's Damages.) In this way, should a reviewing court determine that a particular item of damages is not recoverable, it can reduce the judgment by the amount awarded for that item rather than have to send the case back for a retrial of damages.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

VF-4521–VF-4599. Reserved for Future Use

WHISTLEBLOWER PROTECTION

4600. False Claims Act: Whistleblower Protection—Essential Factual Elements (Gov. Code, § 12653)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/***specify other adverse action***] [him/her/***nonbinary pronoun***] because [he/she/***nonbinary pronoun***] acted [in furtherance of a false claims action/ to stop a false claim by [***name of false claimant***]]. A false claims action is a lawsuit against a person or entity that is alleged to have submitted a false claim to a government agency for payment or approval. A false claim is a claim for payment with the intent to defraud the government. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was an employee of [***name of defendant***];**
2. **That [***name of false claimant***] was alleged to have defrauded the government of money, property, or services by submitting a false or fraudulent claim to the government for payment or approval;**
3. **That [***name of plaintiff***] [***specify acts done in furthering the false claims action or to stop a false claim***];**
4. **That [***name of plaintiff***] acted [in furtherance of a false claims action/to stop a false claim];**
5. **That [***name of defendant***] [discharged/***specify other adverse action***] [***name of plaintiff***];**
6. **That [***name of plaintiff***]'s acts [in furtherance of a false claims action/to stop a false claim] were a substantial motivating reason for [***name of defendant***]'s decision to [discharge/***other adverse action***] [him/her/***nonbinary pronoun***];**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[An act is "in furtherance of" a false claims action if

[[*name of plaintiff***] actually filed a false claims action [himself/herself/ ***nonbinary pronoun***].]**

[*or***]**

[someone else filed a false claims action but [*name of plaintiff***] [***specify acts in support of action, e.g., gave a deposition in the action***], which resulted in the retaliatory acts.]**

[*or***]**

[no false claims action was ever actually filed, but [*name of plaintiff***]**

had reasonable suspicions of a false claim, and it was reasonably possible for [*name of plaintiff*]'s conduct to lead to a false claims action.]

The potential false claims action need not have turned out to be meritorious. [*Name of plaintiff*] need only show a genuine and reasonable concern that the government was being defrauded.]

New December 2012; Revoked June 2013; Restored and Revised December 2013; Renumbered from CACI No. 2440 and Revised June 2015

Directions for Use

The whistleblower protection statute of the False Claims Act (Gov. Code, § 12653) prohibits adverse employment actions against an employee who either (1) takes steps in furtherance of a false claims action or (2) makes efforts to stop a false claim violation. (See Gov. Code, § 12653(a).)

The second sentence of the opening paragraph defines a false claims action in its most common form: a lawsuit against someone who has submitted a false claim for payment. (See Gov. Code, § 12651(a)(1).) This sentence and element 2 may be modified if a different prohibited act is involved. (See Gov. Code, § 12651(a)(2)–(8).)

In element 3, specify the steps that the plaintiff took that are alleged to have led to the adverse action.

The statute reaches a broad range of adverse employment actions short of actual discharge. (See Gov. Code, § 12653(a).) If the case involves an adverse employment action other than termination, specify the action in elements 5 and 6. These elements may also be modified to allege constructive discharge. See CACI No. 2509, *"Adverse Employment Action" Explained*, and CACI No. 2510, *"Constructive Discharge" Explained*, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 6 uses the term "substantial motivating reason" to express both intent and causation between the employee's actions and the discharge. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies to cases under the False Claims Act has not been addressed by the courts.

Give the last part of the instruction if the claim is that the plaintiff was discharged for acting in furtherance of a false claims action.

Sources and Authority

- False Claims Act: Whistleblower Protection. Government Code section 12653.

- "The False Claims Act prohibits a 'person' from defrauding the government of money, property, or services by submitting to the government a 'false or fraudulent claim' for payment." (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1273 [134 Cal.Rptr.3d 883].)
- "To establish a prima facie case, a plaintiff alleging retaliation under the CFCA must show: '(1) that he or she engaged in activity protected under the statute; (2) that the employer knew the plaintiff engaged in protected activity; and (3) that the employer discriminated against the plaintiff because he or she engaged in protected activity.' " (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 455 [152 Cal.Rptr.3d 595].)
- " 'As a statute obviously designed to prevent fraud on the public treasury, [Government Code] section 12653 plainly should be given the broadest possible construction consistent with that purpose.' " (*McVeigh, supra,* 213 Cal.App.4th at p. 456.)
- "The False Claims Act bans retaliatory discharge in section 12653, which speaks not of a 'person' being liable for defrauding the government, but of an 'employer' who retaliates against an employee who assists in the investigation or pursuit of a false claim. Section 12653 has been 'characterized as the whistleblower protection provision of the [False Claims Act and] is construed broadly.' " (*Cordero-Sacks, supra,* 200 Cal.App.4th at p. 1274.)
- "[T]he act's retaliation provision applies not only to qui tam actions but to false claims in general. Section 12653 makes it unlawful for an employer to retaliate against an employee who is engaged 'in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652.' " (*Cordero-Sacks, supra,* 200 Cal.App.4th at p. 1276.)
- "Generally, to constitute protected activity under the CFCA, the employee's conduct must be in furtherance of a false claims action. The employee does not have to file a false claims action or show a false claim was actually made; however, the employee must have reasonably based suspicions of a false claim and it must be reasonably possible for the employee's conduct to lead to a false claims action." (*Kaye v. Board of Trustees of San Diego County Public Law Library* (2009) 179 Cal.App.4th 48, 60 [101 Cal.Rptr.3d 456], internal citation omitted.)
- "We do not construe *Kaye's* requirement that it be 'reasonably possible for [the employee's conduct] to lead to a false claims action' to mean that a plaintiff is not protected under the CFCA unless he or she has discovered grounds for a *meritorious* false claim action. . . . [T]he plaintiff need only show a genuine and reasonable concern that the government was possibly being defrauded in order to establish that he or she engaged in protected conduct. Any more limiting construction or significant burden would deny whistleblowers the broad protection the CFCA was intended to provide." (*McVeigh, supra,* 213 Cal.App.4th at pp. 457–458, original italics.)

- "Qui tam claims based on certain categories of publicly disclosed information are barred unless the plaintiff is an original source of the information. This prohibition, known as the public disclosure bar, is intended to prevent ' "parasitic or opportunistic actions by persons simply taking advantage of public information without contributing to or assisting in the exposure of the fraud." ' In light of CFCA's purpose of protecting the public fisc, 'the public disclosure bar should be applied only as necessary to preclude parasitic or opportunistic actions, but not so broadly as to undermine the Legislature's intent that relators assist in the prevention, identification, investigation, and prosecution of false claims.' " (*State ex rel. Bartlett v. Miller* (2016) 243 Cal.App.4th 1398, 1407 [197 Cal.Rptr.3d 673], footnote and internal citations omitted.)
- "There is a dearth of California authority discussing what constitutes protected activity under the CFCA. However, because the CFCA is patterned on a similar federal statute (31 U.S.C. § 3729 et seq.), we may rely on cases interpreting the federal statute for guidance in interpreting the CFCA. (*Kaye, supra,* 179 Cal.App.4th at pp. 59–60.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 306, 307

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 883, 884

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 468, *Public Entities and Officers: False Claims Actions*, § 468.25 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.61 (Matthew Bender)

4601. Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements (Gov. Code, § 8547.8(c))

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] made a protected disclosure in good faith and that [***name of defendant***] [discharged/***specify other adverse action***] [him/her/***nonbinary pronoun***] as a result. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***specify protected disclosure, e.g., reported waste, fraud, abuse of authority, violation of law, threats to public health, bribery, misuse of government property***];**
2. **That [***name of plaintiff***]'s communication [disclosed/ [or] demonstrated an intention to disclose] evidence of [an improper governmental activity/ [or] a condition that could significantly threaten the health or safety of employees or the public];**
3. **That [***name of plaintiff***] made this communication in good faith [for the purpose of remediating the health or safety condition];**
4. **That [***name of defendant***] [discharged/***specify other adverse action***] [***name of plaintiff***];**
5. **That [***name of plaintiff***]'s communication was a contributing factor in [***name of defendant***]'s decision to [discharge/***other adverse action***] [***name of plaintiff***];**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2014; Renumbered from CACI No. 2442 and Revised June 2015

Directions for Use

Under the California Whistleblower Protection Act (Gov. Code, § 8547 et seq.) (the Act), a state employee or applicant for state employment has a right of action against any person who retaliates against him or her for having made a "protected disclosure." The statute prohibits a "person" from intentionally engaging in acts of reprisal, retaliation, threats, coercion, or similar acts against the employee or applicant. (Gov. Code, § 8547.8(c).) A "person" includes the state and its agencies. (Gov. Code, § 8547.2(d).)

The statute prohibits acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment. (See Gov. Code,

§ 8547.8(b).) If the case involves an adverse employment action other than termination, specify the action in elements 4 and 5. These elements may also be modified if constructive discharge is alleged. See CACI No. 2509, *"Adverse Employment Action" Explained*, and CACI No. 2510, *"Constructive Discharge" Explained*, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 2 alleges a protected disclosure. (See Gov. Code, § 8547.2(e) ["protected disclosure" defined].)

If an "improper governmental activity" is alleged in element 2, it may be necessary to expand the instruction with language from Government Code section 8547.2(c) to define the term. If the court has found that an improper governmental activity is involved as a matter of law, the jury should be instructed that the issue has been resolved.

If a health or safety violation is alleged in element 2, include the bracketed language at the end of element 3.

The statute addresses the possibility of a mixed-motive adverse action. If the plaintiff can establish that a protected disclosure was a "contributing factor" to the adverse action (see element 5), the employer may offer evidence to attempt to prove by clear and convincing evidence that it would have taken the same action for other permitted reasons. (Gov. Code, § 8547.8(e); see CACI No. 4602, *Affirmative Defense—Same Decision*.)

The affirmative defense includes refusing an illegal order as a second protected matter (along with engaging in protected disclosures). (See Gov. Code, § 8547.8(e); see also Gov. Code, § 8547.2(b) [defining "illegal order"].) However, Government Code section 8547.8(c), which creates the plaintiff's cause of action under the Act, mentions only making a protected disclosure; it does not expressly reference refusing an illegal order. But arguably, there would be no need for an affirmative defense to refusing an illegal order if the refusal itself is not protected. Therefore, whether a plaintiff may state a claim based on refusing an illegal order may be unclear; thus the committee has not included refusing an illegal order as within the elements of this instruction.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Civil Action Under California Whistleblower Protection Act. Government Code section 8547.8(c).
- "Improper Governmental Activity" Defined. Government Code section 8547.2(c).
- "Person" Defined. Government Code section 8547.2(d).
- "Protected Disclosure" Defined. Government Code section 8547.2(e).
- Governmental Claims Act Not Applicable. Government Code section 905.2(h).
- "The [Whistleblower Protection Act] prohibits improper governmental activities, which include interference with or retaliation for reporting such activities."

(*Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 939 [163 Cal.Rptr.3d 530].)

- "The CWPA 'prohibits retaliation against state employees who "report waste, fraud, abuse of authority, violation of law, or threat to public health" [citation].' A protected disclosure under the CWPA is 'a good faith communication, including a communication based on, or when carrying out, job duties, that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity, or (2) a condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.' " (*Levi v. Regents of University of California* (2017) 15 Cal.App.5th 892, 902 [223 Cal.Rptr.3d 577], internal citation omitted.)
- "[Government Code] Section 8547.8 requires a state employee who is a victim of conduct prohibited by the [Whistleblower Protection] Act to file a written complaint with the Personnel Board within 12 months of the events at issue and instructs, 'any action for damages shall not be available to the injured party . . .' unless he or she has filed such a complaint. The Legislature could hardly have used stronger language to indicate its intent that compliance with the administrative procedure of sections 8547.8 and 19683 is to be regarded as a mandatory prerequisite to a suit for damages under the Act than to say a civil action is 'not . . . available' to persons who have not complied with the procedure." (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1112–1113 [150 Cal.Rptr.3d 405], internal citations omitted.)
- "Exposing conflicts of interest, misuse of funds, and improper favoritism of a near relative at a public agency are matters of significant public concern that go well beyond the scope of a similar problem at a purely private institution. State employees should be free to report violations of those policies without fear of retribution." (*Levi*, *supra*, 15 Cal.App.5th at p. 905.)
- "Complaints made 'in the context of internal administrative or personnel actions, rather than in the context of legal violations' do not constitute protected whistleblowing." (*Levi*, *supra*, 15 Cal.App.5th at p. 904.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 284 et seq., 303–304

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II)-B, *Retaliation Under Other Whistleblower Statutes*, ¶ 5:1740 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c], [3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 118, *Civil Service*, § 118.56 (Matthew Bender)

3 California Points and Authorities, Ch. 36, *Civil Service*, § 36.40 (Matthew Bender)

4602. Affirmative Defense—Same Decision (Gov. Code, § 8547.8(e))

If [*name of plaintiff*] proves that [his/her/*nonbinary pronoun*] [making a protected disclosure/refusing an illegal order] was a contributing factor to [his/her/*nonbinary pronoun*] [discharge/*specify other adverse action*], [*name of defendant*] is not liable if [he/she/*nonbinary pronoun*/it] proves by clear and convincing evidence that [he/she/*nonbinary pronoun*/it] would have discharged [*name of plaintiff*] anyway at that time, for legitimate, independent reasons.

New December 2014; Renumbered from CACI No. 2443 and Revised June 2015

Directions for Use

Give this instruction in a so-called same-decision or mixed-motive case under the California Whistleblower Protection Act. (See Gov. Code, § 8547 et seq.; CACI No. 4601, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements*.) A mixed-motive case is one in which there is evidence of both a retaliatory reason and a legitimate reason for the adverse action. Even if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason. (Gov. Code, § 8547.8(e).)

Select "refusing an illegal order" if the court has allowed the case to proceed based on that basis. The affirmative defense statute includes refusing an illegal order as protected activity along with making a protected disclosure. The statute that creates the plaintiff's cause of action does not expressly mention refusing an illegal order. (Compare Gov. Code, § 8547.8(e) with Gov. Code, § 8547.2(c).) See the Directions for Use to CACI No. 4601.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Same-Decision Affirmative Defense. Government Code section 8547.8(e).
- "Guided by *Lawson* [*v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703 [289 Cal.Rptr.3d 572, 503 P.3d 659]] and applying its reasoning, we conclude that Government Code section 8547.10, subdivision (e), rather than *McDonnell Douglas*, provides the relevant framework for analyzing claims under Government Code section 8547.10." (*Scheer v. Regents of University of California* (2022) 76 Cal.App.5th 904, 916 [291 Cal.Rptr.3d 822].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 302–307A

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II)-B, *Retaliation Under Other Whistleblower Statutes*, ¶ 5:1790 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 118, *Civil Service*, § 118.56 (Matthew Bender)

3 California Points and Authorities, Ch. 36, *Civil Service*, § 36.40 (Matthew Bender)

4603. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/[***other adverse employment action***]] [him/her/***nonbinary pronoun***] in retaliation for [his/her/***nonbinary pronoun***] [disclosure of information of/refusal to participate in] an unlawful act. To establish this claim, [***name of plaintiff***] must prove all of the following are more likely true than not true:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s employer;**

2. **[That [[***name of plaintiff***] disclosed/[***name of defendant***] believed that [***name of plaintiff***] [had disclosed/might disclose]] to a [government agency/law enforcement agency/person with authority over [***name of plaintiff***]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [***specify information disclosed***];]**

   [*or***]**

   [That [*name of plaintiff***] [provided information to/testified before] a public body that was conducting an investigation, hearing, or inquiry;]**

   [*or***]**

   [That [*name of plaintiff***] refused to [***specify activity in which plaintiff refused to participate***];]**

3. **[That [***name of plaintiff***] had reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***] had reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/ noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***]'s participation in [***specify activity***] would result in [a violation of a [state/federal] statute/[a violation of/ noncompliance with] a [local/state/federal] rule or regulation];]**

4. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

5. **That [[***name of plaintiff***]'s [disclosure of information/refusal to**

[*specify*]]/[*name of defendant*]'s belief that [*name of plaintiff*] [had disclosed/might disclose] information] was a contributing factor in [*name of defendant*]'s decision to [discharge/[*other adverse employment action*]] [*name of plaintiff*];

6. **That [*name of plaintiff*] was harmed; and**
7. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

A "contributing factor" is any factor, which alone or in connection with other factors, tends to affect the outcome of a decision. A contributing factor can be proved even when other legitimate factors also contributed to the employer's decision.

[The disclosure of policies that an employee believes to be merely unwise, wasteful, gross misconduct, or the like, is not protected. Instead, [*name of plaintiff*] must have reasonably believed that [*name of defendant*]'s policies violated federal, state, or local statutes, rules, or regulations.]

[It is not [*name of plaintiff*]'s motivation for [his/her/*nonbinary pronoun*] disclosure, but only the content of that disclosure, that determines whether the disclosure is protected.]

[A disclosure is protected even though disclosing the information may be part of [*name of plaintiff*]'s job duties.]

[A disclosure is protected even though the [agency/employer] already knew about the information disclosed.]

New December 2012; Revised June 2013, December 2013; Revoked June 2014; Restored and Revised December 2014; Renumbered from CACI No. 2730 and Revised June 2015; Revised June 2016, November 2019, May 2020, December 2022, May 2023, November 2023

Directions for Use

The whistleblower protection statute of the Labor Code prohibits retaliation against an employee who, or whose family member, discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c), (h).) Liability may be predicated on retaliation by "any person acting on behalf of the employer." (Lab. Code, § 1102.5(a)–(d).) Select any of the optional paragraphs as appropriate to the facts of the case. For claims under Labor Code section 1102.5(c), the plaintiff must show that the activity in question actually would result in a violation of or noncompliance with a statute, rule, or regulation, which is a legal determination that the court is required to make. (*Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 719 [253 Cal.Rptr.3d 404].)

Modifications to the instruction may be required if liability is predicated on an agency theory and the agent is also a defendant. Modifications will also be required

if the retaliation is against an employee whose family member engaged in the protected activity.

Select the first option for elements 2 and 3 for claims based on actual disclosure of information or a belief that plaintiff disclosed or might disclose information. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648–649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].) Select the second options for providing information to or testifying before a public body conducting an investigation, hearing, or inquiry. Select the third options for refusal to participate in an unlawful activity, and instruct the jury that the court has made the determination that the specified activity would have been unlawful.

Labor Code section 1102.5(b) applies even when an employee discloses information to an employer or agency that already knew about the violation. (*People ex rel. Garcia-Brower v. Kolla's Inc.* (2023) 14 Cal.5th 719, 721 [308 Cal.Rptr.3d 388, 529 P.3d 49].)

"Adverse employment action" is viewed the same as it is under the Fair Employment and Housing Act. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113], disapproved on other grounds by *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 718 [289 Cal.Rptr.3d 572, 503 P.3d 659]; see CACI No. 2505, *Retaliation—Essential Factual Elements.*) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions that may be adapted for use with this instruction.

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. (*Lawson, supra,* 12 Cal.5th at p. 718.) The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. 4604, *Affirmative Defense—Same Decision.*)

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.
- "[W]e now clarify that section 1102.6, and not *McDonnell Douglas*, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims." (*Lawson, supra*, 12 Cal.5th at p. 712.)
- "By its terms, section 1102.6 describes the applicable substantive standards and burdens of proof for both parties in a section 1102.5 retaliation case: First, it must be 'demonstrated by a preponderance of the evidence' that the employee's protected whistleblowing was a 'contributing factor' to an adverse employment action. Then, once the employee has made that necessary threshold showing, the

employer bears 'the burden of proof to demonstrate by clear and convincing evidence' that the alleged adverse employment action would have occurred 'for legitimate, independent reasons' even if the employee had not engaged in protected whistleblowing activities." (*Lawson, supra*, 12 Cal.5th at p. 712, internal citation omitted.)

- "Section 1102.6 prescribes a two-part burden-shifting framework for deciding employee retaliation claims. It states: 'In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.' " (*Zirpel v. Alki David Productions, Inc.* (2023) 93 Cal.App.5th 563, 573 [310 Cal.Rptr.3d 730], internal citation omitted.)
- "In order to prove a claim under section 1102.5(b), the plaintiff must establish a prima facie case of retaliation. It is well-established that such a prima facie case includes proof of the plaintiff's employment status." (*Bennett v. Rancho California Water Dist.* (2019) 35 Cal.App.5th 908, 921 [248 Cal.Rptr.3d 21], internal citations omitted.)
- "To prove a claim of retaliation under this statute, the plaintiff 'must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment.' 'Minor or relatively trivial adverse actions by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee do not materially affect the terms or conditions of employment.' This requirement " ' "guards against both "judicial micromanagement of business practices" [citation] and frivolous suits over insignificant slights." ' " (*Francis v. City of Los Angeles* (2022) 81 Cal.App.5th 532, 540–541 [297 Cal.Rptr.3d 362], internal citations omitted.)
- "[T]he purpose of . . . section 1102.5(b) 'is to "encourag[e] workplace whistleblowers to report unlawful acts without fearing retaliation." ' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 923 [180 Cal.Rptr.3d 359].)
- "Once it is determined that the activity would result in a violation or noncompliance with a statute, rule, or regulation, the jury must then determine whether the plaintiff refused to participate in that activity and, if so, whether that refusal was a contributing factor in the defendant's decision to impose an adverse employment action on the plaintiff." (*Nejadian, supra,* 40 Cal.App.5th at p. 719.)
- "The question here is whether a report of unlawful activities made to an employer or agency that already knew about the violation is a protected 'disclosure' within the meaning of section 1102.5(b). We hold it is." (*People ex*

rel. Garcia-Brower, supra, 14 Cal.5th at p. 721.)

- "The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct." (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 847 [136 Cal.Rptr.3d 259], disapproved on other grounds in *People ex rel. Garcia-Brower, supra,* 14 Cal.5th at p. 734.)
- "[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 852, original italics, disapproved on other grounds in *People ex rel. Garcia-Brower, supra,* 14 Cal.5th at p. 734.)
- "[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency . . . , he or she will have to suffer any retaliatory conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results." (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)
- "Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well [as] unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)
- "The report of 'publicly known' information or 'already known' information is distinct from a rule in which only the first employee to report or disclose unlawful conduct is entitled to protection from whistleblower retaliation." (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548–1553 [176 Cal.Rptr.3d 268], disapproved on other grounds in *Lawson, supra,* 12 Cal.5th at p. 718.)
- "Protection only to the first employee to disclose unlawful acts would defeat the

legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so. The 'first report' rule would discourage whistleblowing. Thus, the [defendant]'s interpretation is a disincentive to report unlawful conduct. We see no such reason to interpret the statute in a manner that would contradict the purpose of the statute." (*Hager, supra*, 228 Cal.App.4th at p. 1550, disapproved on other grounds in *Lawson, supra*, 12 Cal.5th at p. 718.)

- "Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. 'To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected "whistleblowers" arising from the routine workings and communications of the job site. . . .' " (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)
- " 'A wrongful termination action is viable where the employee alleges he [or she] was terminated for reporting illegal activity which could cause harm, not only to the interests of the employer but also to the public.' 'An action brought under the whistleblower statute is inherently such an action.' To preclude a whistleblower from revealing improper conduct by the government based on confidentiality would frustrate the legislative intent underlying the whistleblower statutes. For reasons of public policy, actions against a public entity for claims of discharge from or termination of employment grounded on a whistleblower claim are not barred by governmental immunity." (*Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 365 [225 Cal.Rptr.3d 321], internal citations omitted.)
- "Although [the plaintiff] did not expressly state in his disclosures that he believed the County was violating or not complying with a specific state or federal law, Labor Code section 1102.5, subdivision (b), does not require such an express statement. It requires only that an employee disclose information and that the employee reasonably believe the information discloses unlawful activity." (*Ross v. County of Riverside* (2019) 36 Cal.App.5th 580, 592–593 [248 Cal.Rptr.3d 696].)
- "Section 1102.6 requires whistleblower plaintiffs to show that retaliation was a 'contributing factor' in their termination, demotion, or other adverse action. This means plaintiffs may satisfy their burden of proving unlawful retaliation even when other, legitimate factors also contributed to the adverse action." (*Lawson, supra,* 12 Cal.5th at 713–714.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 302–307A, 373, 374

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II)-A, *Retaliation Under Title VII and FEHA*, ¶ 5:1538 (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 118, *Civil Service*, § 118.55 et seq. (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, §§ 100.48, 100.60–100.61A (Matthew Bender)

4604. Affirmative Defense—Same Decision (Lab. Code, § 1102.6)

If [*name of plaintiff***] proves that [his/her/***nonbinary pronoun***] [disclosure of information of/refusal to participate in] an unlawful act was a contributing factor to [his/her/***nonbinary pronoun***] [discharge/[***other adverse employment action***]], [***name of defendant***] is not liable if [he/she/***nonbinary pronoun***/it] proves by clear and convincing evidence that [he/she/***nonbinary pronoun***/it] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway at that time for legitimate, independent reasons.**

New December 2013; Renumbered from CACI No. 2731 and Revised June 2015, December 2022

Directions for Use

Give this instruction in a so-called mixed-motive case under the whistleblower protection statute of the Labor Code. (See Lab. Code, § 1102.5; CACI No. 4603, *Whistleblower Protection—Essential Factual Elements*.) A mixed-motive case is one in which there is evidence of both a retaliatory and a legitimate reason for the adverse action. Even if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason. (Lab. Code, § 1102.6.) For an instruction on the clear and convincing standard of proof, see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Sources and Authority

- Same-Decision Affirmative Defense. Labor Code section 1102.6.
- "[W]e now clarify that section 1102.6, and not *McDonnell Douglas*, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims." (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 712 [289 Cal.Rptr.3d 572, 503 P.3d 659].)
- "By its terms, section 1102.6 describes the applicable substantive standards and burdens of proof for both parties in a section 1102.5 retaliation case: First, it must be 'demonstrated by a preponderance of the evidence' that the employee's protected whistleblowing was a 'contributing factor' to an adverse employment action. Then, once the employee has made that necessary threshold showing, the employer bears 'the burden of proof to demonstrate by clear and convincing evidence' that the alleged adverse employment action would have occurred 'for legitimate, independent reasons' even if the employee had not engaged in protected whistleblowing activities." (*Lawson, supra*, 12 Cal.5th at p. 712, internal citation omitted.)
- "It is not enough . . . that an employer shows it had a legitimate, nondiscriminatory reason for the adverse employment action. Were that the

standard, then an employer could satisfy its burden simply by showing it had one legitimate reason for its action, even if several illegitimate reasons principally motivated its decision. But that is not the applicable standard here. Under section 1102.6, the employer must instead show 'the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.' " (*Vatalaro v. County of Sacramento* (2022) 79 Cal.App.5th 367, 379 [294 Cal.Rptr.3d 389], internal citation omitted.)

- "[Plaintiff] points to Labor Code section 1102.6, which requires the employer to prove a same-decision defense by clear and convincing evidence when a plaintiff has proven by a preponderance of the evidence that the employer's violation of the whistleblower statute was a 'contributing factor' to the contested employment decision. Yet the inclusion of the clear and convincing evidence language in one statute does not suggest that the Legislature intended the same standard to apply to other statutes implicating the same-decision defense." (*Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 239 [152 Cal.Rptr.3d 392, 294 P.3d 49]; internal citation omitted.)
- "[W]hen we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision.*" (*Harris, supra*, 56 Cal.4th at p. 224, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 373, 374

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II)-A, *Retaliation Under Title VII and FEHA*, ¶ 5:1538 (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline,* § 60.03 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.60 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.12 (Matthew Bender)

4605. Whistleblower Protection—Health or Safety Complaint—Essential Factual Elements (Lab. Code, § 6310)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/[***other adverse employment action***]] [him/her/***nonbinary pronoun***] in retaliation for [his/her/***nonbinary pronoun***] [***specify, e.g., complaint to the Division of Occupational Safety and Health regarding unsafe working conditions***]. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was an employee of [***name of defendant***];**
2. **[That [***name of plaintiff***], on [his/her/***nonbinary pronoun***] own behalf or on behalf of others, [***select one or more of the following options:***]**

   [made [an oral/a written] complaint to [*specify to whom complaint was directed, e.g., the Division of Occupational Safety and Health***] regarding [unsafe/unhealthy] working conditions;]**

   [*or***]**

   [[initiated a proceeding/caused a proceeding to be initiated] relating to [his/her/*nonbinary pronoun* **[or] another person's] rights to workplace health or safety;]**

   [*or***]**

   [[testified/was about to testify] in a proceeding related to [his/her/*nonbinary pronoun* **[or] another person's] rights to workplace health or safety;]**

   [*or***]**

   [exercised [his/her/*nonbinary pronoun* **[or] another person's] rights to workplace health or safety;]**

   [*or***]**

   [participated in a workplace health and safety committee;]

   [*or***]**

   [reported a work-related fatality, injury, or illness;]

   [*or***]**

   [requested access to occupational injury or illness reports and records;]

   [*or***]**

   [exercised [*specify other right(s) protected by the federal*

Occupational Safety and Health Act];]

3. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**
4. **That [***name of plaintiff***]'s [***specify***] was a substantial motivating reason for [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***];**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2015; Revised December 2016, May 2018

Directions for Use

Use this instruction for a whistleblower claim under Labor Code section 6310 for employer retaliation for an employee's, or an employee's family member's, complaint or other protected activity about health or safety conditions. Select the appropriate statutorily protected activity in element 2 and summarize it in the introductory paragraph. (See Lab. Code, § 6310(a), (c).)

With regard to the first option in element 2, the complaint must have been made to (1) the Division of Occupational Safety and Health, (2) to another governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, (3) to the employer, or (4) to the employee's representative. (Lab. Code, § 6310(a)(1).)

The statute requires that the employee's complaint be "bona fide." (See Lab. Code, § 6310(b).) There appears to be a split of authority as to whether "bona fide" means that there must be an actual health or safety violation or only that the employee have a good-faith belief that there are violations. (See *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682, fn. 5 [145 Cal.Rptr.3d 766].) The instruction should be modified if the court decides to instruct one way or the other on the meaning of "bona fide."

Note that element 4 uses the term "substantial motivating reason" to express both intent and causation between the employee's protected conduct and the defendant's adverse action. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained.*) Whether the FEHA standard applies under Labor Code section 6310 has not been addressed by the courts. There is authority for a "but for" causation standard instead of "substantial motivating reason." (See *Touchstone Television Productions, supra*, 208 Cal.App.4th at pp. 681–682.)

Sources and Authority

- Whistleblower Protection for Report of Health or Safety Violation. Labor Code section 6310.
- "Division" Defined. Labor Code section 6302(d).
- "[Plaintiff]'s action is brought under section 6310, subdivision (a)(1), which prohibits an employer from discriminating against an employee who makes 'any oral or written complaint.' Subdivision (b) provides that '[a]ny employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has made a bona fide oral or written complaint to . . . his or her employer . . . of unsafe working conditions, or work practices . . . shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.' " (*Sheridan v. Touchstone Television Productions, LLC* (2015) 241 Cal.App.4th 508, 512 [193 Cal.Rptr.3d 811].)
- "[T]he plaintiff did not lack a remedy: she could sue under section 6310, subdivision (b) which permits 'an action for damages if the employee is discharged, threatened with discharge, or discriminated against by his or her employer because of the employee's complaints about unsafe work conditions. Here, it is alleged that [the defendant] discriminated against [the plaintiff] by not renewing her employment contract. *To prevail on the claim, she must prove that, but for her complaints about unsafe work conditions, [the defendant] would have renewed the employment contract. Damages, however, are limited to "lost wages and work benefits caused by the acts of the employer.*" ' " (*Touchstone Television Productions, supra*, 208 Cal.App.4th at pp. 681–682, original italics.)
- "The voicing of a fear about one's safety in the workplace does not necessarily constitute a complaint about unsafe working conditions under Labor Code section 6310. [Plaintiff]'s declaration shows only that she became frightened for her safety as a result of her unfortunate experience . . . and expressed her fear to [defendant]; it is not evidence that the . . . office where she worked was actually unsafe within the meaning of Labor Code sections 6310 and 6402. Hence, [plaintiff]'s declaration fails to raise a triable issue of fact as to whether she was terminated for complaining to [defendant] about unsafe working conditions in violation of Labor Code section 6310." (*Muller v. Auto. Club of So. Cal.* (1998) 61 Cal.App.4th 431, 452 [71 Cal.Rptr.2d 573], disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6 [130 Cal.Rptr.2d 662, 63 P.3d 220].)
- "Citing *Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431, 452 [71 Cal.Rptr.2d 573], defendants assert plaintiff's causes of action based on section 6310 must fail because an essential element of a section 6310 violation is that the workplace must actually be unsafe. We first note that the *Muller* court cites no authority for this assertion. It appears to contradict Justice Grodin's pronouncement that '. . . an employee is protected against discharge or

discrimination for complaining in good faith about working conditions or practices which he reasonably believes to be unsafe, whether or not there exists at the time of the complaint an OSHA standard or order which is being violated.' We agree that an employee must be protected against discharge for a good faith complaint about working conditions which he believes to be unsafe." (*Cabesuela v. Browning-Ferris Indus.* (1998) 68 Cal.App.4th 101, 109 [80 Cal.Rptr.2d 60], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 405

2 Wilcox, California Employment Law, Ch. 21, *Occupational Health and Safety Regulation*, § 21.20 (Matthew Bender)

3 California Torts, Ch. 40A, *Wrongful Termination*, § 40A.30 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 et seq. (Matthew Bender)

4606. Whistleblower Protection—Unsafe Patient Care and Conditions—Essential Factual Elements (Health & Saf. Code, § 1278.5)

Revoked November 2017

See *Shaw v. Superior Court* (2017) 2 Cal.5th 983 [216 Cal.Rptr.3d 643, 393 P.3d 98].

4607–4699. Reserved for Future Use

VF-4600. False Claims Act: Whistleblower Protection (Gov. Code, § 12653)

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] an employee of [***name of defendant***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of plaintiff***] [***specify acts done in furthering the false claims action or to stop a false claim***]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] act [in furtherance of a false claims action/ to stop a false claim]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] [discharge/***specify other adverse action***] [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Were [***name of plaintiff***]'s acts [in furtherance of a false claims action/to stop a false claim] a substantial motivating reason for [***name of defendant***]'s decision to [discharge/***other adverse action***] [him/her/***nonbinary pronoun***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [***name of defendant***]'s conduct a substantial factor in causing**

harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2015; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 4600, *False Claims Act: Whistleblower Protection—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Questions 4 and 5 may be modified to allege constructive discharge. Questions 2 through 5 of CACI No. VF-2408, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*, should be adapted and included in such a case.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-4601. Protected Disclosure by State Employee—California Whistleblower Protection Act—Affirmative Defense—Same Decision (Gov. Code, § 8547.8(c))

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [***specify protected disclosure, e.g., report waste, fraud, abuse of authority, violation of law, threats to public health, bribery, misuse of government property***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of plaintiff***]'s communication [disclose/ [or] demonstrate an intention to disclose] evidence of [an improper governmental activity/ [or] a condition that could significantly threaten the health or safety of employees or the public]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of plaintiff***] make this communication in good faith [for the purpose of remediating the health or safety condition]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] [discharge/***other adverse action***] [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [***name of plaintiff***]'s communication a contributing factor in [***name of defendant***]'s decision to [discharge/***other adverse action***] [him/her/***nonbinary pronoun***]?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6. If you

answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ **Yes** _____ **No**

   If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. **Did [*name of defendant*] prove by clear and convincing evidence that [*name of defendant*] would have [discharged/*other adverse action*] [*name of plaintiff*] anyway at that time for legitimate, independent reasons?**

   _____ **Yes** _____ **No**

   If your answer to question 7 is no, then answer question 8. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other past economic loss $_____]

   Total Past Economic Damages: $_____]

   [b. Future economic loss

   [lost earnings $_____]

   [lost profits $_____]

   [medical expenses $_____]

   [other future economic loss $_____]

   Total Future Economic Damages: $_____]

   [c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

   [d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

   TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2015; Revised December 2016, December 2022, May 2024

Directions for Use

This verdict form is based on CACI No. 4601, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements*, and CACI No. 4602, *Affirmative Defense—Same Decision*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If a health or safety violation is presented in question 2, include the bracketed language at the end of question 3.

Questions 4 and 5 may be modified to allege constructive discharge. Questions 2 through 5 of CACI No. VF-2408, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*, should be adapted and included in such a case.

Question 7 presents the employer's affirmative defense that it would have made the same decision anyway for legitimate reasons even though the jury finds that retaliation for whistleblowing was also a contributing factor for the adverse action. (See Gov. Code, § 8547.8(e).)

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-4602. Whistleblower Protection—Affirmative Defense of Same Decision (Lab. Code, §§ 1102.5, 1102.6)

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [***name of plaintiff***]'s employer?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **[Did [[***name of plaintiff***] disclose/[***name of defendant***] believe that [***name of plaintiff***] [had disclosed/might disclose]] to a [government agency/law enforcement agency/person with authority over [***name of plaintiff***]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [***specify information disclosed***]?]**

   [*or***]**

   [Did [*name of plaintiff***] [provide information to/testify before] a public body that was conducting an investigation, hearing, or inquiry?]**

   [*or***]**

   [Did [*name of plaintiff***] refuse to [***specify activity in which plaintiff refused to participate***]?]**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

[3. [Did [*name of plaintiff***] have reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation]?]**

   [*or***]**

   [Did [*name of plaintiff***] have reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/ noncompliance with] a [local/state/federal] rule or regulation]?]**

   [*or***]**

   [Would [*name of plaintiff***]'s participation in [***specify activity***] result**

in [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation]?]

_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

4. **Did [***name of defendant***] [discharge/***other adverse action***] [***name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was [[***name of plaintiff***]'s [disclosure of information/refusal to [***specify***]]/[***name of defendant***]'s belief that [***name of plaintiff***] [had disclosed/might disclose] information] a contributing factor in [***name of defendant***]'s decision to [discharge/***other adverse action***] [him/her/***nonbinary pronoun***]?**

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. **Did [***name of defendant***] prove by clear and convincing evidence that [***name of defendant***] would have [discharged/***other adverse action***] [***name of plaintiff***] anyway at that time for legitimate, independent reasons?**

_____ Yes _____ No

If your answer to question 7 is no, then answer question 8. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. **What are [***name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2015; Revised December 2016, May 2020, December 2022, May 2024

Directions for Use

This verdict form is based on CACI No. 4603, *Whistleblower Protection—Essential Factual Elements*, and CACI No. 4604, *Affirmative Defense—Same Decision.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Use the appropriate options in questions 2 and 3 as used for elements 2 and 3 in CACI No. 4603. Omit question 3 entirely, however, if the plaintiff allegedly refused to participate in an activity that would result in a violation or noncompliance with a statute, rule, or regulation. (*Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 719 [253 Cal.Rptr.3d 404].) If the plaintiff allegedly refused to

participate in an activity that would result in a violation or noncompliance with a statute, rule, or regulation, replace "disclosure of information" in question 5 with "refusal to [*specify activity employee refused to participate in and what specific statute, rule, or regulation would be violated by that activity*]."

Questions 4 and 5 may be modified to allege constructive discharge. Questions 2 through 5 of CACI No. VF-2408, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*, should be adapted and included in such a case.

Question 7 presents the employer's affirmative defense that it would have made the same decision anyway for legitimate reasons even though the jury finds that retaliation for whistleblowing was also a contributing factor for the adverse action. (See Lab. Code, § 1102.6.)

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-4603–VF-4699. Reserved for Future Use

CONSUMERS LEGAL REMEDIES ACT

4700. Consumers Legal Remedies Act—Essential Factual Elements (Civ. Code, § 1770)

[*Name of plaintiff***] claims that [***name of defendant***] engaged in unfair methods of competition and unfair or deceptive acts or practices in a transaction that resulted, or was intended to result, in the sale or lease of goods or services to a consumer, and that [***name of plaintiff***] was harmed by [***name of defendant***]'s violation. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] acquired, or sought to acquire, by purchase or lease, [***specify product or service***] for personal, family, or household purposes;**
2. **That [***name of defendant***] [***specify one or more prohibited practices from Civ. Code, § 1770(a), e.g., represented that [product or service] had characteristics, uses, or benefits that it did not have***];**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of plaintiff***]'s harm resulted from [***name of defendant***]'s conduct.**

[[*Name of plaintiff***]'s harm resulted from [***name of defendant***]'s conduct if [***name of plaintiff***] relied on [***name of defendant***]'s representation. To prove reliance, [***name of plaintiff***] need only prove that the representation was a substantial factor in [his/her/***nonbinary pronoun***] decision. [He/She/***Nonbinary pronoun***] does not need to prove that it was the primary factor or the only factor in the decision.**

If [*name of defendant***]'s representation of fact was material, reliance may be inferred. A fact is material if a reasonable consumer would consider it important in deciding whether to buy or lease the [goods/services].]**

New November 2017

Directions for Use

Give this instruction for a claim under the Consumers Legal Remedies Act (CLRA).

The CLRA prohibits 27 distinct unfair methods of competition and unfair or deceptive acts or practices with regard to consumer transactions. (See Civ. Code, § 1770(a).) In element 2, insert the prohibited practice or practices at issue in the case.

The last two optional paragraphs address the plaintiff's reliance on the defendant's conduct. CLRA claims not sounding in fraud do not require reliance. (See, e.g., Civ. Code, § 1770(a)(19) [inserting an unconscionable provision in a contract].) Give these paragraphs in a case sounding in fraud.

Many of the prohibited practices involve a misrepresentation made by the defendant. (See, e.g., Civ. Code, § 1770(a)(4) [using deceptive representations or designations of geographic origin in connection with goods or services].) In a misrepresentation claim, the plaintiff must have relied on the information given. (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1022 [112 Cal.Rptr.3d 607], disapproved of on other grounds in *Raceway Ford Cases* (2016) 2 Cal.5th 161, 180 [211 Cal.Rptr.3d 244, 385 P.3d 397].) An element of reliance is that the information must have been material (or important). (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 256 [134 Cal.Rptr.3d 588].)

Other prohibited practices involve a failure to disclose information. (See *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1258 [248 Cal.Rptr.3d 61]; see, e.g., Civ. Code, § 1770(a)(9) [advertising goods or services with intent not to sell them as advertised].) Reliance in concealment cases is best expressed in terms that the plaintiff would have behaved differently had the true facts been known. (See *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568].) The next-to-last paragraph may be modified to express reliance in this manner. (See CACI No. 1907, *Reliance*.)

The CLRA provides for class actions. (See Civ. Code, § 1781.) In a class action, this instruction should be modified to state that only the named plaintiff's reliance on the defendant's representation must be proved. Class-wide reliance does not require a showing of actual reliance on the part of every class member. Rather, if all class members have been exposed to the same material misrepresentations, class-wide reliance will be inferred, unless rebutted by the defendant. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814–815 [94 Cal.Rptr. 796, 484 P.2d 964]; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 362–363 [134 Cal.Rptr. 388, 556 P.2d 750]; *Massachusetts Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1293 [119 Cal.Rptr.2d 190].) In class cases then, exposure and materiality are the only facts that need to be established to justify class-wide relief. Those determinations are a part of the class certification analysis and will, therefore, be within the purview of the court.

Sources and Authority

- Consumers Legal Remedies Act: Prohibited Practices. Civil Code section 1770(a).
- Consumers Legal Remedies Act: Private Cause of Action. Civil Code section 1780(a).
- " 'The CLRA makes unlawful, in Civil Code section 1770, subdivision (a) . . . various "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." ' The CLRA proscribes 27 specific acts or practices." (*Rubenstein v. The Gap, Inc.* (2017) 14 Cal.App.5th 870, 880–881 [222 Cal.Rptr.3d 397], internal citation omitted.)
- "The Legislature enacted the CLRA 'to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures

to secure such protection.' " (*Valdez v. Seidner-Miller, Inc.* (2019) 33 Cal.App.5th 600, 609 [245 Cal.Rptr.3d 268].)

- " 'Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires "consideration and weighing of evidence from both sides" and which usually cannot be made on demurrer.' " (*Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156, 1164 [237 Cal.Rptr.3d 683].)
- "The CLRA is set forth in Civil Code section 1750 et seq. . . . [U]nder the CLRA a consumer may recover actual damages, punitive damages and attorney fees. However, relief under the CLRA is limited to '[a]ny consumer who suffers any damage *as a result* of the use or employment by any person of a method, act, or practice' unlawful under the act. As [defendant] argues, this limitation on relief requires that plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm." (*Massachusetts Mutual Life Ins. Co., supra*, 97 Cal.App.4th at p. 1292, original italics, internal citations omitted.)
- "[T]he CLRA does not require lost injury or property, but does require damage and causation. 'Under Civil Code section 1780, subdivision (a), CLRA actions may be brought "only by a consumer 'who suffers any damage as a result of the use or employment' of a proscribed method, act, or practice. . . . Accordingly, 'plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm." ' " (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 916, fn. 3 [211 Cal.Rptr.3d 769].)
- " 'To have standing to assert a claim under the CLRA, a plaintiff must have "suffer[ed] any damage as a result of the . . . practice declared to be unlawful." ' Our Supreme Court has interpreted the CLRA's 'any damage' requirement broadly, concluding that the 'phrase . . . is not synonymous with "actual damages," which generally refers to pecuniary damages.' Rather, the consumer must merely 'experience some [kind of] damage,' or 'some type of increased costs' as a result of the unlawful practice." (*Hansen v. Newegg.com Americas, Inc.* (2018) 25 Cal.App.5th 714, 724 [236 Cal.Rptr.3d 61], internal citations omitted.)
- "This language does not create an automatic award of statutory damages upon proof of an unlawful act." (*Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1152 [208 Cal.Rptr.3d 303].)
- "[Civil Code section 1761(e)] provides a broad definition of 'transaction' as 'an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.' " (*Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 869 [118 Cal.Rptr.2d 770].)
- " 'While a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause. " 'It is not . . . necessary that [the plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or

decisive factor in influencing his conduct. . . . It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.' [Citation.]" ' In other words, it is enough if a plaintiff shows that ' "in [the] absence [of the misrepresentation] the plaintiff 'in all reasonable probability' would not have engaged in the injury-producing conduct.' [Citation.]' " (*Veera, supra*, 6 Cal.App.5th at p. 919, internal citations omitted.)

- "Under the CLRA, plaintiffs must show actual reliance on the misrepresentation and harm." (*Nelson, supra*, 186 Cal.App.4th at p. 1022.)
- "[T]he failure to disclose *material* facts may be actionable under the CLRA in certain situations. For purposes of the CLRA, 'a fact is "material" if a reasonable consumer would deem it important in determining how to act in the transaction at issue.' The concept of materiality is related to the issue of causation. A causal link between the deceptive practice and damage to the plaintiff is a necessary element of a CLRA cause of action. A misrepresentation or an omission of fact is material only if the plaintiff relied on it—that is, the plaintiff would not have acted as he or she did without the misrepresentation or the omission of fact." (*Torres v. Adventist Health System/West* (2022) 77 Cal.App.5th 500, 513 [292 Cal.Rptr.3d 557], original italics, internal citations omitted.)
- "[M]ateriality usually is a question of fact. In certain cases, a court can determine the factual misrepresentation or omission is so obviously unimportant that the jury could not reasonably find that a reasonable person would have been influence (*sic*) by it." (*Gutierrez*, *supra*, 19 Cal.App.5th at p. 1262, internal citations omitted.)
- "If a claim of misleading labeling runs counter to ordinary common sense or the obvious nature of the product, the claim is fit for disposition at the demurrer stage of the litigation." (*Brady*, *supra*, 26 Cal.App.5th at p. 1165.)
- "In the CLRA context, a fact is deemed 'material,' and obligates an exclusively knowledgeable defendant to disclose it, if a ' "reasonable [consumer]" ' would deem it important in determining how to act in the transaction at issue." (*Collins, supra*, 202 Cal.App.4th at p. 256.)
- "If the undisclosed assessment was material, an inference of reliance as to the entire class would arise, subject to any rebuttal evidence [defendant] might offer." (*Massachusetts Mutual Life Ins. Co., supra*, 97 Cal.App.4th at p. 1295.)
- "[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer." (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360 [8 Cal.Rptr.3d 22].)
- "In California . . . product mislabeling claims are generally evaluated using a 'reasonable consumer' standard, as distinct from an 'unwary consumer' or a 'suspicious consumer' standard." (*Brady*, *supra*, 26 Cal.App.5th at p. 1174.)

- "Not every omission or nondisclosure of fact is actionable. Consequently, we must adopt a test identifying which omissions or nondisclosures fall within the scope of the CLRA. Stating that test in general terms, we conclude an omission is actionable under the CLRA if the omitted fact is (1) 'contrary to a [material] representation actually made by the defendant' or (2) is 'a fact the defendant was obliged to disclose.' " (*Gutierrez*, *supra*, 19 Cal.App.5th at p. 1258.)
- "[T]here is no independent duty to disclose [safety] concerns. Rather, a duty to disclose material safety concerns 'can be actionable in four situations: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; or (4) when the defendant makes partial representations but also suppresses some material fact.' " (*Gutierrez*, *supra*, 19 Cal.App.5th at p. 1260.)
- "Under the CLRA, even if representations and advertisements are true, they may still be deceptive because ' "[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable." [Citation.]' " (*Jones, supra*, 237 Cal.App.4th Supp. at p. 11.)
- "Defendants next allege that plaintiffs cannot sue them for violating the CLRA because their debt collection efforts do not involve 'goods or services.' The CLRA prohibits 'unfair methods of competition and unfair or deceptive acts or practices.' This includes the inaccurate 'represent[ation] that a transaction confers or involves rights, remedies, or obligations which it does not have or involve . . . .' However, this proscription only applies with respect to 'transaction[s] intended to result or which result[] in the sale or lease of goods or services to [a] consumer . . . .' The CLRA defines 'goods' as 'tangible chattels bought or leased for use primarily for personal, family, or household purposes', and 'services' as 'work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.' " (*Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 39–40 [185 Cal.Rptr.3d 84], internal citations omitted [mortgage loan is neither a good nor a service].)
- "[A] 'reasonable correction offer prevent[s] [the plaintiff] from maintaining a cause of action for damages under the CLRA, but [does] not prevent [the plaintiff] from pursuing remedies based on other statutory violations or common law causes of action based on conduct under those laws.' " (*Valdez, supra*, 33 Cal.App.5th at p. 612.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 298 et seq.

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch.1 4(II)-B, *Elements of Claim*, ¶ 14:315 et seq. (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, *California's Consumer Legal Remedies Act*, § 4.01 et seq. (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.12 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable Law*, 1.33

4701. Consumers Legal Remedies Act—Notice Requirement for Damages (Civ. Code, § 1782)

To recover actual damages in this case, [*name of plaintiff***] must prove that, 30 days or more before filing a claim for damages, [he/she/***nonbinary pronoun***] gave notice to [***name of defendant***] that did all of the following:**

1. **Informed [***name of defendant***] of the particular violations for which the lawsuit was brought;**
2. **Demanded that [***name of defendant***] correct, repair, replace, or otherwise fix the problem with [***specify product or service***]; and**
3. **Provided the notice to the defendants in writing and by certified or registered mail, return receipt requested, to the place where the transaction occurred or to [***name of defendant***]'s principal place of business within California.**

[*Name of plaintiff***] must have complied exactly with these notice requirements and procedures.**

New November 2017

Directions for Use

Give this instruction if it is disputed whether the plaintiff gave the defendant the prefiling notice required by Civil Code section 1782(a).

Sources and Authority

- Consumers Legal Remedies Act: Notice Requirement. Civil Code section 1782.
- "[T]he CLRA includes a prefiling notice requirement on actions seeking damages. At least 30 days before filing a claim for damages under the CLRA, 'the consumer must notify the prospective defendant of the alleged violations of [the CLRA] and "[d]emand that such person correct, repair, replace or otherwise rectify the goods or services alleged to be in violation' thereof. If, within this 30-day period, the prospective defendant corrects the alleged wrongs, or indicates that it will make such corrections within a reasonable time, no cause of action for damages will lie.' " (*Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal. App. 4th 1235, 1259–1260 [99 Cal.Rptr.3d 768], internal citations omitted.)
- "The purpose of the notice requirement of section 1782 is to give the manufacturer or vendor sufficient notice of alleged defects to permit appropriate corrections or replacements. The notice requirement commences the running of certain time constraints upon the manufacturer or vendor within which to comply with the corrective provisions. The clear intent of the act is to provide and

facilitate precomplaint settlements of consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished. This clear purpose may only be accomplished by a literal application of the notice provisions." (*Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 40–41 [124 Cal.Rptr. 852], footnote omitted.)

- "Once a prospective defendant has received notice of alleged violations of section 1770, the extent of its ameliorative responsibilities differs considerably depending on whether the notification sets forth an individual or class grievance. Section 1782, subdivision (b) provides that "[except] as provided in subdivision (c)," an individual consumer cannot maintain an action for damages under section 1780 if, within 30 days after receipt of such notice, an appropriate remedy is given, or agreed to be given within a reasonable time, to the individual consumer. In contrast, subdivision (c) of section 1782 provides that a class action for damages may be maintained under section 1781 unless the prospective defendant shows that it has satisfied all of the following requirements: (1) identified or made a reasonable effort to identify all similarly situated consumers; (2) notified such consumers that upon their request it will provide them with an appropriate remedy; (3) provided, or within a reasonable time will provide, such relief; and (4) demonstrated that it has ceased, or within a reasonable time will cease, from engaging in the challenged conduct. [¶] Thus, unlike the relatively simple resolution of individual grievances under section 1782, subdivision (b), subdivision (c) places extensive affirmative obligations on prospective defendants to identify and make whole the entire class of similarly situated consumers." (*Kagan v. Gibraltar Sav. & Loan Assn.* (1984) 35 Cal.3d 582, 590–591 [200 Cal.Rptr. 38; 676 P.2d 1060], disapproved on other grounds in *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 643 fn. 3 [88 Cal.Rptr.3d 859, 200 P.3d 295].)
- "[Plaintiff] argues that substantial compliance only is required by section 1782, that petitioners had actual notice of the defects, and that a technicality of form should not be a bar to the action. He asserts that inasmuch as the act mandates a liberal construction, substantial compliance with notification procedures should suffice. In the face of the clear, unambiguous, and unequivocal language of the statute, his contention must fail." (*Outboard Marine Corp., supra*, 52 Cal.App.3d at p. 40 [however, defendant may waive strict compliance].)
- "Filing a complaint *before* the response period expired was [plaintiff]'s (really his lawyers') decision. Instituting the lawsuit could easily have waited until after [defendant] made its correction offer. The fact that the lawsuit was filed before [plaintiff] heard back from [defendant] strongly suggests that the correction offer, unless it was truly extravagant, would have had no effect on [plaintiff]'s (really his lawyers') plan to sue." (*Benson v. Southern California Auto Sales, Inc.* (2015) 239 Cal.App.4th 1198, 1209 [192 Cal.Rptr.3d 67], original italics.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 298 et seq.

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 14(II)-B, *Elements of Claim*, ¶¶ 14:321 to 14:325 (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, *California's Consumer Legal Remedies Act*, § 4.01 et seq. (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.13 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable Law*, 1.33

4702. Consumers Legal Remedies Act—Statutory Damages—Senior or Person With a Disability (Civ. Code, § 1780(b))

If you decide that [*name of plaintiff***] has proven [his/her/***nonbinary pronoun***] claim against [***name of defendant***], in addition to any actual damages that you award, you may award [***name of plaintiff***] additional damages up to $5,000 if you find all of the following:**

1. **That [***name of plaintiff***] has suffered substantial physical, emotional, or economic damage because of [***name of defendant***]'s conduct;**

2. **One or more of the following factors:**

   (a) [*Name of defendant***] knew or should have known that [his/her/***nonbinary pronoun***/its] conduct was directed to one or more senior citizens or persons with disabilities;**

   (b) [*Name of defendant***]'s conduct caused one or more senior citizens or persons with disabilities to suffer:**

      (1) loss or encumbrance of a primary residence, principal employment, or source of income;

      (2) substantial loss of property set aside for retirement, or for personal or family care and maintenance; or

      (3) substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or person with a disability;

      or

   (c) One or more senior citizens or persons with disabilities are substantially more vulnerable than other members of the public to [*name of defendant***]'s conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct;**

   and

3. **That an additional award is appropriate.**

New November 2017; Revised November 2023

Directions for Use

Give this instruction if the plaintiff is a senior citizen or person with a disability seeking to obtain $5,000 in statutory damages. (See Civ. Code, § 1780(b).)

Sources and Authority

- Consumers Legal Remedies Act: Additional Remedy for Senior Citizens and Persons With Disabilities. Civil Code section 1780(b).

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 298 et seq.

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 14(II)-B, *Elements of Claim*, ¶ 14:435 (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, *California's Consumer Legal Remedies Act*, § 4.02 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.13 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable Law*, 1.33

4703–4709. Reserved for Future Use

4710. Consumers Legal Remedies Act—Affirmative Defense—Bona Fide Error and Correction (Civ. Code, § 1784)

[*Name of defendant***] is not responsible for damages to [***name of plaintiff***] if [***name of defendant***] proves both of the following:**

1. **The violation[s] alleged by [***name of plaintiff***] [was/were] not intentional and resulted from a bona fide error even though [***name of defendant***] used reasonable procedures adopted to avoid any such error; and**
2. **Within 30 days of receiving [***name of plaintiff***]'s notice of violation, [***name of defendant***] made, or agreed to make within a reasonable time, an appropriate correction, repair, replacement, or other remedy of the [***specify product or service***].**

New November 2017

Directions for Use

Different correction requirements apply to class actions. (See Civ. Code, § 1782(c).)

Sources and Authority

- Consumers Legal Remedies Act: Defenses. Civil Code section 1784.
- "Damages are not awardable under the CLRA if the defendant proves its violation was not intentional and resulted from a bona fide error despite reasonable procedures to avoid such an error, and remedies the violating goods or services." (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 471 [178 Cal.Rptr.3d 784].)
- "[Defendants] also contend [plaintiff] cannot avoid the safe harbor provided for a reasonable correction offer under the CLRA by recasting her claim as a violation of the UCL. This is incorrect. [Plaintiff]'s UCL claim was based directly on evidence of fraudulent advertising practices and was not dependent on finding an underlying violation of the CLRA. The CLRA expressly states that the effect of a reasonable correction offer is to prevent the consumer from maintaining an action for damages under Civil Code section 1780, but the remedies of the CLRA are cumulative and the consumer may assert other common law or statutory causes of action under the procedures and with the remedies provided for in those laws." (*Flores v. Southcoast Automotive Liquidators, Inc.* (2017) 17 Cal.App.5th 841, 852 [226 Cal.Rptr.3d 12].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 298 et seq.

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 14(II)-C, *Particular Defenses*, ¶¶ 14:321–14:505 (The Rutter Group)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.40 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.37 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 10, *Seeking or Opposing Statutory Remedies in Contract Actions*, 10.05

4711–4799. Reserved for Future Use

CALIFORNIA FALSE CLAIMS ACT

4800. False Claims Act—Essential Factual Elements (Gov. Code, § 12651)

The California False Claims Act allows a public entity to recover damages from any person or entity that knowingly presents a false claim for payment or approval. [[*Name of plaintiff***] is an individual who brings this action on behalf of [***name of public entity***].] [***Name of public entity***] is a public entity.**

[*Name of plaintiff***] claims that [***name of defendant***] presented a false claim to [it/[***name of public entity***]] for payment or approval. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] knowingly presented or caused to be presented a false or fraudulent claim to [***name of public entity***] for payment or approval;**
2. **That the claim was false or fraudulent in that [***specify reason, e.g., [name of defendant] did not actually perform the work for which payment or approval was sought***]; and**
3. **That [***name of defendant***]'s false or fraudulent claim was material to [***name of public entity***]'s decision to pay out money to [***name of defendant***].**

"Knowingly" means that with respect to information about the claim, [*name of defendant***]**

1. **had actual knowledge that the information was false; or**
2. **acted in deliberate ignorance of the truth or falsity of the information; or**
3. **acted in reckless disregard of the truth or falsity of the information.**

Proof of specific intent to defraud is not required.

"Material" means that the claim had a natural tendency to influence, or was capable of influencing, the payment or receipt of [money/property/services] on the claim.

New May 2018

Directions for Use

An action under the False Claims Act (Gov. Code, § 12650 et seq.) may be brought by the attorney general if state funds are involved, the public entity that claims to have paid out money on a false claim, or by a private person acting as a "qui tam" plaintiff on behalf of the state or public entity. (Gov. Code, § 12650(a)–(c).) Give

the optional next-to-last sentence of the opening paragraph if the plaintiff is an individual bringing the action qui tam.

The False Claims Act lists eight prohibited acts that violate the statute. (See Gov. Code, § 12651(a).) Element 1 sets out the first and most common of the prohibited acts—the knowing presentation of a false claim. (See Gov. Code, § 12650(a)(1).) Modify element 1 if a different prohibited act is at issue.

For an instruction on retaliation against an employee for bringing a false claim action, see CACI No. 4600, *False Claims Act: Whistleblower Protection—Essential Factual Elements*.

Sources and Authority

- California False Claims Act. Government Code section 12650 et seq.
- "In 1987, the California Legislature enacted the False Claims Act, patterned on a similar federal statutory scheme, to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities. As relevant here, the False Claims Act permits the recovery of civil penalties and treble damages from any person who '[k]nowingly presents or causes to be presented [to the state or any political subdivision] . . . a false claim for payment or approval.' To be liable under the False Claims Act, a person must have actual knowledge of the information, act in deliberate ignorance of the truth or falsity of the information, and/or act in reckless disregard of the truth or falsity of the information." (*Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal.App.4th 488, 494–495 [99 Cal.Rptr.2d 721], internal citations omitted.)
- "The Legislature designed the CFCA ' "to prevent fraud on the public treasury," ' and it ' "should be given the broadest possible construction consistent with that purpose." ' " (*San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.* (2010) 182 Cal.App.4th 438, 446 [106 Cal.Rptr.3d 84], internal citations omitted.)
- "Since there are no pattern instructions for CFCA claims, the trial court gave instructions taken from the language of the statute. Quoting Government Code section 12651, the trial court explained that a person would be liable for damages under the CFCA if the person '(1) Knowingly presents or causes to be presented to an officer or employee of the City, a false claim for payment or approval. [¶] (2) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the City.' The instructions defined 'person,' 'knowingly,' and 'claim' using the language of Government Code section 12650, but did not define the word 'false.' Indeed, 'false' is not defined in the statute." (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 546 [66 Cal.Rptr.3d 175].)
- "We agree with City that the word 'false' has no special meaning and that [claimant]'s concern is really related to the mental state necessary for liability under the CFCA, an element that was adequately explained in the instructions

that were given." (*Thompson Pacific*, *supra*, 155 Cal.App.4th at p. 547.)

- "[A]n alleged falsity satisfies the materiality requirement where it has the ' " 'natural tendency to influence agency action or is capable of influencing agency action.' " [Citation.]' " (*San Francisco Unified School Dist. ex rel. Contreras*, *supra*, 182 Cal.App.4th at p. 454.)
- "Our conclusion that the allegations in the Complaint are sufficient to withstand a demurrer does not mean that every breach of a contract term that is in some sense 'material' necessarily satisfies the materiality requirement for a CFCA claim. That is, a false implied certification relating to a 'material' contract term may not always be 'material' to the government's decision to pay a contractor. Materiality is a mixed question of law and fact, and a showing in a motion for summary judgment or at trial that the alleged breach would not have affected the payment decision will defeat a CFCA claim." (*San Francisco Unified School Dist. ex rel. Contreras*, *supra*, 182 Cal.App.4th at p. 456, internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 306, 307

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 884

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II)-B, *Retaliation Under Other Whistleblower Statutes*, ¶ 5:1770 et seq. (The Rutter Group)

6 Levy et al., California Torts, Ch. 91, *Contractual Arbitration*, § 91.08 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 468, *Public Entities and Officers: False Claims Actions*, § 468.21 (Matthew Bender)

4801. Implied Certification of Compliance With All Contractual Provisions—Essential Factual Elements

Under the California False Claims Act, when [a/an] [*specify defendant's status, e.g., vendor***] submits a claim to a public entity for payment on a contract, [he/she/***nonbinary pronoun***/it] impliedly certifies that [he/she/***nonbinary pronoun***/it] has complied with all of the requirements of the contract, not just those relevant to the claim presented. [[***Name of plaintiff***] is an individual who brings this action on behalf of [***name of public entity***].] [***Name of public entity***] is a public entity.**

[*Name of plaintiff***] claims that [***name of defendant***] presented a false claim to [it/[***name of public entity***]] for payment or approval by falsely certifying by implication that it had complied with the requirements of the contract. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] had not complied with [***specify contractual terms alleged to have been breached***] when it presented a claim for payment to [***name of public entity***].**
2. **That when [***name of defendant***] submitted its claims for payment, [he/she/***nonbinary pronoun***/it] knowingly failed to disclose that [he/she/***nonbinary pronoun***/it] had not complied with all of the terms of the contract; and**
3. **That [***name of defendant***]'s failure to comply with all the terms of the contract was material to [***name of public entity***]'s decision to make the requested payment to [***name of defendant***].**

"Knowingly" means that with respect to the claim, [*name of defendant***]**

1. **had actual knowledge that [he/she/***nonbinary pronoun***/it] had failed to disclose [his/her/***nonbinary pronoun***/its] noncompliance; or**
2. **acted in deliberate ignorance of the truth or falsity of whether [he/she/***nonbinary pronoun***/it] had failed to disclose [his/her/***nonbinary pronoun***/its] noncompliance; or**
3. **acted in reckless disregard of the truth or falsity of whether [he/she/***nonbinary pronoun***/it] had failed to disclose [his/her/***nonbinary pronoun***/its] noncompliance.**

Proof of specific intent to defraud is not required.

A failure to comply with all the terms of the contract is "material" if it had a natural tendency to influence, or was capable of influencing, the payment or receipt of [money/property/services] on the claim.

New May 2018

Directions for Use

Under the California False Claims Act, a vendor impliedly certifies compliance with its express contractual requirements when it bills a public agency for providing goods or services. A False Claims Act action may be based on allegations that the implied certification was false and had a natural tendency to influence the public agency's decision to pay for the goods or services. (*San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.* (2010) 182 Cal.App.4th 438, 441 [106 Cal.Rptr.3d 84].)

The vendor must have made the claim knowing that it had failed to disclose noncompliance with all of the terms of the contract. (See *San Francisco Unified School Dist. ex rel. Contreras*, *supra*, 182 Cal.App.4th at pp. 452–453 [contractor must have the requisite knowledge, rendering the failure to disclose the contractual noncompliance fraudulent]; see also *Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal.App.4th 488, 494–495 [99 Cal.Rptr.2d 721].) While the breach must be material as defined, it does not have to involve the particular contractual provision on which payment is sought. (See *San Francisco Unified School Dist. ex rel. Contreras*, *supra*, 182 Cal.App.4th at pp. 442–444 [bus company provided school district with student transportation, but did so with buses that did not meet the contractually and legally required safety requirements].)

Sources and Authority

- "Under the CFCA, a vendor impliedly certifies compliance with its express contractual requirements when it bills a public agency for providing goods or services. Allegations that the implied certification was false and had a natural tendency to influence the public agency's decision to pay for the goods or services are sufficient to survive a demurrer." (*San Francisco Unified School Dist. ex rel. Contreras*, *supra*, 182 Cal.App.4th at p. 441.)
- "[Defendant] initially argues its claims for payment were not false, because there was no literally false information on the face of the invoices, which identify the routes driven and the charges arising from each route. However, [defendant] ultimately concedes that a section 12651, subdivision (a)(1) false claim need not contain an expressly false statement to be actionable." (*San Francisco Unified School Dist. ex rel. Contreras*, *supra*, 182 Cal.App.4th at p. 448.)
- "[A]n alleged falsity satisfies the materiality requirement where it has the ' " 'natural tendency to influence agency action or is capable of influencing agency action.' " [Citation.]' " (*San Francisco Unified School Dist. ex rel. Contreras*, *supra*, 182 Cal.App.4th at p. 454.)
- "Plaintiffs further allege that [defendant]'s invoices impliedly certified compliance with the material terms of the Contract, that the terms violated were material, and that the District was unaware of the falsity of [defendant]'s implied certification, resulting in a loss of District funds. Plaintiffs' allegations are adequate to survive a demurrer. Under the case law discussed above,

[defendant]'s implied certification that it had satisfactorily performed its material obligations under the Contract, including provisions designed to protect the health and safety of the student population, had a ' " 'natural tendency' " ' to cause the District to make payments it would not have made had it been aware of [defendant]'s noncompliance." (*San Francisco Unified School Dist. ex rel. Contreras*, *supra*, 182 Cal.App.4th at p. 455, internal citation omitted.)

- "Our conclusion that the allegations in the Complaint are sufficient to withstand a demurrer does not mean that every breach of a contract term that is in some sense 'material' necessarily satisfies the materiality requirement for a CFCA claim. That is, a false implied certification relating to a 'material' contract term may not always be 'material' to the government's decision to pay a contractor. Materiality is a mixed question of law and fact, and a showing in a motion for summary judgment or at trial that the alleged breach would not have affected the payment decision will defeat a CFCA claim." (*San Francisco Unified School Dist. ex rel. Contreras*, *supra*, 182 Cal.App.4th at p. 456, internal citation omitted.)
- "The False Claims Act is not 'an all-purpose antifraud statute,' or a vehicle for punishing garden-variety breaches of contract or regulatory violations. A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial." (*Universal Health Servs. v. United States ex rel. Escobar* (2016) 579 U.S. 176 [136 S.Ct. 1989, 2003, 195 L.Ed.2d 348] [construing similar Federal False Claims Act].)
- "What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." (*Universal Health Servs. v. United States ex rel. Escobar*, *supra*, ___ U.S. at p. ___ [136 S.Ct. at p. 1994] [construing similar Federal False Claims Act].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 884

40 California Forms of Pleading and Practice, Ch. 468, *Public Entities and Officers: False Claims Actions,* § 468.21 (Matthew Bender)

4802–4899. Reserved for Future Use

REAL PROPERTY LAW

4900. Adverse Possession

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] is the owner of [*briefly describe property*] because [he/she/*nonbinary pronoun*] has obtained title to the property by adverse possession. In order to establish adverse possession, [*name of plaintiff*] must prove that for a period of five years, all of the following were true:

1. **That [*name of plaintiff*] exclusively possessed the property;**
2. **That [*name of plaintiff*]'s possession was continuous and uninterrupted;**
3. **That [*name of plaintiff*]'s possession of the property was open and easily observable, or was under circumstances that would give reasonable notice to [name of defendant];**
4. **That [*name of plaintiff*] did not recognize, expressly or by implication, that [*name of defendant*] had any ownership rights in the land;**
5. **That [*name of plaintiff*] claimed the property as [his/her/*nonbinary pronoun*] own under [either] [color of title/ [or] a claim of right]; and**
6. **That [*name of plaintiff*] timely paid all of the taxes assessed on the property during the five-year period.**

New November 2019

Directions for Use

Use this instruction for a claim that the plaintiff has obtained title of property by adverse possession. A claimant for a prescriptive easement is entitled to a jury trial. (*Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 124 [21 Cal.Rptr.2d 127]; see CACI No. 4901, *Prescriptive Easement*.) Presumably the same right would apply to a claim for adverse possession. (See *Kendrick v. Klein* (1944) 65 Cal.App.2d 491, 496 [150 P.2d 955] [whether occupancy amounted to adverse possession is question of fact].)

By statute, the taxes must have been paid by "the party or persons, their predecessors and grantors." (Code Civ. Proc., § 325(b).) Revise element 6 if the taxes were paid by someone other than the plaintiff.

Sources and Authority

- Adverse Possession. Code of Civil Procedure section 325.
- Color of Title: Occupancy Under Written Instrument or Judgment. Code of Civil Procedure section 322.

- Occupancy Under Claim of Right. Code of Civil Procedure section 324.
- "There is a difference between a prescriptive use of land culminating in an easement (i.e., an incorporeal interest) and adverse possession which creates a change in title or ownership (i.e., a corporeal interest); the former deals with the *use* of land, the other with *possession*; although the elements of each are similar, the requirements of proof are materially different." (*Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1032 [232 Cal.Rptr.3d 247], original italics.)
- "In an action to quiet title based on adverse possession the burden is upon the claimant to prove every necessary element: (1) Possession must be by actual occupation under such circumstances as to constitute reasonable notice to the owner. (2) It must be hostile to the owner's title. (3) The holder must claim the property as his own, under either color of title or claim of right. (4) Possession must be continuous and uninterrupted for five years. (5) The holder must pay all the taxes levied and assessed upon the property during the period." (*Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 421 [24 Cal.Rptr. 856, 374 P.2d 824].)
- "The elements of an adverse possession claim consist of the following: (1) actual possession by the plaintiff of the property under claim of right or color of title; (2) the possession consists of open and notorious occupation of the property in such a manner as to constitute reasonable notice to the true owner; (3) the possession is adverse and hostile to the true owner; (4) the possession is uninterrupted and continuous for at least five years; and (5) the plaintiff has paid all taxes assessed against the property during the five-year period." (*Bailey v. Citibank, N.A.* (2021) 66 Cal.App.5th 335, 351 [280 Cal.Rptr.3d 546].)
- " 'The elements necessary to establish title by adverse possession are tax payment and open and notorious use or possession that is continuous and uninterrupted, hostile to the true owner and under a claim of title,' for five years. [Citation.]" (*McLear-Gary v. Scott* (2018) 25 Cal.App.5th 145, 152 [235 Cal.Rptr.3d 443].)
- "Claim of right does not require a belief or claim that the use is legally justified. It simply means that the property was used without permission of the owner of the land. As the American Law of Property states in the context of adverse possession: 'In most of the cases asserting [the requirement of a claim of right], it means no more than that possession must be hostile, which in turn means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in it by the denial of adverse claim on the part of the possessor.' One text proposes that because the phrase ' "claim of right" ' has caused so much trouble by suggesting the need for an intent or state of mind, it would be better if the phrase and the notions it has spawned were forgotten." (*Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 450 [17 Cal.Rptr.3d 135], internal citations omitted.)
- "Because of the taxes element, it is more difficult to establish adverse possession than a prescriptive easement. The reason for the difference in relative difficulty is

that a successful adverse possession claimant obtains ownership of the land (i.e., an estate), while a successful prescriptive easement claimant merely obtains the right to *use* the land in a particular way (i.e., an easement)." (*Hansen, supra*, 22 Cal.App.5th at p. 1033, original italics.)

- " 'The requirement of "hostility" . . . means, not that the parties must have a dispute as to the title during the period of possession, but that the claimant's possession must be adverse to the record owner, "unaccompanied by any recognition, express or inferable from the circumstances of the right in the latter." . . . "Title by adverse possession may be acquired through [sic] the possession or use commenced under mistake." ' " (*Kunza v. Gaskell* (1979) 91 Cal.App.3d 201, 210–211 [154 Cal.Rptr. 101].)
- "Adverse possession under [Code of Civil Procedure] section 322 is based on what is commonly referred to as color of title. In order to establish a title under this section it is necessary to show that the claimant or 'those under whom he claims, entered into possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property . . . for five years . . . .' " (*Sorensen v. Costa* (1948) 32 Cal.2d 453, 458 [196 P.2d 900].)
- "The requirements of possession are more stringent where the possessor acts under mere claim of right than when he occupies under color of title. In the former case, the land is deemed to have been possessed and occupied only where it has (a) been protected by a substantial inclosure, or (b) usually cultivated or improved." (*Brown v. Berman* (1962) 203 Cal.App.2d 327, 329 [21 Cal.Rptr. 401], internal citations omitted; see Code Civ. Proc., § 325.)
- "It is settled too that the burden of proving all of the essential elements of adverse possession rests upon the person relying thereon and it cannot be made out by inference but only by clear and positive proof." (*Mosk v. Summerland Spiritualist Asso*. (1964) 225 Cal.App.2d 376, 382 [37 Cal.Rptr. 366].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 223 et seq.

10 California Real Estate Law and Practice, Ch. 360, *Adverse Possession*, § 360.20 (Matthew Bender)

2 California Forms of Pleading and Practice, Ch. 13, *Adverse Possession*, § 13.12 (Matthew Bender)

1 California Points and Authorities, Ch. 13, *Adverse Possession*, §§ 13.10, 13.20 (Matthew Bender)

6 Miller & Starr California Real Estate 4th (2015) § 18:1 et seq. (Ch. 18, *Real Property*) (Thomson Reuters)

Smith-Chavez, et al., California Civil Practice, Real Property Litigation § 13:1 et seq. (Thomson Reuters)

4901. Prescriptive Easement

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] is entitled to a nonexclusive use of [*name of defendant*]'s property for the purpose of [*describe use, e.g., reaching the access road*]. This right is called a prescriptive easement. In order to establish a prescriptive easement, [*name of plaintiff*] must prove that for a period of five years all of the following were true:

1. **That [*name of plaintiff*] has been using [*name of defendant*]'s property for the purpose of [*e.g., reaching the access road*];**
2. **That [*name of plaintiff*]'s use of the property was continuous and uninterrupted;**
3. **That [*name of plaintiff*]'s use of [*name of defendant*]'s property was open and easily observable, or was under circumstances that would give reasonable notice to [*name of defendant*]; and**
4. **That [*name of plaintiff*] did not have [*name of defendant*]'s permission to use the land.**

New November 2019

Directions for Use

Use this instruction for a claim that the plaintiff has obtained a prescriptive easement to use the defendant's property. A claimant for a prescriptive easement is entitled to a jury trial. (*Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 124 [21 Cal.Rptr.2d 127].)

If the case involves periods of prescriptive use by successive users (i.e., "tacking"), modify each element to account for the prior use by others. (*Windsor Pacific LLC v. Samwood Co., Inc*. (2013) 213 Cal.App.4th 263, 270 [152 Cal.Rptr.3d 518], disapproved on other grounds in *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 756 fn. 3 [220 Cal.Rptr.3d 650, 398 P.3d 556].)

There is a split of authority over the standard of proof for a prescriptive easement. (Compare *Vieira Enterprises, Inc. v. McCoy* (2017) 8 Cal.App.5th 1057, 1074 [214 Cal.Rptr.3d 193] [preponderance of evidence] with *Grant v. Ratliff* (2008) 164 Cal.App.4th 1304, 1310 [79 Cal.Rptr.3d 902] [clear and convincing evidence].)

Sources and Authority

- " 'The elements necessary to establish a prescriptive easement are well settled. The party claiming such an easement must show use of the property which has been open, notorious, continuous and adverse for an uninterrupted period of five years. [Citations.] Whether the elements of prescription are established is a question of fact for the trial court [citation], and the findings of the court will

not be disturbed where there is substantial evidence to support them.' '[A]n essential element necessary to the establishment of a prescriptive easement is visible, open and notorious use sufficient to impart actual or constructive notice of the use to the owner of the servient tenement. [Citation.]' " (*McLear-Gary v. Scott* (2018) 25 Cal.App.5th 145, 159 [235 Cal.Rptr.3d 443], internal citation omitted.)

- "Periods of prescriptive use by successive owners of the dominant estate can be 'tacked' together if the first three elements are satisfied." (*Windsor Pacific LLC, supra*, 213 Cal.App.4th at p. 270.)
- "[The] burden of proof as to each and all of the requisite elements to create a prescriptive easement is upon the one asserting the claim. [Citations.] [Para.] . . . [The] existence or nonexistence of each of the requisite elements to create a prescriptive easement is a question of fact for the court or jury." (*Twin Peaks Land Co. v. Briggs* (1982) 130 Cal.App.3d 587, 593 [181 Cal.Rptr. 25].)
- "[A] party seeking to establish a prescriptive easement has the burden of proof by clear and convincing evidence. The higher standard of proof demonstrates there is no policy favoring the establishment of prescriptive easements." (*Grant, supra*, 164 Cal.App.4th at p. 1310, internal citation omitted.)
- "[Plaintiff] correctly contends that the burden of proof of a prescriptive easement or prescriptive termination of an easement is not clear and convincing evidence . . . ." (*Vieira Enterprises, Inc., supra*, 8 Cal.App.5th at p. 1064.)
- "Whether the use is hostile or is merely a matter of neighborly accommodation, however, is a question of fact to be determined in light of the surrounding circumstances and the relationship between the parties." (*Warsaw v. Chicago Metallic Ceilings, Inc*. (1984) 35 Cal.3d 564, 572 [199 Cal.Rptr. 773, 676 P.2d 584].)
- " 'The term "adverse" in this context is essentially synonymous with "hostile" and " 'under claim of right.' " [Citations.] A claimant need not believe that his or her use is legally justified or expressly claim a right of use for the use to be adverse. [Citations.] Instead, a claimant's use is adverse to the owner if the use is made without any express or implied recognition of the owner's property rights. [Citations.] In other words, a claimant's use is adverse to the owner if it is wrongful and in defiance of the owner's property rights. [Citation.]' " (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1181 [227 Cal.Rptr.3d 390].)
- "Claim of right does not require a belief or claim that the use is legally justified. It simply means that the property was used without permission of the owner of the land. As the American Law of Property states in the context of adverse possession: 'In most of the cases asserting [the requirement of a claim of right], it means no more than that possession must be hostile, which in turn means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in it by the denial of adverse claim on the part of the possessor.' One text proposes that because the phrase ' "claim of right" ' has caused so much trouble by suggesting the need for an intent or state of mind, it

would be better if the phrase and the notions it has spawned were forgotten." (*Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 450 [17 Cal.Rptr.3d 135], internal citations omitted.)

- "Prescription cannot be gained if the use is permissive." (*Ranch at the Falls LLC v. O'Neal* (2019) 38 Cal.App.5th 155, 182 [250 Cal.Rptr.3d 585], citation omitted.)
- "Use with the owner's permission, however, is not adverse to the owner. [Citations.] To be adverse to the owner a claimant's use must give rise to a cause of action by the owner against the claimant. [Citations.] This ensures that a prescriptive easement can arise only if the owner had an opportunity to protect his or her rights by taking legal action to prevent the wrongful use, yet failed to do so. [Citations.]" (*McBride, supra*, 18 Cal.App.5th at p. 1181.)
- "Prescriptive rights 'are limited to the uses which were made of the easements during the prescriptive period. [Citations.] Therefore, no different or greater use can be made of the easements without defendants' consent.' While the law permits increases in the scope of use of an easement where 'the change is one of degree, not kind', 'an actual change in the physical objects passing over the road' constitutes a 'substantial change in the nature of the use and a consequent increase of burden upon the servient estate . . . more than a change in the degree of use.' ' "In ascertaining whether a particular use is permissible under an easement appurtenant created by prescription there must be considered . . . the needs which result from a normal evolution in the use of the dominant tenement and the extent to which the satisfaction of those needs increases the burden on the servient tenement." ' '[T]he question of whether there has been an unreasonable use of an easement is one of fact . . . .' " (*McLear-Gary, supra*, 25 Cal.App.5th at p. 160, internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 415 et seq.

10 California Real Estate Law and Practice, Ch. 343, *Easements*, § 343.15 (Matthew Bender)

2 California Forms of Pleading and Practice, Ch. 13, *Adverse Possession*, § 13.13 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 240, *Easements*, § 240.16 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.180 (Matthew Bender)

4902. Interference With Secondary Easement

[*Name of plaintiff***] has an easement on the land of [***name of defendant***] for the purpose of [***specify, e.g., providing ingress and egress to the public highway***]. A person with an easement and the owner of land on which the easement lies each have a duty not to unreasonably interfere with the rights of the other to use and enjoy their respective rights. Neither party can conduct activities or place obstructions on the property that unreasonably interfere with the other party's use of the property.**

In this case, [*name of plaintiff***] claims that [***name of defendant***] [***specify interference, e.g., built a gate across the path of the easement***]. You must determine whether [***name of defendant***]'s [***e.g., building of a gate***] unreasonably interfered with [***name of plaintiff***]'s use and enjoyment of the easement.**

New November 2019

Directions for Use

Give this instruction in a claim for breach of a secondary easement. A secondary easement is the right to do the things that are necessary for the full enjoyment of the easement itself. (*Dolnikov v. Ekizian* (2013) 222 Cal.App.4th 419, 428 [165 Cal.Rptr.3d 658].)

This instruction is structured for an easement holder's claim against the property owner. A different instruction will be required if the owner is bringing a claim against the easement holder for interference with the owner's property rights.

Sources and Authority

- "A secondary easement can be the right to make 'repairs, renewals and replacements on the property that is servient to the easement' 'and to do such things as are necessary to the exercise of the right'. . . . A right-of-way to pass over the land of another carries with it 'the implied right . . . to make such changes in the surface of the land as are necessary to make it available for travel in a convenient manner.' " (*Dolnikov, supra*, 222 Cal.App.4th at p. 428, internal citations omitted.)
- "Incidental or secondary easement rights are limited by a rule of reason. 'The rights and duties between the owner of an easement and the owner of the servient tenement . . . are correlative. Each is required to respect the rights of the other. Neither party can conduct activities or place obstructions on the property that unreasonably interfere with the other party's use of the property. In this respect, there are no absolute rules of conduct. The responsibility of each party to the other and the "reasonableness" of use of the property depends on the nature of the easement, its method of creation, and the facts and circumstances

surrounding the transaction.' " (*Dolnikov, supra*, 222 Cal.App.4th at pp. 428–429.)

- "A servient tenement owner . . . is ' "entitled to make all uses of the land that are not prohibited by the servitude and that do not interfere unreasonably with the uses authorized by the easement . . . ." [Citation.] "[T]he servient owner may use his property in any manner not inconsistent with the easement so long as it does not *unreasonably impede* the dominant tenant in his rights." [Citation.] "*Actions that make it more difficult to use an easement, that interfere with the ability to maintain and repair improvements built for its enjoyment, or that increase the risks attendant on exercise of rights created by the easement are prohibited . . . unless justified by needs of the servient estate.* In determining whether the holder of the servient estate has unreasonably interfered with exercise of an easement, the interests of the parties must be balanced to strike a *reasonable accommodation* that maximizes overall utility to the extent consistent with effectuating the purpose of the easement . . . and subject to any different conclusion based on the intent or expectations of the parties . . . ." ' " (*Inzana v. Turlock Irrigation Dist. Bd. of Directors* (2019) 35 Cal.App.5th 429, 445 [247 Cal.Rptr.3d 427], original italics.)
- "Whether a particular use of the land by the servient owner, or by someone acting with his authorization, is an unreasonable interference is a question of fact for the jury." (*Pasadena v. California-Michigan Land & Water Co*. (1941) 17 Cal.2d 576, 579 [110 P.2d 983].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 422, 424, 429

10 California Real Estate Law and Practice, Ch. 343, *Easements*, § 343.16 (Matthew Bender)

2 California Forms of Pleading and Practice, Ch. 13, *Adverse Possession*, § 13.13 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 240, *Easements*, § 240.15 (Matthew Bender)

4903–4909. Reserved for Future Use

4910. Violation of Homeowner Bill of Rights—Essential Factual Elements (Civ. Code, § 2924.12(b))

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] has been harmed because of [***name of defendant***]'s [***specify, e.g., foreclosure sale of [his/her/nonbinary pronoun] home***]. To establish this claim, [***name of plaintiff***] must prove:**

1. **That [***specify one or more violations of the Homeowner Bill of Rights in Civil Code sections 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17***];**
2. **That [***name of plaintiff***] was harmed; and**
3. **That [***name of defendant***]'s actions were a substantial factor in causing [***name of plaintiff***]'s harm.**

The violation claimed by [*name of plaintiff***] must have been "material," which means that it was significant or important.**

New November 2019

Directions for Use

Give this instruction in a case claiming a violation of the Homeowner Bill of Rights (the HBOR). (Civ. Code, §§ 2920.5, 2923.4–2923.7, 2924, 2924.9–2924.12, 2924.15, 2924.17–2924.20). The HBOR provides for a homeowner's civil action for actual economic damages against a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent for a material violation of specified provisions of the HBOR. (Civ. Code, § 2924.12(b); see Civ. Code, §§ 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, 2924.17.) In element 1, insert the specific violation(s) alleged.

For a violation that is intentional or reckless, or resulted from willful misconduct, there is a penalty of the greater of treble actual damages or $50,000. (Civ. Code, § 2924.12(b).) These terms are not further defined in the HBOR. If the plaintiff seeks a penalty, an additional element should be added to require an intentional or reckless violation or willful misconduct.

Sources and Authority

- Action for Damages Under Homeowner Bill of Rights. Civil Code section 2924.12(b).
- Preforeclosure Requirements. Civil Code section 2923.55.
- "Dual Tracking" Prohibited. Civil Code section 2923.6.
- Single Point of Contact Required. Civil Code section 2923.7.
- Written Notice to Borrower on Recording of Notice of Default. Civil Code section 2924.9.

- Written Acknowledgment of Receipt of Loan Modification Application. Civil Code section 2924.10.
- Approved Foreclosure Prevention Alternative; Prohibition Against Recording Notice of Default or Sale or Conducting Trustee Sale; Rescission or Cancellation. Civil Code section 2924.11.
- Recording Inaccurate Title Document. Civil Code section 2924.17.
- "The Homeowner Bill of Rights (Civ. Code, §§ 2920.5, 2923.4–2923.7, 2924, 2924.9–2924.12, 2924.15, 2924.17–2924.20) (HBOR), effective January 1, 2013, was enacted 'to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure.' (§ 2923.4, subd. (a).) Among other things, HBOR prohibits 'dual tracking,' which occurs when a bank forecloses on a loan while negotiating with the borrower to avoid foreclosure. (See § 2923.6.) HBOR provides for injunctive relief for statutory violations that occur prior to foreclosure (§ 2924.12, subd. (a)), and monetary damages when the borrower seeks relief for violations after the foreclosure sale has occurred (§ 2924.12, subd. (b))." (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272 [188 Cal.Rptr.3d 668].)
- "A material violation found by the court to be intentional or reckless, or to result from willful misconduct, may result in a trebling of actual damages or statutory damages of $50,000. 'A court may award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to this section.' " (*Valbuena, supra*, 237 Cal.App.4th at p. 1273, internal citation omitted.)
- "Nothing in the language of HBOR suggests that a borrower must tender the loan balance before filing suit based on a violation of the requirements of the law. Indeed, such a requirement would completely eviscerate the remedial provisions of the statute." (*Valbuena, supra*, 237 Cal.App.4th at p. 1273.)
- "We disagree with the [plaintiffs'] assertion that 'contacts' between the lender or its agent and the borrow [sic] must be initiated by the lender or its agent in order to comply with former section 2923.55, and that any telephone calls initiated by the [plaintiffs], and not by [the loan servicer], in which the [plaintiffs'] financial situation and alternatives to foreclosure were discussed, cannot constitute compliance with former section 2923.55. The language of the statute does not require that a lender initiate the contact; rather, the statute requires only that the lender make contact in some manner and provide the borrower with an opportunity to discuss the borrower's financial situation and possible options for avoiding foreclosure." (*Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1122 [239 Cal.Rptr.3d 648], original italics.)
- "We conclude that a borrower who obtains a TRO enjoining the trustee's sale of his or her home is a 'prevailing borrower' within the meaning of section 2924.12, subdivision (h), and therefore may recover attorney fees and costs. The text of the statute refers to 'injunctive relief,' which plainly includes a TRO. The

statute makes no exception for temporary injunctions. Thus, under the plain language of the statute, a trial court is authorized, in its discretion, to award attorney fees and costs to such a borrower." (*Bustos v. Wells Fargo Bank, N.A.* (2019) 39 Cal.App.5th 369, 380 [252 Cal.Rptr.3d 172].)

Secondary Sources

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 6-I, *Real Property Foreclosures and Antideficiency Laws*, ¶ 6:511.1 et seq. (The Rutter Group)

5 California Real Estate Law and Practice, Ch. 123, *Nonjudicial Disclosure*, § 123.08C (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages*, § 555.51C (Matthew Bender)

10 California Legal Forms Transaction Guide, Ch. 25D, Foreclosure, § 25D.34 (Matthew Bender)

4911–4919. Reserved for Future Use

4920. Wrongful Foreclosure—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongly foreclosed on [***name of plaintiff***]'s [home/***specify other real property***]. In order to establish a wrongful foreclosure, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] caused a foreclosure sale of [***name of plaintiff***]'s [home/***specify other real property***] under a power of sale in a [mortgage/deed of trust];**
2. **That this sale was wrongful because [***specify reason(s) supporting illegality, fraud, or willful oppression***];**
3. **That [***name of plaintiff***] [tendered all amounts that were due under the loan secured by the [mortgage/deed of trust], but [***name of defendant***] refused the tender]/[was excused from tendering all amounts that were due under loan secured by the [mortgage/deed of trust]];**
4. **[That [***name of plaintiff***] was not materially in breach of any other condition and had not failed to perform any other material requirement of the loan agreement that would otherwise justify the foreclosure;]**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s actions were a substantial factor in causing [***name of plaintiff***]'s harm.**

New May 2020

Directions for Use

Use this instruction for a claim for wrongful foreclosure.

For element 3, use the optional language depending on the circumstances. If plaintiff claims that tender is excused, give CACI No. 4921, *Wrongful Foreclosure—Tender Excused*.

There is a split in authority as to whether the plaintiff must prove element 4. (Compare *Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 525 [238 Cal.Rptr.3d 528] [stating the elements of a wrongful foreclosure claim without element 4] with *Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1306–1307 [197 Cal.Rptr.3d 151] [including element 4 as a basic element of a wrongful foreclosure claim].) If the defendant does not claim that the plaintiff is in material breach of some loan condition, however, omit element 4.

Sources and Authority

- Curing Default. Civil Code section 2924c.
- "The elements of the tort of wrongful foreclosure are: ' "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering" '; and (4) ' "no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale." ' " (*Majd, supra,* 243 Cal.App.4th at pp. 1306–1307 [197 Cal.Rptr.3d 151].)
- " 'The basic elements of a tort cause of action for wrongful foreclosure track the elements of an equitable cause of action to set aside a foreclosure sale. They are: "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." ' " (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1184–1185 [201 Cal.Rptr.3d 390].)
- "Justifications for setting aside a trustee's sale from the reported cases, which satisfy the first element, include the trustee's or the beneficiary's failure to comply with the statutory procedural requirements for the notice or conduct of the sale. Other grounds include proof that (1) the trustee did not have the power to foreclose; (2) the trustor was not in default, no breach had occurred, or the lender had waived the breach; or (3) the deed of trust was void." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104–105 [134 Cal.Rptr.3d 622], internal citations omitted.)
- "Wrongful foreclosure is a common law tort claim." (*Turner, supra,* 27 Cal.App.5th at p. 525.)
- "[A] trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there has been an illegal, fraudulent or wil[l]fully oppressive sale of property under a power of sale contained in a mortgage or deed of trust. [Citations.] This rule of liability is also applicable in California, we believe, upon the basic principle of tort liability declared in the Civil Code that every person is bound by law not to injure the person or property of another or infringe on any of his rights." (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408 [186 Cal.Rptr.3d 625].)
- "To successfully challenge a foreclosure sale based on a procedural irregularity, the plaintiff must show both that there was a failure to comply with the procedural requirements for the foreclosure sale and that the irregularity

prejudiced the plaintiff." (*Citrus El Dorado, LLC v. Chicago Title Co.* (2019) 32 Cal.App.5th 943, 950 [244 Cal.Rptr.3d 372].)

- "[M]ere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case. This is a sound addition." (*Miles, supra,* 236 Cal.App.4th at p. 409.)
- " '[O]nly the entity currently entitled to enforce a debt may foreclose on the mortgage or deed of trust securing that debt . . . .' 'It is no mere "procedural nicety," from a contractual point of view, to insist that only those with authority to foreclose on a borrower be permitted to do so.' " (*Sciarratta v. U.S. Bank National Assn*. (2016) 247 Cal.App.4th 552, 562 [202 Cal.Rptr.3d 219], internal citation omitted.)
- "[W]here a mortgagee or trustee makes an unauthorized sale under a power of sale he and his principal are liable to the mortgagor for the value of the property at the time of the sale in excess of the mortgages and liens against said property." (*Miles, supra,* 236 Cal.App.4th at p. 409.)
- "[L]ost equity in the property . . . is a recoverable item of damages. It is not, however, the *only* recoverable item of damages. Wrongfully foreclosing on someone's home is likely to cause other sorts of damages, such as moving expenses, lost rental income (which plaintiff claims here), and damage to credit. It may also result in emotional distress (which plaintiff also claims here). As is the case in a wrongful eviction cause of action, ' "The recovery includes all consequential damages occasioned by the wrongful eviction (personal injury, including infliction of emotional distress, and property damage) . . . and, upon a proper showing . . . , punitive damages." ' " (*Miles, supra,* 236 Cal.App.4th at p. 409.)
- "Civil Code section 2924c thus limits the beneficiary's contractual power of sale by giving the trustor a right to cure a default and reinstate the loan within the stated time, even if the beneficiary does not voluntarily agree. ' "The law does not require plaintiff to tender the purchase price to a trustee who has no right to sell the property at all." ' To adequately plead a cause of action for wrongful foreclosure, all plaintiffs had to allege was that they met their statutory obligation by timely tendering the amount required by Civil Code section 2924c to stop the foreclosure sale, but [defendant] refused that tender and thus allowed the foreclosure sale to go forward when [defendant] should have accepted their tender and canceled the sale. Plaintiffs did so. If [defendant] had accepted the tender, which [defendant's employee] stated was sufficient to cure the default, a rescission of the foreclosure sale and reinstatement of the loan was *mandatory,* and the subsequent sale was without legal basis and void . . . ." (*Turner, supra,* 27 Cal.App.5th at pp. 530–531, original italics, internal citations omitted.)
- " '[A] tender is an *offer* of performance . . . .' Subdivision (a)(1) of Civil Code section 2924c provides in pertinent part that '[w]henever all or a portion of the principal sum of any obligation secured by deed of trust . . . has . . . been declared due by reason of default in payment of interest or of any installment of

principal . . . , the trustor . . . may pay to the beneficiary . . . the entire amount due, at the time payment is tendered . . . other than the portion of principal as would not then be due had no default occurred, and thereby cure the default theretofore existing, and thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and deed of trust . . . shall be reinstated and shall be and remain in force and effect . . . .' Here, for purposes of Civil Code section 2924c, [plaintiff] effectively tendered payment of the amount then due when he told [an agent of defendant] that he would like to pay off the entire amount of the default. Actual submission of a payment was not required." (*Turner, supra,* 27 Cal.App.5th pp. 531–532.)

- "A tender is an unconditional offer to perform an order to extinguish an obligation." (*Crossroads Investors, L.P. v. Federal National Mortgage Association* (2017) 13 Cal.App.5th 757, 783 [222 Cal.Rptr.3d 1].)
- "The third element—tender—requires the trustor to make 'an offer to pay the full amount of the debt for which the property was security.' " (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 11 [183 Cal.Rptr.3d 638].)
- " 'A full tender must be *made* to set aside a foreclosure sale, based on equitable principles.' Courts, however, have not required tender when the lender has not yet foreclosed and has allegedly violated laws related to avoiding the necessity for a foreclosure." (*Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1280 [150 Cal.Rptr.3d 673], original italics.)
- "*Pfeifer*[, *supra,* 211 Cal.App.4th 1250] and the other tender cases are inapplicable here because [plaintiff] has not sued to set aside or prevent a foreclosure sale. In the sixth cause of action, he sought to quiet title to the property, which he cannot do without paying the outstanding indebtedness." (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 87 [163 Cal.Rptr.3d 804].)
- "Here, neither the deed of trust nor the governing statutes expressly create a duty on the part of [defendant] to verify that the beneficiary received a valid assignment of the loan or to verify the authority of the person who signed the substitution of trustee. [Plaintiff] has not cited, and we have not discovered, any authority holding a trustee liable for wrongful foreclosure or any other cause of action based on similar purported failures to investigate. To the contrary, the trustee generally 'has no duty to take any action except on the express instructions of the parties or as expressly provided in the deed of trust and the applicable statutes.' " (*Citrus El Dorado, LLC, supra,* 32 Cal.App.5th at pp. 948–949.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Secured Transactions in Real Property, § 153 et seq.

5 California Real Estate Law and Practice, Ch. 123, *Nonjudicial Foreclosure*, § 123.14 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real*

Property Mortgages, § 555.54 (Matthew Bender)

23 California Points and Authorities, Ch. 230, *Trust Deeds and Real Property Mortgages*, § 230.72 (Matthew Bender)

4921. Wrongful Foreclosure—Tender Excused

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was not required to tender all amounts that were due under loan secured by the [mortgage/deed of trust]. Tender is excused if [***insert one or more of the following***]:**

a. The underlying debt was not valid because [*specify reason(s)***];**

b. [*Name of plaintiff***] has a claim for money against [***name of defendant***] and the claim, if valid, would completely offset the amount due on the loan secured by the [mortgage/deed of trust];**

c. It would be unfair to require tender of [*name of plaintiff***] because [***specify reason(s)***];**

d. The trust deed is void on its face because [*specify reason(s)***];**

e. The loan was illegal or made in violation of [the loan agreement/ an agreement to modify the loan] because [*specify reason(s)***]; or**

f. [*Name of plaintiff***] was not in default and there is no basis for a foreclosure.**

New May 2020

Directions for Use

Give this instruction if the plaintiff alleges that tender is excused in element 3 of CACI No. 4920, *Wrongful Foreclosure—Essential Factual Elements*.

Sources and Authority

- "Courts have applied equitable exceptions to the tender rule, such as: '(1) where the borrower's action attacks the validity of the underlying debt, tender is not required since it would constitute affirmation of the debt; (2) when the person who seeks to set aside the trustee's sale has a counter-claim or set-off against the beneficiary, the tender and the counter-claim offset each other and if the offset is greater than or equal to the amount due, tender is not required; (3) a tender may not be required if it would be 'inequitable' to impose such a condition on the party challenging the sale; . . . (4) tender is not required where the trustor's attack is based not on principles of equity but on the basis that the trustee's deed is void on its face (such as where the original trustee had been substituted out before the sale occurred)[;] [(5)] when the loan was made in violation of substantive law, or in breach of the loan agreement or an agreement to modify the loan[;] [and (6)] when the borrower is not in default and there is no basis for the foreclosure . . . .' " (*Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 525–526 [238 Cal.Rptr.3d 528].)

- "Because [plaintiff] alleges a void as distinguished from a voidable assignment, she is excused from having to allege tender as an element of her wrongful foreclosure cause of action." (*Sciarratta v. U.S. Bank National Association* (2016) 247 Cal.App.4th 552, 565 fn. 10 [202 Cal.Rptr.3d 219].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Secured Transactions in Real Property, § 153 et seq.

5 California Real Estate Law and Practice, Ch. 123, *Nonjudicial Foreclosure*, § 123.14 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 555, *Trust Deeds and Real Property Mortgages*, § 555.54 (Matthew Bender)

23 California Points and Authorities, Ch. 230, *Trust Deeds and Real Property Mortgages*, § 230.72 (Matthew Bender)

4922–4999. Reserved for Future Use

CONCLUDING INSTRUCTIONS

5000. Duties of the Judge and Jury

Members of the jury, you have now heard all the evidence [and the closing arguments of the attorneys]. [The attorneys will have one last chance to talk to you in closing argument. But before they do, it] [It] is my duty to instruct you on the law that applies to this case. You must follow these instructions [as well as those that I previously gave you]. You will have a copy of my instructions with you when you go to the jury room to deliberate. [I have provided each of you with your own copy of the instructions.] [I will display each instruction on the screen.]

You must decide what the facts are. You must consider all the evidence and then decide what you think happened. You must decide the facts based on the evidence admitted in this trial.

Do not allow anything that happens outside this courtroom to affect your decision. Do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and coworkers, spiritual leaders, advisors, or therapists. Do not do any research on your own or as a group. Do not use dictionaries or other reference materials.

These prohibitions on communications and research extend to all forms of electronic communications. Do not use any electronic devices or media, such as a cell phone or smart phone, PDA, computer, tablet device, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or website, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. [Do not read, listen to, or watch any news accounts of this trial.] You must not let bias, sympathy, prejudice, or public opinion influence your decision.

[If you violate any of these prohibitions on communications and research, including prohibitions on electronic communications and research, you may be held in contempt of court or face other sanctions. That means that you may have to serve time in jail, pay a fine, or face other punishment for that violation.]

I will now tell you the law that you must follow to reach your verdict. You must follow the law exactly as I give it to you, even if you disagree

with it. If the attorneys [have said/say] anything different about what the law means, you must follow what I say.

In reaching your verdict, do not guess what I think your verdict should be from something I may have said or done.

Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others. In addition, the order in which the instructions are given does not make any difference.

[Most of the instructions are typed. However, some handwritten or typewritten words may have been added, and some words may have been deleted. Do not discuss or consider why words may have been added or deleted. Please treat all the words the same, no matter what their format. Simply accept the instruction in its final form.]

New September 2003; Revised April 2004, October 2004, February 2005, December 2009, June 2011, December 2013

Directions for Use

As indicated by the brackets in the first paragraph, this instruction can be read either before or after closing arguments. The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Charge to the Jury. Code of Civil Procedure section 608.
- Contempt of Court for Juror Misconduct. Code of Civil Procedure section 1209(a)(6).
- Jury as Trier of Fact. Evidence Code section 312(a).
- An instruction to disregard any appearance of bias on the part of the judge is proper. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478–479 [6 Cal.Rptr. 289, 353 P.2d 929].)
- Jurors must avoid bias: " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution.' " (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98,

110 [95 Cal.Rptr. 516, 485 P.2d 1132], internal citations omitted.) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid.*)

- An instruction to consider all the instructions together can help avoid instructional errors of conflict, omission, and undue emphasis. (*Escamilla v. Marshburn Brothers* (1975) 48 Cal.App.3d 472, 484 [121 Cal.Rptr. 891].)
- Providing an instruction stating that, depending on what the jury finds to be the facts, some of the instructions may not apply can help avoid reversal on the grounds of misleading jury instructions. (See *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 629–630 [124 Cal.Rptr. 143].)
- "[T]he jury was charged that (1) no undue emphasis was intended by repetition of any rule, direction or idea; (2) instructions on the measure of damages should not be interpreted to mean that liability must be found; and (3) the judge did not intend to intimate how any issue should be decided and if any juror believed such intimation was present such should be disregarded. Of course such admonitions will not salvage an inherently one-sided charge although the giving of such instructions should be considered in weighing the net effect of the charge." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57 [118 Cal.Rptr. 184, 529 P.2d 608].)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 300

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 14-D, *Preparing Jury Instructions*, ¶¶ 14:151, 14:190 (The Rutter Group)

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.21 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.12

California Judges Benchbook: Civil Proceedings—Trial §§ 12.6, 13.27 (Cal CJER 2019)

5001. Insurance

You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence.

New September 2003; Revised April 2004, May 2019, November 2019

Directions for Use

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

By statute, evidence of a defendant's insurance coverage is inadmissible to prove liability. (Evid. Code, § 1155.) If evidence of insurance has been admitted for some other reason, (1) this instruction may need to be modified to clarify that insurance may not be considered for purposes of determining liability; and (2) a limiting instruction should be given advising the jury to consider the evidence only for the purpose for which it was admitted.

Sources and Authority

- Evidence of Insurance Inadmissible to Prove Liability. Evidence Code section 1155.
- " 'The evidence [of liability insurance] is regarded as both irrelevant and prejudicial to the defendant. Hence, not only is it subject to objection and exclusion, but any attempt to inject it by question, suggestion or argument is considered misconduct of counsel, and is often held reversible error. [Citations.]' " (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469 [130 Cal.Rptr. 786].)
- "Evidence of a *defendant's* insurance coverage ordinarily is not admissible to prove the defendant's negligence or other wrongdoing." (*Blake v. E. Thompson Petroleum Repair Co.* (1985) 170 Cal.App.3d 823, 830 [216 Cal.Rptr. 568], original italics.)
- "[E]vidence of a plaintiff's insurance coverage is not admissible for the purpose of mitigating the damages the plaintiff would otherwise recover from the tortfeasor. This is the 'collateral source rule.' " (*Blake, supra,* 170 Cal.App.3d at p. 830; see *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16–18 [84 Cal.Rptr. 173, 465 P.2d 61].)
- "Both of the foregoing principles are subject to the qualification that where the topic of insurance coverage is coupled with other relevant evidence, that topic may be admitted along with such other evidence. '[para.] It has always been the rule that the existence of insurance may properly be referred to in a case if the evidence is otherwise admissible.' The trial court must then determine, pursuant to Evidence Code section 352, whether the probative value of the other evidence

outweighs the prejudicial effect of the mention of insurance." (*Blake, supra*, 170 Cal.App.3d at p. 831, internal citation omitted.)

- "[T]he trial court did not abuse its discretion by excluding evidence of [plaintiff]'s insured [health care coverage] under Evidence Code section 352. [Plaintiff] had the right to treat outside his plan. Evidence of his insurance would have confused the issues or misled and prejudiced the jury." (*Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1278 [232 Cal.Rptr.3d 404].)
- "[M]ost of these references to Kaiser and Medicare, as well as the single reference to Social Security, merely provided context and background information on [plaintiff]'s past treatment at Kaiser and on some aspects of [defendant]'s experts' calculation of past and future reasonable medical expenses. They were helpful and even necessary to the jury's understanding of the issues. [Plaintiff] has not shown the court abused its discretion in admitting these references to assist the jurys understanding of the facts." (*Stokes v. Muschinske* (2019) 34 Cal.App.5th 45, 58 [245 Cal.Rptr.3d 764].)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 243

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 34.32–34.36

California Practice Guide: Civil Trials and Evidence § 5:371

3 California Trial Guide, Unit 50, *Extrinsic Policies Affecting or Excluding Evidence*, §§ 50.20, 50.32 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.68 (Matthew Bender)

5002. Evidence

You must decide what the facts are in this case only from the evidence you have seen or heard during the trial, including any exhibits that I admit into evidence. Sworn testimony, documents, or anything else may be admitted into evidence. You may not consider as evidence anything that you saw or heard when court was not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggested that it was true. [However, the attorneys for both sides have agreed that certain facts are true. This agreement is called a stipulation. No other proof is needed and you must accept those facts as true in this trial.]

Each side had the right to object to evidence offered by the other side. If I sustained an objection to a question, ignore the question and do not guess as to why I sustained the objection. If the witness did not answer, you must not guess what he or she might have said. If the witness already answered, you must ignore the answer.

[During the trial I granted a motion to strike testimony that you heard. You must totally disregard that testimony. You must treat it as though it did not exist.]

New September 2003; Revised April 2004, February 2007, December 2012, June 2014

Directions for Use

The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law. For a similar instruction to be given before trial, see CACI No. 106, *Evidence*.

Include the bracketed language in the third paragraph if the parties have entered into any stipulations of fact.

Read the last bracketed paragraph if a motion to strike testimony was granted during the trial.

Sources and Authority

- "Evidence" Defined. Evidence Code section 140.

- Jury to Decide Questions of Fact. Evidence Code section 312.
- Miscarriage of Justice. Evidence Code section 353.
- "Unless the trial court, in its discretion, permits a party to withdraw from a stipulation, it is conclusive upon the parties, and the truth of the facts contained therein cannot be contradicted." (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142 [199 P.2d 952].)
- "[A]ttempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)
- "The right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished." (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49]; *Horn v. Atchison, Topeka & Santa Fe Ry. Co*. (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561].)

Secondary Sources

11 Witkin, California Evidence (6th ed. 2023) Presentation at Trial, § 106 et seq.

7 Witkin, California Procedure (6th ed. 2021) Trial, § 314, et seq.

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, § 322.56 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial §§ 2.37, 2.38, 11.9, 11.35 (Cal CJER 2019)

5003. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

(a) How well did the witness see, hear, or otherwise sense what the witness described in court?

(b) How well did the witness remember and describe what happened?

(c) How did the witness look, act, and speak while testifying?

(d) Did the witness have any reason to say something that was not true? For example, did the witness show any bias or prejudice or have a personal relationship with any of the parties involved in the case or have a personal stake in how this case is decided?

(e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else the witness said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness did not tell the truth about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness did not tell the truth about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased in favor of or against any witness because of the witness's disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [*insert any other impermissible form of bias***]].**

New September 2003; Revised April 2004, April 2007, December 2012, December 2016, May 2020

Directions for Use

This instruction may be given as either an introductory instruction before trial (see CACI No. 107) or as a concluding instruction.

The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

In the last paragraph, the court may delete inapplicable categories of potential jury bias.

Sources and Authority

- Role of Jury. Evidence Code section 312.
- Considerations for Evaluating the Credibility of Witnesses. Evidence Code section 780.
- Direct Evidence of Single Witness Sufficient. Evidence Code section 411.
- The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: "It should certainly not be deemed of vital importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)
- Standard 10.20(a)(2) of the Standards for Judicial Administration provides: "In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."
- Canon 3(b)(5) of the Code of Judicial Ethics provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment." Canon 3(b)(6) requires the judge to impose these standards on attorneys also.

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 314, et seq.

11 Witkin, California Evidence (6th ed. 2023) Presentation at Trial, § 107

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 10-D, *Objectives Of Cross-Examination*, ¶ 10:91 et seq. (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8E-F, *Limitations On Impeachment And Rehabilitation*, ¶ 8:2990 et seq. (The Rutter Group)

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, § 322.56 (Matthew Bender)

Cotchett, California Courtroom Evidence, § 16.45 (Matthew Bender)

5004. Service Provider for Juror With Disability

[*Name or number of juror***] has been assisted by [a/an] [***insert type of service provider***] to communicate and receive information. The [***service provider***] will be with you during your deliberations. You may not discuss the case with the [***service provider***]. The [***service provider***] is not a member of the jury and is not to participate in the deliberations in any way other than as necessary to provide the service to [***name or number of juror***].**

All jurors must be able to fully participate in deliberations. In order to allow the [*service provider***] to properly assist [***name or number of juror***], jurors should not talk at the same time and should not have side conversations. Jurors should speak directly to [***name or number of juror***], not to the [***service provider***].**

[Two [*service providers***] will be present during deliberations and will take turns in assisting [***name or number of juror***].]**

New September 2003; Revised April 2004, December 2012

Directions for Use

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Eligibility to Serve as Juror. Code of Civil Procedure section 203(a)(6).
- Service Provider for Juror With Disability. Code of Civil Procedure section 224.

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, §§ 335

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, § 322.32[3] (Matthew Bender)

1 Matthew Bender Practice Guide: Trial and Post-Trial Civil Procedure, Ch. 8 *Interpreters*, 8.31

California Judges Benchbook: Civil Proceedings—Trial § 13.10 (Cal CJER 2019)

5005. Multiple Parties

[There are [*number*] plaintiffs in this trial. You should decide the case of each plaintiff separately as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of each plaintiff's own claim(s).]

[There are [*number*] defendants in this trial. You should decide the case against each defendant separately as if it were a separate lawsuit. Each defendant is entitled to separate consideration of each defendant's own defenses.]

[Different aspects of this case involve different parties (plaintiffs and defendants). Each instruction will identify the parties to whom it applies. Pay particular attention to the parties named in each instruction.]

[*or*]

[Unless I tell you otherwise, all instructions apply to each plaintiff and defendant.]

New April 2004; Revised April 2009, May 2020

Directions for Use

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

The CACI instructions require the use of party names rather than party-status words like "plaintiff" and "defendant." In multiparty cases, it is important to name only the parties in each instruction to whom the instruction applies. For example, an instruction on loss of consortium (see CACI No. 3920) will not apply to all plaintiffs. Instructions on vicarious liability (see CACI No. 3700 et seq.) will not apply to all defendants. Unless all or nearly all of the instructions will apply to all of the parties, give the first option for the last paragraph.

Sources and Authority

- "We realize, of course, that multiple defendants are involved and that each defendant is entitled to instructions on, and separate consideration of, every defense available and applicable to it. The purpose of this rule is to insure that the jury will distinguish and evaluate the separate facts relevant to each defendant." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 58 [148 Cal.Rptr. 596, 583 P.2d 121], internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 303

5006. Nonperson Party

A [corporation/partnership/city/county/[*other entity*]], [*name of entity*], is a party in this lawsuit. [*Name of entity*] is entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.

When I use words like "person" or "he" or "she" in these instructions to refer to a party, those instructions also apply to [*name of entity*].

New April 2004

Directions for Use

This instruction should be given if one of the parties is an entity. Select the type of entity and insert the name of the entity where indicated in the instruction. If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Corporations Have Powers of Natural Person. Corporations Code section 207.
- "Person" Includes Corporation. Civil Code section 14.
- As a general rule, a corporation is considered to be a legal entity that has an existence separate from that of its shareholders. (*Erkenbrecher v. Grant* (1921) 187 Cal. 7, 9 [200 P. 641].)
- "In general, any person or entity has capacity to sue or defend a civil action in the California courts. This includes artificial 'persons' such as corporations, partnerships and associations." (*American Alternative Energy Partners II, 1985 v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 559 [49 Cal.Rptr.2d 686], internal citations omitted.)

Secondary Sources

9 Witkin, Summary of California Law (11th ed. 2017) Corporations, § 1

5007. Removal of Claims or Parties and Remaining Claims and Parties

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[[*Name of plaintiff***]'s claim for [***insert claim***] is no longer an issue in this case.]**

[[*Name of party***] is no longer a party to this case.]**

Do not speculate as to why this [claim/person] is no longer involved in the case. You should not consider this during your deliberations.

The following claims remain for you to resolve by your deliberations:

1. **[***Name of plaintiff***]'s claim against [***name of defendant***] for [***specify claim***] [to which [***name of defendant***] alleges [***specify affirmative defense***]].**
2. **[***Repeat for all claims, defenses, and parties that will go to the jury***.]**

New April 2004; Revised December 2011

Directions for Use

This instruction may be read if some of the claims and parties before the jury at the beginning of the trial (see CACI No. 101, *Overview of Trial*) are no longer to be resolved by the jury. The instruction then summarizes the claims and parties that remain for the jury to resolve. The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

In the second part of the instruction that sets forth the remaining claims, include the optional language if there are affirmative defenses that the jury will be asked to determine.

5008. Duty to Abide by Translation Provided in Court

Some testimony was given in [*insert language other than English*]. An interpreter provided translation for you at the time that the testimony was given. You must rely solely on the translation provided by the interpreter, even if you understood the language spoken by the witness. Do not retranslate any testimony for other jurors.

New April 2004

Directions for Use

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

Sources and Authority

- It is misconduct for a juror to retranslate for other jurors testimony that has been translated by the court-appointed interpreter. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303 [281 Cal.Rptr. 238].)
- "It is well-settled a juror may not conduct an independent investigation into the facts of the case or gather evidence from outside sources and bring it into the jury room. It is also misconduct for a juror to inject his or her own expertise into the jury's deliberation." (*People v. Cabrera, supra,* 230 Cal.App.3d at p. 303.)
- "If [the juror] believed the court interpreter was translating incorrectly, the proper action would have been to call the matter to the trial court's attention, not take it upon herself to provide her fellow jurors with the 'correct' translation." (*People v. Cabrera, supra,* 230 Cal.App.3d at p. 304.)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Hearsay, § 126

3 Witkin, California Evidence (5th ed. 2012) Presentation, § 40

1 California Trial Guide, Unit 3, *Other Non-Evidentiary Motions*, § 3.32 (Matthew Bender)

1A California Trial Guide, Unit 20, *Procedural Rules for Presentation of Evidence*, § 20.13 (Matthew Bender)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, §§ 91.10, 91.12 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 8.119 (Cal CJER 2019)

5009. Predeliberation Instructions

When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations or immediately announce how you plan to vote as it may interfere with an open discussion. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense and experience in deciding whether testimony is true and accurate. However, during your deliberations, do not make any statements or provide any information to other jurors based on any special training or unique personal experiences that you may have had related to matters involved in this case. What you may know or have learned through your training or experience is not a part of the evidence received in this case.

[Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may [ask to have testimony read back to you] [or] [ask to see any exhibits admitted into evidence that have not already been provided to you].] [Also, jurors/Jurors] may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the [clerk/bailiff/court attendant]. I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

Your decision must be based on your personal evaluation of the evidence presented in the case. Each of you may be asked in open court how you voted on each question.

While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then, without further

deliberations, make the average your verdict.

You may take breaks, but do not discuss this case with anyone, including each other, until all of you are back in the jury room.

New September 2003; Revised April 2004, October 2004, February 2007, December 2009, June 2011, June 2013, May 2019, May 2024

Directions for Use

The advisory committee recommends that this instruction be read to the jury after closing arguments and after reading instructions on the substantive law.

If a special verdict will be used, give CACI No. 5012, *Introduction to Special Verdict Form*. If a general verdict is to be used, give CACI No. 5022, *Introduction to General Verdict Form*.

Judges may want to provide each juror with a copy of the verdict form so that the jurors can use it to keep track of how they vote. Jurors can be instructed that this copy is for their personal use only and that the presiding juror will be given the official verdict form to record the jury's decision. Judges may also want to advise jurors that they may be polled in open court regarding their individual verdicts.

Do not read the bracketed portion of the fifth paragraph that refers to reading back testimony if a court reporter is not being used to record the trial proceedings. Consider deleting the reference to providing exhibits if the court sends all admitted exhibits into the jury room.

Sources and Authority

- Conduct of Jury Deliberations. Code of Civil Procedure section 613.
- Further Instructions After Deliberation Begins. Code of Civil Procedure section 614.
- Verdict Requires Three Fourths. Code of Civil Procedure section 618, article I, section 16, of the California Constitution.
- Juror Misconduct as Grounds for New Trial. Code of Civil Procedure section 657.
- "Chance is the 'hazard, risk, or the result or issue of uncertain and unknown conditions or forces.' Verdicts reached by tossing a coin, drawing lots, or any other form of gambling are examples of improper chance verdicts. 'The more sophisticated device of the *quotient verdict* is equally improper: The jurors agree to be bound by an *average* of their views; each writes the amount he favors on a slip of paper; the sums are added and divided by 12, and the resulting "quotient" pursuant to the prior agreement, is accepted as the verdict without further deliberation or consideration of its fairness.' " (*Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064 [18 Cal.Rptr.2d 106], original italics.)
- " '[T]here is no impropriety in the jurors making an average of their individual

estimates as to the amount of damages for the purpose of arriving at a basis for discussion and consideration, nor in adopting such average if it is subsequently agreed to by the jurors; but to agree beforehand to adopt such average and abide by the agreement, without further discussion or deliberation, is fatal to the verdict.' " (*Chronakis*, *supra*, 14 Cal.App.4th at p. 1066.)

- Jurors should be encouraged to deliberate on the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911 [64 Cal.Rptr.2d 492].)
- The jurors may properly be advised of the duty to hear and consider each other's arguments with open minds, rather than preventing agreement by stubbornly sticking to their first impressions. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118].)
- "The trial court properly denied the motion for new trial on the ground that [the plaintiff] did not demonstrate the jury reached a chance or quotient verdict. The jury agreed on a high and a low figure and, before calculating an average, they further agreed to adjust downward the high figure and to adjust upward the low figure. There is no evidence that this average was adopted without further consideration or that the jury agreed at any time to adopt an average and abide by the agreement without further discussion or deliberation." (*Lara v. Nevitt* (2004) 123 Cal.App.4th 454, 462–463 [19 Cal.Rptr.3d 865].)
- "It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*In re Malone* (1996) 12 Cal.4th 935, 963 [50 Cal.Rptr.2d 281, 911 P.2d 468].)
- "[The juror]'s comments to the jury, in the nature of an expert opinion concerning the placement of crossing gate 'sensors,' their operation, and the consequent reason why gates had not been or could not be installed at the J-crossing, constituted misconduct . . . . Speaking with the authority of a professional transportation consultant, [the juror] interjected the subject of 'sensors,' on which there had been no evidence at trial." (*McDonald v. S. Pac. Transp. Co.* (1999) 71 Cal.App.4th 256, 263–264 [83 Cal.Rptr.2d 734].)
- "Jurors cannot, without violation of their oath, receive or communicate to fellow jurors information from sources outside the evidence in the case. '[It] is misconduct for a juror during the trial to discuss the matter under investigation outside the court or to receive any information on the subject of the litigation except in open court and in the manner provided by law. Such misconduct *unless shown by the prevailing party to have been harmless will invalidate the verdict*.' " (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 952–953 [161 Cal.Rptr. 377], original italics, internal citations omitted.)

- " 'All the jurors, including those with relevant personal backgrounds, were entitled to consider this evidence and express opinions regarding it. "[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors." [Citation.] "It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' " [Citation.] A juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in *evaluating and interpreting* that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's *analysis* of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations. "Jurors are not automatons. They are imbued with human frailties as well as virtues." [Citation.]' " (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 77 [133 Cal.Rptr.3d 548, 264 P.3d 336], original italics.)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, §§ 258, 333

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-A, *General Considerations*, ¶ 15:15 et seq. (The Rutter Group)

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.30 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.28

California Judges Benchbook: Civil Proceedings—Trial §§ 13.8, 13.32, 13.50, 13.53, 13.59, 14.6, 14.21 (Cal CJER 2019)

5010. Taking Notes During the Trial

If you have taken notes during the trial, you may take your notebooks with you into the jury room.

You may use your notes only to help you remember what happened during the trial. Your independent recollection of the evidence should govern your verdict. You should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

At the end of the trial, your notes will be [collected and destroyed/collected and retained by the court but not as a part of the case record/[*specify other disposition***]].**

New April 2004; Revised February 2005, April 2007, December 2007

Directions for Use

If CACI No. 102, *Taking Notes During the Trial*, is given as a pretrial instruction, the court may also give this instruction as a concluding instruction.

In the last paragraph, specify the court's disposition of the notes after trial. No statute or rule of court requires any particular disposition.

Sources and Authority

- Juror Notes. Rule 2.1031 of the California Rules of Court.
- "Because of [the risks of note-taking], a number of courts have held that a cautionary instruction is required. For example, [one court] held that the instruction should include 'an explanation . . . that [jurors] should not permit their note-taking to distract them from the ongoing proceedings; that their notes are only an aid to their memory and should not take precedence over their independent recollection; that those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another juror has taken notes; and that the notes are for the note taker's own personal use in refreshing his recollection of the evidence. The jury must be reminded that should any discrepancy exist between their recollection of the evidence and their notes, they should request that the record of the proceedings be read back and that it is the transcript that must prevail over their notes.' " (*People v. Whitt* (1984) 36 Cal.3d 724, 747 [205 Cal.Rptr. 810, 685 P.2d 1161], internal citations and footnote omitted.)
- "In *People v. Whitt*, we recognized the risks inherent in juror note-taking and observed that it is 'the better practice' for courts to give, sua sponte, a cautionary instruction on note-taking. Although the ideal instruction would advert specifically to all the dangers of note-taking, we found the less complete instruction given in *Whitt* to be adequate: 'Be careful as to the amount of notes that you take. I'd rather that you observe the witness, observe the demeanor of

that witness, listen to how that person testifies rather than taking copious notes . . . . [I]f you do not recall exactly as to what a witness might have said or you disagree, for instance, during the deliberation [*sic*] as to what a witness may have said, we can reread that transcript back . . . . ' " (*People v. Silbertson* (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152, 709 P.2d 1321], internal citations and footnote omitted.)

Secondary Sources

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 7-D, *Jurors' Notes,* ¶ 7:41 et seq. (The Rutter Group)

California Deskbook on Complex Civil Litigation Management, Ch. 4, *Trial of Complex Cases*, § 4.21[5] (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.32 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 3.97 (Cal CJER 2019)

5011. Reading Back of Trial Testimony in Jury Room

You may request in writing that trial testimony be read to you. I will have the court reporter read the testimony to you. You may request that all or a part of a witness's testimony be read.

Your request should be as specific as possible. It will be helpful if you can state:

1. **The name of the witness;**
2. **The subject of the testimony you would like to have read; and**
3. **The name of the attorney or attorneys asking the questions when the testimony was given.**

The court reporter is not permitted to talk with you when she or he is reading the testimony you have requested.

While the court reporter is reading the testimony, you may not deliberate or discuss the case.

You may not ask the court reporter to read testimony that was not specifically mentioned in a written request. If your notes differ from the testimony, you must accept the court reporter's record as accurate.

New April 2004; Revised February 2005

Directions for Use

The read-back should not be conducted in the jury room unless the attorneys stipulate to that location.

Sources and Authority

- Jury Request for Additional Information During Deliberations. Code of Civil Procedure section 614.
- "Section 614 of the Code of Civil Procedure provides that if there is a disagreement among jurors during their deliberations as to any part of the testimony which they have heard they may return into court and secure from the court in the presence of counsel for all parties the desired information as to the record. If they ask for testimony relating to a specified subject, they are entitled to hear all of it. However, it is equally clear that the trial judge does not have to order read any part of the record which is not thus requested by the jury foreman." (*McGuire v. W. A. Thompson Distributing Co.* (1963) 215 Cal.App.2d 356, 365–366 [30 Cal.Rptr. 113], internal citations omitted.)
- "When the jury requests a repetition of certain testimony, the trial court is not required to furnish the jury with testimony not requested." (*Allen v. Toledo*

(1980) 109 Cal.App.3d 415, 422 [167 Cal.Rptr. 270], internal citations omitted.)

- "Appellants assign as error the court's refusal to comply with their counsel's request for testimony reading. It was not. It is not the party to whom the law gives the right to *select* testimony to be read. And the law does not make the party or his attorney the arbiter to determine the jury's wishes." (*Asplund v. Driskell* (1964) 225 Cal.App.2d 705, 714 [37 Cal.Rptr. 652], original italics.)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 337

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.34

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-D, *Juror Requests for Additional Information During Deliberations*, ¶ 15:92 (The Rutter Group)

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.32 (Matthew Bender)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.01 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 13.37 (Cal CJER 2019)

5012. Introduction to Special Verdict Form

I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Although you may discuss the evidence and the issues to be decided in any order, you must answer the questions on the verdict form[s] in the order they appear. After you answer a question, the form tells you what to do next.

At least 9 of you must agree on an answer before you can move on to the next question. However, the same 9 or more people do not have to agree on each answer.

All 12 of you must deliberate on and answer each question regardless of how you voted on any earlier question. Unless the verdict form tells all 12 jurors to stop and answer no further questions, every juror must deliberate and vote on all of the remaining questions.

When you have finished filling out the form[s], your presiding juror must write the date and sign at the bottom [of the last page] and then notify the [bailiff/clerk/court attendant].

New September 2003; Revised April 2004, October 2008, December 2009, December 2014, May 2019, May 2024

Directions for Use

This instruction should be given if a special verdict form is used. The second and third paragraphs will have to be modified in a case under the Lanterman-Petris-Short Act. (See CACI No. 4012, *Concluding Instruction* (for LPS Act).)

Sources and Authority

- General and Special Verdict Forms. Code of Civil Procedure section 624.
- Special Verdicts; Requirements for Award of Punitive Damages. Code of Civil Procedure section 625.
- " 'The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.' (Code Civ. Proc., § 624.)" (*J.P. v. Carlsbad Unified School Dist.* (2014) 232 Cal.App.4th 323, 338 [181 Cal.Rptr.3d 286].)

- "A special verdict is 'fatally defective' if it does not allow the jury to resolve every controverted issue." (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 136 [220 Cal.Rptr.3d 127].)
- "It is true that, in at least some respects, a special verdict—if carefully drawn and astutely employed—may improve the quality of the factfinding process. It can focus the jury's attention on the relevant questions, incorporating the pertinent legal principles, and guiding the jury away from irrelevant or improper considerations. It can also expose defects in the jury's deliberations when they occur, providing an opportunity for the court to seek correction through further deliberations." (*Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 795 [211 Cal.Rptr.3d 743].)
- " 'This procedure presents certain problems: " 'The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. "[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings . . . ." [Citation.]' [Citation.]" ' 'A special verdict is "fatally defective" if it does not allow the jury to resolve every controverted issue.' " (*J.P., supra*, 232 Cal.App.4th at p. 338, internal citations omitted.)
- "All litigation is ultimately a matter of striking a reasonable compromise among competing interests, particularly the interest in resolving cases fairly and that of utilizing public and private resources economically. A special verdict is unlikely to serve either of these objectives unless it is drawn with considerable care." (*Ryan, supra,* 6 Cal.App.5th at p. 796.)
- "[T]hat the jury instruction . . . defined [the element] did not obviate the necessity of including that required element in the special verdict. 'A jury instruction alone does not constitute a finding. Nor does the fact that the evidence might support such a finding constitute a finding.' " (*Trejo, supra,* 13 Cal.App.5th at p. 138.)
- "When a jury is composed of 12 persons, it is sufficient if *any* nine jurors arrive at each special verdict, regardless of the jurors' votes on other special verdict questions." (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 255 [92 Cal.Rptr.3d 862, 206 P.3d 403], original italics.)
- "Appellate courts differ concerning the use of special verdicts. In one case the court said, 'we should utilize opportunities to force counsel into requesting special verdicts.' In contrast, a more recent decision included the negative view: 'Toward this end we advise that special findings be requested of juries only when there is a compelling need to do so. Absent strong reason to the contrary their use should be discouraged.' Obviously, it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result." (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221 [228 Cal.Rptr. 736], internal citations omitted.)
- "[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the

evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil 'cause of action' to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved." (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243, footnote omitted.)

- "In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, . . . we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved." (*Stoner, supra,* 46 Cal.App.4th at p. 1002.)
- "[A] juror who dissented from a special verdict finding negligence should not be disqualified from fully participating in the jury's further deliberations, including the determination of proximate cause. The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate as to each verdict submitted to it. To hold that a juror may be disqualified by a special verdict on negligence from participation in the next special verdict would deny the parties of 'the right to a jury of 12 persons deliberating on all issues.' Permitting any nine jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue." (*Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 682 [205 Cal.Rptr. 827, 685 P.2d 1178], internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 346

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.21 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 318, *Judgments*, § 318.49 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.11[3] (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts*, 18.11 et seq.

California Judges Benchbook: Civil Proceedings—Trial § 14.14 (Cal CJER 2019)

5013. Deadlocked Jury Admonition

You should reach a verdict if you reasonably can. You have spent time trying to reach a verdict, and this case is important to the parties so that they can move on with their lives with this matter resolved.

[If you are unable to reach a verdict, the case will have to be tried before another jury selected in the same manner and from the same community from which you were chosen and at additional cost to everyone.]

Please carefully consider the opinions of all the jurors, including those with whom you disagree. Keep an open mind and feel free to change your opinion if you become convinced that it is wrong.

You should not, however, surrender your beliefs concerning the truth and the weight of the evidence. Each of you must decide the case for yourself and not merely go along with the conclusions of your fellow jurors.

New September 2003; Revised April 2004, June 2012

Directions for Use

Give the optional second paragraph if desired. Similar language has been found to be noncoercive in a civil case as long as it is accompanied by language such as that included in the last paragraph of the instruction. (See *Inouye v. Pacific Southwest Airlines* (1981) 126 Cal.App.3d 648, 650–652 [179 Cal.Rptr. 13]; cf. *People v. Gainer* (1977) 19 Cal. 3d 835, 852 [139 Cal.Rptr. 861, 566 P.2d 997] [in criminal case, it is error for a trial court to give an instruction that states or implies that if the jury fails to agree, the case will necessarily be retried].)

Sources and Authority

- Deadlocked Jury. Rule 2.1036 of the California Rules of Court.
- "The court told the jury they should reach a verdict if they reasonably could; they should not surrender their conscious convictions of the truth and the weight of the evidence; each juror must decide the case for himself and not merely acquiesce in the conclusion of his fellows; the verdict should represent the opinion of each individual juror; and in reaching a verdict each juror should not violate his individual judgment and conscience. These remarks clearly outweighed any offensive portions of the charge. The court did not err in giving the challenged instruction." (*Inouye, supra,* 126 Cal.App.3d at p. 652.)
- "A trial court may properly advise a jury of the importance of arriving at a verdict and of the duty of individual jurors to hear and consider each other's arguments with open minds, rather than to prevent agreement by obstinate

adherence to first impressions. But, as the exclusive right to agree or not to agree rests with the jury, the judge may not tell them that they must agree nor may he harry their deliberations by coercive threats or disparaging remarks." (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118], internal citations omitted.)

- "Only when the instruction has coerced the jurors into surrendering their conscientious convictions in order to reach agreement should the verdict be overturned." (*Inouye, supra,* 126 Cal.App.3d at p. 651.)
- "The instruction says if the jury did not reach a verdict, the case would have to be retried. It also says the jurors should listen with deference to the arguments and distrust their own judgment if they find a large majority taking a different view of the case. In a criminal case the mere presence of these remarks in a jury instruction is error. However, civil cases are subject to different considerations; the special protections given criminal defendants are absent." (*Inouye, supra,* 126 Cal.App.3d at p. 651, internal citation omitted.)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 339

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-D, *Juror Requests For Additional Information During Deliberations*, ¶ 15:137 et seq. (The Rutter Group)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.39

California Judges Benchbook: Civil Proceedings—Trial § 13.43 (Cal CJER 2019)

5014. Substitution of Alternate Juror

One of your fellow jurors has been excused and an alternate juror has been selected to join the jury. Do not consider this substitution for any purpose.

The alternate juror must participate fully in the deliberations that lead to any verdict. The parties have the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This right will only be assured if you begin your deliberations again, from the beginning. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place.

Now, please return to the jury room and start your deliberations from the beginning.

New September 2003; Revised April 2004, December 2012

Sources and Authority

- "Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations." (*People v. Collins* (1976) 17 Cal.3d 687, 693 [131 Cal.Rptr. 782, 552 P.2d 742].)
- "We agree with plaintiff that the principles set forth in *Collins* apply to civil as well as criminal cases. The right to a jury trial in civil cases is also guaranteed by article I, section 16 of the California Constitution, and the provisions of the statute governing the substitution of jurors in civil cases are the same as the ones governing criminal cases. The same considerations require that each juror engage in all of the jury's deliberations in both criminal and civil cases. The requirement that at least nine persons reach a verdict is not met unless those nine reach their consensus through deliberations which are the common experience of all of them. Accordingly, we construe section 605 [now 234] of the Code of Civil Procedure to require that the court instruct the jury to disregard all past deliberations and begin deliberating anew when an alternate juror is substituted after jury deliberations have begun." (*Griesel v. Dart Industries, Inc.* (1979) 23 Cal.3d 578, 584–585 [153 Cal.Rptr. 213, 591 P.2d 503], overruled on other grounds in *Privette v. Superior Court* (1993) 5 Cal.4th 689, 702, fn. 4 [21 Cal.Rptr.2d 72, 854 P.2d 721], internal citations and footnote omitted.)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 152

Wegner, et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-E, *Jury Deliberations*, ¶ 15:139 et seq. (The Rutter Group)

1 Matthew Bender Practice Guide: Trial and Post-Trial Civil Procedure, Ch. 17 *Dealing With the Jury*, 17.38

27 California Forms of Pleading and Practice, Ch. 322, Juries and Jury Selection, § 322.52 (Matthew Bender)

1 California Trial Guide, Unit 10, *Voir Dire Examination*, § 10.01 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 13.19 (Cal CJER 2019)

5015. Instruction to Alternate Jurors on Submission of Case to Jury

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The jury [will soon begin/is now] deliberating, but you are still alternate jurors and are bound by my earlier instructions about your conduct.

Until the jury is discharged, do not talk about the case or about any of the people or any subject involved in it with anyone, not even your family or friends[, and not even with each other]. Do not have any contact with the deliberating jurors. Do not decide how you would vote if you were deliberating. Do not form or express an opinion about the issues in this case, unless you are substituted for one of the deliberating jurors.

New February 2005; Revised December 2012

Directions for Use

If an alternate juror is substituted, see CACI No. 5014, *Substitution of Alternate Juror*.

Sources and Authority

- Alternate Jurors. Code of Civil Procedure section 234.
- "Alternate jurors are members of the jury panel which tries the case. They are selected at the same time as the regular jurors. They take the same oath and are subject to the same qualifications as the regular jurors. Alternate jurors hear the same evidence and are subject to the same admonitions as the regular jurors and, unless excused by the court, are available to participate as regular jurors." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 152

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, §§ 322.44, 322.52, 322.53, 322.101 (Matthew Bender)

1 California Trial Guide, Unit 10, *Voir Dire Examination*, § 10.01 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial §§ 3.89, 13.14 (Cal CJER 2019)

5016. Judge's Commenting on Evidence

In this case, I have exercised my right to comment on the evidence. However, you the jury are the exclusive judges of all questions of fact and of the credibility of the witnesses. You are free to completely ignore my comments on the evidence and to reach whatever verdict you believe to be correct, even if it is contrary to any or all of those comments.

New April 2007

Directions for Use

Read this instruction before deliberations if the judge has exercised the right under article VI, section 10 of the California Constitution to comment on the evidence. This instruction should also be given if after deliberations have begun, the jury asks for additional guidance and the judge then comments on the evidence. (See *People v. Rodriguez* (1986) 42 Cal.3d 730 [230 Cal.Rptr. 667, 726 P.2d 113].)

Sources and Authority

- Judge May Comment on the Evidence. Article VI, section 10 of the California Constitution.
- "[T]he decisions admonish that judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*People v. Rodriguez, supra,* 42 Cal.3d at p. 766, internal citations omitted.)
- "[A] trial court has 'broad latitude in fair commentary, so long as it does not effectively control the verdict. For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but *may focus critically on particular evidence,* expressing views about its persuasiveness.' . . . '[A] judge may restrict his comments to portions of the evidence or to the *credibility of a single witness* and need not sum up all the testimony, both favorable and unfavorable.' " (*People v. Proctor* (1992) 4 Cal.4th 499, 542 [15 Cal.Rptr.2d 340, 842 P.2d 1100], original italics.)
- "[A] judge's power to comment on the evidence is not unlimited. He cannot withdraw material evidence from the jury or distort the testimony, and he must inform the jurors that they are the exclusive judges of all questions of fact and of the credibility of the witnesses. In civil cases, the court's powers of comment are less limited than in criminal cases, but they still must be kept within certain bounds. The court may express an opinion on negligence, but the court's remarks must be appropriate and fair." (*Lewis v. Bill Robertson & Sons Inc.* (1984) 162 Cal.App.3d 650, 654 [208 Cal.Rptr. 699], internal citation omitted.)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 5

California Trial Objections (Cont.Ed.Bar 10th ed.) §§ 29.21, 29.23

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.20 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial §§ 12.30, 12.33 (Cal CJER 2019)

5017. Polling the Jury

After your verdict is read in open court, you may be asked individually to indicate whether the verdict expresses your personal vote. This is referred to as "polling" the jury and is done to ensure that at least nine jurors have agreed to each decision.

The verdict form[s] that you will receive ask[s] you to answer several questions. You must vote separately on each question. Although nine or more jurors must agree on each answer, it does not have to be the same nine for each answer. Therefore, it is important for each of you to remember how you have voted on each question so that if the jury is polled, each of you will be able to answer accurately about how you voted.

[Each of you will be provided a draft copy of the verdict form[s] for your use in keeping track of your votes.]

New October 2008; Revised May 2019

Directions for Use

Use this instruction to explain the process of polling the jury, particularly if a long special verdict form will be used to assess the liability of multiple parties and the damages awarded to each plaintiff from each defendant.

The third sentence in the second paragraph referring to the agreement of nine or more jurors must be revised in a case under the Lanterman-Petris-Short Act. (See CACI No. 4012, *Concluding Instruction* (for LPS Act).

Sources and Authority

- Verdict by Three Fourths in Civil Case. Article I, section 16 of the California Constitution.
- Polling the Jury. Code of Civil Procedure section 618.
- "The polling process is designed to reveal mistakes in the written verdict, or to show 'that one or more jurors acceded to a verdict in the jury room but was unwilling to stand by it in open court.' " (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 256 [92 Cal.Rptr.3d 862, 206 P.3d 403].)
- "[A] juror may change his or her vote at the time of polling." (*Keener, supra,* 46 Cal.4th at p. 256.)
- "[I]t is quite apparent that when a poll discloses that more than one-quarter of the members of the jury disagree with the verdict, the trial judge retains control of the proceedings, and may properly order the jury to retire and again consider the case." (*Van Cise v. Lencioni* (1951) 106 Cal.App.2d 341, 348 [235 P.2d 236].)

- "[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil 'cause of action' to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved." (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243], footnote omitted.)
- "In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, . . . we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved." (*Stoner, supra,* 46 Cal.App.4th at p. 1002.)
- "[I]f nine identical jurors agree that a party is negligent and that such negligence is the proximate cause of the other party's injuries, special verdicts apportioning damages are valid so long as they command the votes of any nine jurors. To hold otherwise would be to prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 persons deliberating on all issues." (*Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768 [183 Cal.Rptr. 852, 647 P.2d 128].)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 354

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.30[3][b] (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.14[3] (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts*, 18.43

California Judges Benchbook: Civil Proceedings—Trial § 14.27 (Cal CJER 2019)

5018. Audio or Video Recording and Transcription

A [sound/video] recording has been admitted into evidence, and a transcription of the recording has been provided to you. The recording itself, not the transcription, is the evidence. The transcription is not an official court reporter's transcript. The transcription was prepared by a party only for the purpose of assisting the jury in following the [sound/video] recording. The transcription may not be completely accurate. It may contain errors, omissions, or notations of inaudible portions of the recording. Therefore, you should use the transcription only as a guide to help you in following along with the recording. If there is a discrepancy between your understanding of the recording and the transcription, your understanding of the recording must prevail.

[[Portions of the recording have been deleted.] [The transcription [also] contains strikeouts or other deletions.] You must disregard any deleted portions of the recording or transcription and must not speculate as to why there are deletions or guess what might have been said or done.]

[For the video deposition(s) of [*name(s) of deponent(s)***], the transcript of the court reporter is the official record that you should consider as evidence.]**

New December 2010; Revised June 2016

Directions for Use

Give this instruction if an audio or a video recording was played at trial and accepted into evidence. A transcription is created by a party or parties in the case to assist the jury in following the video/audio recording. Include the second paragraph if only a portion of the recording was received into evidence or if parts of the transcription have been redacted. Give the last paragraph if a transcript of a deposition was provided to the jury. (See Code Civ. Proc., § 2025.510(g); see also CACI No. 208, *Deposition as Substantive Evidence*.)

Sources and Authority

- Electronic Recordings of Deposition. Cal. Rules of Court, Rule 2.1040.
- "Defendant contends the trial court erred in permitting the prosecution to provide the jury with a written transcript of the tape recording, because the transcript was not properly authenticated as an accurate rendition of the tape recording. [¶] Following the testimony of [witness] during the prosecution's case-in-chief, the prosecutor proposed to play the tape recording to the jury. Defense counsel suggested the jury should be informed that portions of the tape recording were unintelligible. When the trial court observed that a transcript of the tape recording would be submitted to the jury, defense counsel voiced concern that

the jury would follow the transcript rather than independently consider the tape recording. The trial court indicated it would listen to the tape recording and, in the event the court determined that the transcript would assist the jury in its understanding of the interview, a copy of the transcript would be provided to the jury at the time of its deliberations. . . . The trial court instructed the jury that in the event there was any discrepancy between the jury's understanding of the tape recording and the typed transcript, the jury's understanding of the recording should control." (*People v. Sims* (1993) 5 Cal.4th 405, 448 [20 Cal.Rptr.2d 537, 853 P.2d 992], internal citation omitted.)

- " 'To be admissible, tape recordings need not be completely intelligible for the entire conversation as long as enough is intelligible to be relevant without creating an inference of speculation or unfairness.' [¶] Thus, partially unintelligible tape is admissible unless the audible portions of the tape are so incomplete the tape's relevance is destroyed. The fact a tape recording 'may not be clear in its entirety does not of itself require its exclusion from evidence since a witness may testify to part of a conversation if that is all he heard and it appears to be intelligible.' " (*People v. Polk* (1996) 47 Cal.App.4th 944, 952–953 [54 Cal.Rptr.2d 921], internal citations omitted.)
- "[T]ranscripts of admissible tape recordings are only prejudicial if it is shown they are so inaccurate that the jury might be misled into convicting an innocent man." (*Polk, supra,* 47 Cal.App.4th at p. 955.)
- "During closing arguments all counsel cautioned the jury the transcript was only a guide and to just listen to the tape. Before the jury left to deliberate, the court again instructed it to disregard the transcript and sent that instruction into the jury room. We presume the jurors followed the court's instructions regarding the tape and the use of the transcript." (*People v. Brown* (1990) 225 Cal.App.3d 585, 598 [275 Cal.Rptr. 268].)

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, § 162

5 California Trial Guide, Unit 100, *The Oral Deposition*, § 100.27 (Matthew Bender)

16 California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions*, §§ 193.70 et seq., 193.172 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 7.23 (Cal CJER 2019)

5019. Questions From Jurors

If, during the trial, any of you had a question that you believed should be asked of a witness, you were instructed to write out the question and provide it to me through my courtroom staff. I shared your questions with the attorneys, after which, I decided whether the question could be asked.

If a question was asked and answered, you are to consider the answer as you would any other evidence received in the trial. Do not give the answer any greater or lesser weight because it was initiated by a juror question.

If the question was not asked, do not speculate as to what the answer might have been or why it was not asked. There are many legal reasons why a suggested question cannot be asked of a witness. Give the question no further consideration.

New June 2011

Directions for Use

This is an optional instruction for use if the jurors will be allowed to ask questions of the witnesses. For a similar instruction to be given at the beginning of the trial, see CACI No. 112, *Questions From Jurors*. This instruction may be modified to account for an individual judge's practice.

Sources and Authority

- Juror Questions Allowed. Rule 2.1033 of the California Rules of Court.
- "In a proper case there may be a real benefit from allowing jurors to submit questions under proper control by the court. However, in order to permit the court to exercise its discretion and maintain control of the trial, the correct procedure is to have the juror write the questions for consideration by the court and counsel prior to their submission to the witness." (*People v. McAlister* (1985) 167 Cal.App.3d 633, 644 [213 Cal.Rptr. 271].)
- "[T]he judge has discretion to ask questions submitted by jurors or to pass those questions on and leave to the discretion of counsel whether to ask the questions." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1305 [18 Cal.Rptr.2d 796, 850 P.2d 1].)
- "The appellant urges that when jurymen ask improper questions the defendant is placed in the delicate dilemma of either allowing such question to go in without objection or of offending the jurors by making the objection and the appellant insists that the court of its own motion should check the putting of such improper questions by the jurymen, and thus relieve the party injuriously affected thereby from the odium which might result from making that objection

thereto. There is no force in this contention. Objections to questions, whether asked by a juror or by opposing counsel, are presented to the court, and its ruling thereon could not reasonably affect the rights or standing of the party making the objection before the jury in the one case more than in the other." (*Maris v. H. Crummey, Inc.* (1921) 55 Cal.App. 573, 578–579 [204 P. 259].)

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, § 97

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 7-E, *Juror Questioning of Witnesses*, ¶ 7:45.10 et seq. (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, §§ 91.01–91.03 (Matthew Bender)

5020. Demonstrative Evidence

During the trial, materials have been shown to you to [help explain testimony or other evidence in the case/[*specify other purpose***]]. [Some of these materials have been admitted into evidence, and you will be able to review them during your deliberations.**

Other materials have also been shown to you during the trial, but they have not been admitted into evidence.] You will not be able to review them during your deliberations because they are not themselves evidence or proof of any facts. You may, however, consider the testimony given in connection with those materials.

New December 2011; Revised June 2012

Directions for Use

This instruction may be given if the jury has been provided with charts, summaries, or other demonstrative evidence during the trial to assist in understanding complex evidence. The purpose of the instruction is to explain to the jury why certain materials are available for deliberations and other materials are not. Include the bracketed sentences if some materials have been admitted into evidence.

Secondary Sources

Cotchett, California Courtroom Evidence, Ch. 27, *Demonstrative and Experimental Evidence*, § 27.01 et seq. (Matthew Bender)

Johnson, California Trial Guide, Unit 65, *Presentation of Demonstrative Evidence*, §§ 65.01, 65.10 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, *Questioning Witnesses and Objections*, 11.109 et seq.

California Judges Benchbook: Civil Proceedings—Trial § 7.30 (Cal CJER 2019)

5021. Electronic Evidence

Some exhibits that have been admitted into evidence will be provided to you electronically. The equipment necessary to view these exhibits will be available to you in the jury room. Do not use the equipment for any purpose other than to view the electronic exhibits. Do not use it to access the Internet or any other source of information. Do not use it for any personal reason whatsoever, including but not limited to reviewing email, entertainment, or engaging in social media.

If you need technical assistance or additional equipment or supplies, you may make a request by sending me a note through the [clerk/bailiff/court attendant]. Should it become necessary for a technician to enter the jury room, stop your deliberations until the technician has left. Do not discuss with him or her, or with each other, any exhibit or any aspect of the case while the technician is present. Do not say anything to the technician other than to (1) describe the technical problem(s) and/or to (2) request instruction on how to operate the equipment.

[You may request a paper copy of an exhibit received in evidence. One will be supplied, if possible.]

New June 2014

Directions for Use

Give this instruction if exhibits have been introduced in electronic format only. Modify or expand the instruction as necessary to set forth the particular process for the viewing of electronic exhibits in the particular courtroom. Give the last paragraph if a paper copy will be available.

Secondary Sources

Wegner, et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-C, *Matters Allowed In Jury Room During Deliberations*, ¶ 15:83 et seq. (The Rutter Group)

Cotchett, California Courtroom Evidence, Ch. 27 *Demonstrative and Experimental Evidence*, § 27.01 (Matthew Bender)

Johnson, California Trial Guide, Unit 65, *Presentation of Demonstrative Evidence*, § 65.10 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial §§ 7.24, 13.27 (Cal CJER 2019)

5022. Introduction to General Verdict Form

I will give you [a] general verdict form[s]. The form[s] ask[s] you to find either in favor of [*name of plaintiff***] or [***name of defendant***]. [It also asks you to answer [an] additional question[s] regarding [***specify, e.g., the right to punitive damages***].] I have already instructed you on the law that you are to refer to in making your determination[s].**

At least nine of you must agree on your decision [and in answering the additional question[s]]. [If there is more than one question on the verdict form, as long as nine of you agree on your answers to each question, the same nine do not have to agree on each answer.]

In reaching your verdict [and answering the additional question[s]], you must decide whether the party with the burden of proof has proved all of the necessary facts in support of each required element of [his/her/ *nonbinary pronoun***/its] claim or defense. You should review the elements addressed in the other instructions that I have given you and determine if at least nine of you agree that each element has been proven by the evidence received in the trial. The same nine do not have to agree on each element.**

When you have finished filling out the form, your presiding juror must write the date and sign it at the bottom and then notify the [bailiff/clerk/ court attendant].

New May 2018; Revised May 2019, November 2024

Directions for Use

If a general verdict will be used, this instruction may be given to guide the jury on how to go about reaching a verdict. With a general verdict, there is a danger that the jury will shortcut the deliberative process of carefully looking at each element of each claim or defense and simply vote for the plaintiff or for the defendant. This instruction directs the jury to approach its task as if a special verdict were being used and questions on each element of each claim or defense had to be answered. This instruction assumes that the rule applicable to special verdicts, that the same nine jurors do not need to agree on every element of a claim as long as there are nine in favor of each (see *Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768–769 [183 Cal.Rptr. 852, 647 P.2d 128]; CACI No. 5012, *Introduction to Special Verdict Form*), would apply to deliberations using a general verdict.

This purpose of this instruction is to lessen the possibility that the "paradox of shifting majorities" will happen. This paradox occurs when the same jury analyzing the same evidence would find liability with a special verdict, but not with a general verdict. The possibility arises because with a special verdict, a juror who votes no on one question but is in a minority of three or fewer must continue to deliberate

and vote on all of the remaining questions.

If, for example, the vote on element 3 is 9–3 yes with jurors 10–12 voting no, and the vote on element 4 is 11–1 yes with juror 1 voting no, there will be liability with a special verdict because each element has received nine yes votes. But if a general verdict is used, there would be no liability because only eight jurors have found true every element of the claim. The California Supreme Court has found this result to be proper with regard to special verdicts. (See *Juarez*, *supra*, 31 Cal.3d at p. 768.) With a general verdict, if the jury votes on each element of each claim or defense, it is more likely to find nine votes for each element, even though it may be a different nine each time.

The second and third paragraphs will have to be modified in a case under the Lanterman-Petris-Short Act. (See CACI No. 4012, *Concluding Instruction* (for LPS Act).)

Sources and Authority

- "[I]f nine identical jurors agree that a party is negligent and that such negligence is the proximate cause of the other party's injuries, special verdicts apportioning damages are valid so long as they command the votes of *any* nine jurors. To hold otherwise would be to prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 persons deliberating on all issues." (*Juarez*, *supra*, 31 Cal.3d at p. 768, original italics.)
- "To determine whether a general verdict is supported by the evidence it is necessary to ascertain the issues embraced within the verdict and measure the sufficiency of the evidence as related to those issues. For this purpose reference may be had to the pleadings, the pretrial order and the charge to the jury. A general verdict implies a finding of every fact essential to its validity which is supported by the evidence. Where several issues responsive to different theories of law are presented to the jury and the evidence is sufficient to support facts sustaining the verdict under one of those theories, it will be upheld even though the evidence is insufficient to support facts sustaining it under any other theory." (*Owens v. Pyeatt* (1967) 248 Cal.App.2d 840, 844 [57 Cal.Rptr. 100], internal citations omitted.)
- "Implicit in [general] verdicts is the presumption that 'all material facts in issue as to which substantial evidence was received were determined in a manner consistent and in conformance with the verdict.' " (*Coorough v. De Lay* (1959) 171 Cal.App.2d 41, 45 [339 P.2d 963].)
- "A general verdict imports a finding in favor of the winning party on all the averments of his pleading material to his recovery." (*Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697, 712 [342 P.2d 987].)

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 345

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 17-A, *Verdicts*, ¶ 17:1 et seq. (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury Ch. 9-M, *Verdicts and Judgment,* ¶ 9:645 et seq. (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.21 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.70.1 et seq. (Matthew Bender)

Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts*, 18.03 et seq.

5023–5029. Reserved for Future Use

5030. Implicit or Unconscious Bias

In your role as a juror, you must not let bias influence your assessment of the evidence or your decisions.

I will now provide some information about how bias might affect decisionmaking. Our brains help us navigate and respond quickly to events by grouping and categorizing people, places, and things. We all do this. These mental shortcuts are helpful in some situations, but in the courtroom they may lead to biased decisionmaking.

Bias can affect what we notice and pay attention to, what we see and hear, what we remember, how we perceive people, and how we make decisions. We may favor or be more likely to believe people whom we see as similar to us or with whom we identify. Conversely, we may disfavor or be less likely to believe people whom we see as different from us.

Although we are aware of some of our biases, we may not be aware of all of them. We refer to biases that we are not aware of as "implicit" or "unconscious." They may be based on stereotypes we would reject if they were brought to our attention. Implicit or unconscious biases can affect how we perceive others and how we make decisions, without our being aware of the effect of these biases on those decisions.

To ensure that bias does not affect your decisions in this case, consider the following steps:

1. **Reflect carefully and thoughtfully about the evidence. Think about why you are making each decision and examine it for bias. Resist the urge to jump to conclusions or to make judgments based on personal likes or dislikes, generalizations, prejudices, stereotypes, or biases.**
2. **Consider your initial impressions of the people and the evidence in this case. Would your impressions be different if any of the people were, for example, of a different age, gender, race, religion, sexual orientation, ethnicity, or national origin? Was your opinion affected because a person has a disability or speaks in a language other than English or with an accent? Think about the people involved in this case as individuals. Focusing on individuals can help reduce the effect of biases or stereotypes on decisionmaking.**
3. **Listen to the other jurors. Their backgrounds, experiences, and insights may be different from yours. Hearing and sharing different perspectives may help identify and eliminate biased conclusions.**

The law demands that jurors make unbiased decisions, and these

strategies can help you fulfill this important responsibility. You must base your decisions solely on the evidence presented, your evaluation of that evidence, your common sense and experience, and these instructions.

New November 2023

Directions for Use

This instruction may be given on request or sua sponte.

Sources and Authority

- Duty to Prevent Bias and Ensure Fairness. Standard 10.20(b)(1), (2) of the California Standards of Judicial Administration.
- Judge Must Perform Duties Without Bias. Canon 3(B)(5) of the California Code of Judicial Ethics.
- "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132].)

Secondary Sources

Witkin, California Procedure (5th ed. 2008) Trial, §§ 145–146

1 California Trial Guide, Unit 10, *Voir Dire Examination*, §§ 10.03[1], 10.21[2], 10.50, 10.80, 10.100, 10.110 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, *Jury Selection*, § 6.21

5031–5089. Reserved for Future Use

5090. Final Instruction on Discharge of Jury

Members of the jury, this completes your duties in this case. On behalf of the parties and their attorneys, thank you for your time and your service. It can be a great personal sacrifice to serve as a juror, but by doing so you are fulfilling an extremely important role in California's system of justice. Each of us has the right to a trial by jury, but that right would mean little unless citizens such as each of you are willing to serve when called to do so. You have been attentive and conscientious during the trial, and I am grateful for your dedication.

Throughout the trial, I continued to admonish you that you could not discuss the facts of the case with anyone other than your fellow jurors and then only during deliberations when all twelve jurors were present. I am now relieving you from that restriction, but I have another admonition.

You now have the absolute right to discuss or not to discuss your deliberations and verdict with anyone[, including members of the media]. It is appropriate for the parties, their attorneys or representatives to ask you to discuss the case, but any such discussion may occur only with your consent and only if the discussion is at a reasonable time and place. You should immediately report any unreasonable contact to the court.

If you do choose to discuss the case with anyone, feel free to discuss it from your own perspective, but be respectful of the other jurors and their views and feelings.

Thank you for your time and your service; you are discharged.

New June 2013

Directions for Use

In the third paragraph, include the reference to members of the media if the case has received media attention and coverage.

Secondary Sources

7 Witkin, California Procedure (6th ed. 2021) Trial, § 482

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 16, *Court's Instructions to Jury*, 16.20[3]

California Judges Benchbook: Civil Proceedings—Trial § 14.40 (Cal CJER 2019)

5091–5099. Reserved for Future Use

VF-5000. General Verdict Form—Single Plaintiff—Single Defendant—Single Cause of Action

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Select one of the following two options:

_____ **We find in favor of [***name of plaintiff***] and against [***name of defendant***] and award damages to [***name of plaintiff***] in the amount of $_____.**

_____ **We find in favor of [***name of defendant***] and against [***name of plaintiff***].**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, May 2024

VF-5001. General Verdict Form—Single Plaintiff—Single Defendant—Multiple Causes of Action

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For each claim, select one of the two options listed.

On [*name of plaintiff***]'s claim for [***insert first cause of action***]**

_____ **we find in favor of [***name of plaintiff***] and against [***name of defendant***].**

_____ **we find in favor of [***name of defendant***] and against [***name of plaintiff***].**

On [*name of plaintiff***]'s claim for [***insert second cause of action***]**

_____ **we find in favor of [***name of plaintiff***] and against [***name of defendant***].**

_____ **we find in favor of [***name of defendant***] and against [***name of plaintiff***].**

Complete the section below only if you find in favor of [*name of plaintiff***] on at least one of [his/her/***nonbinary pronoun***/its] claims.**

We award [*name of plaintiff***] the following damages: $_____.**

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2010, May 2024

Directions for Use

Use of a special verdict form is recommended when there are different measures of damages for the different causes of action.

VF-5002–VF-5099. Reserved for Future Use

See tracked changes of New, Revoked, Renumbered, and Revised CACI in the latest update.

Disposition Table

DISPOSITION TABLE

Case Name:
Case Number:
Date:

Jury Instruction or Verdict Form #	Proposed By	Given as requested	Given as modified	Refused	Withdrawn

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